

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Priority   
Send   
Enter   
Closed   
JS-5/JS-6   
JS-2/JS-3   
Scan Only

CIVIL MINUTES - GENERAL ORIGINAL

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007  
Title M.M., et al. v. East Whittier School District

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy K. Hernandez  
Deputy Clerk

Not Present  
Court Reporter

n/a  
Tape No.

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

**Proceedings: (In Chambers) Order AFFIRMING the Administrative Law Judge's June 30, 2006 Decision**

The father of Plaintiff M.M. ("M.M." or "Plaintiff") seeks reversal of the administrative law judge's ("ALJ") decision regarding the education of M.M. The ALJ Decision, issued June 30, 2006, determined that the Defendant East Whittier Unified School District ("District") provided M.M. with a free and appropriate education ("FAPE") to which he was entitled under Individuals with Disabilities Education Act ("IDEA"). 20 U.S.C. §§ 1400-1482. Plaintiff appeals this ruling, arguing in part, that the individualized education plan ("IEP") offered by the District did not satisfy the IDEA.

On September 25, 2007, the Court conducted a bench trial to determine whether, in fact, Plaintiff was denied a FAPE.<sup>1</sup> For the reasons described below, the Court AFFIRMS the ALJ's Decision.

I. BACKGROUND

ENTERED  
CLERK, U.S. DISTRICT COURT  
SEP 28 2007  
CENTRAL DISTRICT OF CALIFORNIA  
BY [Signature] DEPUTY

<sup>1</sup>On September 25, 2007, the day of the bench trial, Plaintiff requested the Court take judicial notice of a ruling by the California Superior Court, issued September 18, 2007. (See Request for Judicial Notice of Superior Court Ruling). Finding that these documents are all capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, the Court GRANTS Plaintiff's Request for Judicial Notice.

41

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

SCANNED

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007  
 Title M.M., et al. v. East Whittier School District

A. Factual Background

M.M. is a nine-year old boy diagnosed with Down's Syndrome. (2-21-06 AR 91). Because of his disability, M.M. is eligible for special education and related services pursuant to the IDEA and the California Education Code. See generally, 20 U.S.C. §§ 1400 *et seq*; Cal. Ed.Code §§ 56000 *et seq*. M.M.'s eligibility for special education is in the category of Mental Retardation and Speech and Language Impairment. (Ex. B-14).

Before moving to the East Whittier School District in early 2004, M.M. resided in the Los Angeles Unified School District ("LAUSD") (2/21/06 AR 94:1-7). Since M.M. is disabled, the LAUSD was required by 20 U.S.C. § 1414(d)(1)(A) to create an individualized education plan ("IEP") each year that stated M.M.'s "present levels of educational performance," outlined the "special education and related services . . . to be provided to [M.M.]," and set forth "measurable annual goals."

On December 13, 2004, when M.M. was six years old, the LAUSD held an IEP meeting to conduct its annual review of M.M.'s progress. (Ex. B-30). At the meeting, the LAUSD recommended that M.M. be placed in a first grade general education class with full inclusion support (including educational support from the Severely Handicapped Program and assistance from a one-on-one aide), and that M.M. receive occupational therapy, physical therapy, adapted physical education, language and speech, and least restrictive environment ("LRE") support. (Ex. B-23 to 26; 2/21/06 AR 91:15-92:15). At the time, M.M. did not have behavior needs. (2/21/06 AR 92:13-17). On December 20, 2004, M.M.'s father signed the IEP, but marked that he disagreed with certain aspects of the IEP and intended to initiate a due process hearing. (Ex. B-28; 2/21/06 AR 55:19-57:14).

In early 2005, M.M. transferred from the LAUSD to the District. (2/21/06 AR 84:1-7). M.M. attended his first day of the school at Laurel Elementary on January 10, 2005. (*Id.* at 102:5-1-5:2). In accordance with the IEP prepared by LAUSD, M.M. was fully included in Mr. Perez's first-grade general education classroom with a one-on-one aide, and received speech and language therapy, occupational therapy, and adaptive physical education. (*Id.* at 103:8-22; ALJ Decision, p. 4, ¶ 3). Around the same time period, M.M.'s parents agreed to have the District assess M.M. to determine his needs for the purposes of a new IEP. (ALJ Decision, p. 3, ¶ 4). In February and March 2005, the District tested Plaintiff in occupational therapy, adapted physical education, speech and language, psychoeducation, and physical therapy. (Exs. D, E, F, G; Ex. 3).

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

FILED  
SEP 27 2007

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007  
Title M.M., et al. v. East Whittier School District

(1) *Occupational Therapy*

Harpreet Khandpur, a non-District occupational therapist with Gallagher Pediatric Therapy ("Gallagher"), conducted a 30-day review of M.M.'s occupation therapy goals set forth in the LAUSD's IEP. (Ex. F). On March 1, 2005, Ms. Khandpur issued a report based on information obtained through clinical observations and from M.M.'s one-on-one instructional assistant. (Ex. F-1). Concerned with M.M.'s fine motor skills and tactile processing, Ms. Khandpur wrote two occupational therapy goals for the IEP addressing these issues. (Ex. F-2 through 3). Ms. Khandpur also recommended that M.M. continue occupational therapy services once per week for one clinical hour per session. (Ex. F-3).

(2) *Speech & Language*

In February 2005, Lilia Mata, the District's speech and language specialist, conducted an assessment of M.M.'s speech and language abilities. (Ex. 10). After administering five different tests, Ms. Mata found that M.M. presented with "a severe expressive and receptive language disorder."<sup>2</sup> (Ex. 10-3). In her report, Ms. Mata wrote: "[M.M.'s] current skills do not allow him to access the core curriculum for his grade level. He is currently unable to express his basic needs, wants and ideas." (*Id.*). Ms. Mata reported that M.M. "continues to meet eligibility criteria as a student with a speech and/or language impairment (SLI)." (*Id.*).

(3) *Physical Therapy*

On February 16, 2005, Brenda Camarena, a non-District physical therapist with Gallagher, conducted a physical therapy evaluation to assess M.M. for the possible need for school-based physical therapy. (Ex. D). Ms. Camarena observed M.M. both in the classroom and playground, and spoke to his teacher and classroom assistant. (2/22/06 AR 10:9-23). Ms. Camarena found that M.M. could walk independently across different surfaces on the playground (*Id.* at 14:9-18), go up and down stairs holding the handrail (*Id.* at 14:19-15:5), climb the ladder and slide down the slide independently (*Id.* at 15:11-16), climb down spiral bars and access U-shaped bar (*Id.* at 15:17-21), and kick and throw a ball. (*Id.* at 15:24-15). Ms. Camarena also determined that M.M.'s balance was adequate, and that he could maintain single-

---

<sup>2</sup>The five tests are: (1) Expressive One Word Picture Vocabulary Test ; (2) Receptive One Word Picture Vocabulary Test ; (3) Pre-School Language Scale-3; (4) Language Sample; and (5) Pragmatic Language Check-List. (Ex 10-2).

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007  
 Title M.M., et al. v. East Whittier School District

SCANNED

limb balance while trying to kick a ball. (*Id.* at 17:11-17). Based on these observations, Ms. Camarena stated in her report that “physical therapy intervention is not indicated, as [M.M.] was able to participate in appropriate playground and classroom activities by independently ambulating and climbing on the equipment with the supervision of the school staff.” (Ex. D-3).

(4) *Multidisciplinary Psychoeducational Evaluation*

During a two-week period in February 2005, two District psychologists, Jacquelyne Leigh and Julie Balandran, and the District inclusion specialist Candice Clark, conducted a multidisciplinary psychoeducational evaluation (“MPE”) designed to assess a student’s cognitive and academic abilities, social, emotional and behavioral functioning, and adaptive behavior. (Ex. E). On February 8 and 11, 2005, Balandran observed M.M. in Mr. Perez’s first-grade general education classroom, using the behavior assessment for children structured observation system. (E-30 to 32). Ms. Leigh conducted objective observations of M.M. on February 9 and 10, 2005. (E-32 to 39).

Ms. Leigh and Ms. Balandran observed M.M. to be most engaged in classroom activities involving music, singing and clapping. (Ex. E-30 to 39; 2/24/06 AR 129:21-130:17). When other students were engaged in academic activities beyond M.M.’s skill levels, M.M.’s performance never approximated the general education curriculum. (2/24/06 AR 187:3-8). “There were times when [M.M. and his aide] were doing an alternate curriculum.” (*Id.*). Both psychologists observed some inappropriate behavior by M.M., such as repeatedly throwing a crayon back into his desk when directed to trace letters, attempting to get out of his seat during an activity, and looking around the room or at his peers rather than focusing on the activity. (Ex. E-31). On one occasion, when the students were returning to the classroom after recess, M.M. dropped to the ground and his aide had to physically lift him up. (E-33).

Ms. Leigh administered to M.M. the psychoeducational profile revised (PEP-R), “a comprehensive survey of developmental tasks designed for children with differences or delays in their development, as well as communication handicaps.” (Ex. E-39). Based on the PEP-R developmental scale, M.M. demonstrated developmental mastery skills equivalent to that of a child of 17-21 months of age, with emerging skills bringing his functional level to 21-25 months. (Ex. E-44, 47). In other isolated skills, including imitating actions, catching and kicking a ball, and sorting dissimilar objects, M.M. demonstrated levels at slightly higher skill levels, from 26-51 months. (Ex. E-47).

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CLERK

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007

Title M.M., et al. v. East Whittier School District

Ms. Clark determined that M.M.'s academic skills were below kindergarten level and were more closely similar to that of a preschool aged child. (2/24/06 AR 141:4-6). The MPE team addressed M.M.'s behavior in the general education classroom, such as "the distraction, rubbing of pants, taking off his shoes, vocalizing, blowing sounds," and discussed that those actions were possibly related to boredom and an inability to connect with the instructional material. (*Id.* at 141:12-18). The MPE team "felt there was a communicative function there for his behavior that was in a sense artificially controlled by the demands of the setting that he was in, to which he could not meet." (*Id.* at 141:18-142:1).

Based on the assessment results, the MPE team found that M.M.'s primary needs were "pre-academic," requiring a pre-kindergarten curriculum. (Ex. E-51). The MPE team identified 20 specific educational needs for M.M., including using a writing tool to copy basic geometric lines and figures, completing a 6-8 piece inset puzzle, matching numbers 1-10, and receptively identifying some basic shapes and colors. (Ex. E-50 to 51). (Ex. E-50 to 51). The MPE team noted that while past placement in general education kindergarten afforded M.M. social and non-academic benefit, it did not provide him with "reasonable educational benefit." (Ex. E-53). The examiners therefore recommended M.M. be placed "outside of the general education first grade classroom as a full time placement and consider meeting his needs in a classroom designed for children of primary elementary school age who have moderate to severe disabilities, with opportunities for mainstreaming on a daily basis."<sup>3</sup> (*Id.*). The MPE team suggested the classroom have at least a 1:3 staff to student ratio, that M.M. have a one-on-one aide for this placement for the first two months to assist with his transition to a new classroom, and that the IEP include a daily session of mainstreaming in non-academic classroom activities, and at recess, lunch and school assemblies. (Ex. E-53 to 54). Finally, the MPE team determined that because M.M.'s behaviors in the general education classroom were an "artificial artifact of the placement and the demands of it, on [M.M.'s] limited set of skills," a behavior support plan or functional analysis would not address the instructional, environmental and developmental factors present for him in the first grade setting. (*Id.*). The team felt these would be remedied by placement in an "appropriate special day class to meet his unique need," but that if M.M. continued to exhibit behaviors that interfered with his or other students' learning in the special day class, a behavior support plan could be added to the IEP. (*Id.*).

<sup>3</sup> Mainstreaming is a term used to describe opportunities for disabled students to engage in activities with non-disabled students.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

FILED

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

(5) *March 15, 2005 IEP Meeting*

On March 15, 2005, the District held an IEP meeting to review the assessment results and determine M.M.'s needs, services and placement. (Exs. D-G; Ex. 3). Both parents and the Special Education Director, Ruth Valadez, attended the meeting, as did the specialists who conducted the assessments of M.M., including Ms. Khandpur, Ms. Mata, Ms. Leigh, Ms. Balandran, Ms. Clark, and the school nurse, Elaine Shubin. Physical therapist Ms. Camarena did not attend the meeting, but another physical therapist from Gallagher presented the results of Ms. Camarena's assessments. (ALJ Decision, p. 11, ¶ 3). Ms. Leigh prepared notes of the IEP meeting, attached to the IEP report. (*Id.*).

The service offer formulated as a result of the April 23, 2004 IEP meeting included placing M.M. in a special day class for 52% of the school day, with participation in general education for art, music, daily recess and lunch, and school wide assemblies. (Ex. 3-1). The District also offered M.M. Designated Instructional Service ("DIS"), including 50 minutes of occupational therapy per week, adapted physical education twice a week for 30 minutes, speech and language sessions twice per week for 15 minute group sessions, and once per week for a 30-minute individual session. (*Id.*). Unlike the LAUSD's IEP, the District's IEP offered no physical therapy services. (*Id.*).

M.M.'s parents disagreed with the District's proposed placement, insisting instead on a full-inclusion general education placement. On March 16, 2005, M.M.'s parents signed the IEP, but attached an addendum noting that while they agreed to the speech and language, occupational therapy and adaptive physical education services offered, they disagreed with the physical therapy and psychoeducational assessments. (Ex. 3-41). Plaintiff's parent requested that the District pay for independent psychiatric and physical therapy assessments, and further requested a "stay-put" of the December 2004 IEP conducted by LAUSD regarding full-inclusion placement, physical therapy services, and one-on-one aide. (*Id.*). In a letter dated March 24, 2005, the District denied the parents' request for independent psychoeducational and physical therapy assessments at public expense, stating that "further assessments of [M.M.'s] unique educational needs is not warranted at this time." (Ex. J; ALJ Decision, p. 12, ¶ 24).

(6) *Requests for Administrative Due Process Hearing*

Because of the parents' "stay-put" request, M.M. remained in the regular, first-grade

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

FILED  
SEP 27 2007

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007  
Title M.M., et al. v. East Whittier School District

classroom. (ALJ Decision, p. 2). On March 28, 2005, the District initiated a due process hearing before the California Special Education Hearing Office ("SEHO"),<sup>4</sup> seeking a determination that the District's psychoeducational and physical therapy assessments were appropriate. (*Id.*). On April 29, 2005, the District filed a second request for due process hearing to determine whether the District offered M.M. a FAPE in the March 15, 2005 IEP. (*Id.*). In June of 2005, M.M.'s parents also filed a request for due process hearing and motion to consolidate the case with the District's two previously filed cases. (*Id.*; Ex. A). M.M.'s parents challenged the District's offer as both a substantive and procedural denial of a FAPE. (Ex. A-2 to 3).

(7) *ELARC Feeding Therapy*

While still a resident of the LAUSD, M.M. received oral motor feeding services, including a nutritionist and oral occupational therapist, at Pasadena Child Development Associates. (5/5/06 AR 90:17-91:2). The services were provided twice a week, for one hour, at 6:00 p.m. in the evening. (*Id.*). Upon moving to the District, M.M.'s parents asked the East Los Angeles Regional Center ("ELARC") to locate a vendor to come to their home. (*Id.* at 91:3-14). Thereafter, ELARC conducted a full assessment of M.M. (*Id.*).

In or around October 2005, Ms. Karena Perez, the service coordinator from ELARC, contacted Ms. Valadez, the District's Director of Special Education, regarding feeding services for M.M. (2/24/06 AR 71:5-9). Ms. Perez informed Ms. Valadez that M.M.'s parents contacted ELARC for feeding therapy, and that ELARC offered to provide the therapy after school hours, as ELARC services are traditionally provided. (*Id.* at 71:5-23; Ex. 8). However, because the after school hours were inconvenient to the parents, ELARC then procured a different vendor to offer feeding services during the instructional school day. (*Id.* at 71:15-19; Ex. 8). In a letter dated October 25, 2005, Ms. Valadez informed ELARC that during the most recent IEP meeting, neither the parents nor school district professionals suggested feeding therapy as a necessary instructional service to provide Plaintiff with a FAPE; consequently, additional services should be provided after-school hours. (Ex. 8). The letter also stated that if the parents desired to have

---

<sup>4</sup>On July 1, 2005, the California Department of Education transferred the responsibility to hear special education cases from SEHO to the Office for Administrative Hearings ("OAH"), including cases filed prior to July 1, 2005 but not yet heard by SEHO. (ALJ Decision, p. 2, fn. 1).

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

DEPOSED  
RECORDED

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

an IEP team meet and discuss feeding therapy as a necessary educational component of M.M.'s FAPE, they could make a written request with the District and the District would schedule an IEP meeting. (*Id.*).

(8) *M.M.'s Parents' Independent Evaluations*

In Fall of 2005, M.M.'s parents obtained independent evaluations of M.M. by Dr. Denise Eckman, a licensed clinical psychologist (Ex. O), Dr. Chris Davidson, a licensed educational psychologist (Ex. Q), and Dr. Jerry Linquist, a clinical psychologist, neuropsychologist, and occupational therapist. (Ex. P).

Dr. Denise Eckman, a licensed clinical psychologist and also the director of Autism Solutions, conducted a behavioral assessment of M.M. on November 11, 2005. (Ex. O). Dr. Eckman determined that M.M. communicated through approximate vocalizations or approximate signs. (5/10/06 AR 14:11-20). In her report, Dr. Eckman recommended an intensive one-on-one behavioral based intervention program at home and at school to address M.M.'s communication, play and social skills. (Ex. O-11). Specifically, Dr. Eckman recommended that M.M. receive 10 hours per week at school and 12.5 hours per week at home of Applied Behavior Analysis ("ABA") utilizing effective teaching procedures.<sup>5</sup> (*Id.*). Dr. Eckman opined that placing M.M. in a special day class for the most of the day would be inappropriate, since, with the help of a shadow and behavioral interventions, M.M. would be able to generalize his skills and learn and model from his typical peers. (5/10/06 AR 38:11-20).

Dr. Davidson conducted a psycho-educational evaluation to determine the current intellectual, educational and social skills of M.M., who at the time was fully-included in a second-grade classroom. (Ex. Q-1). Dr. Davidson based her report on her observations of M.M. in her office on November 7, 2005 (2/22/06 AR 182:14-15), in the classroom on January 12, 2006 (Ex. Q-31 to 34), the results of several standardized tests, and on her review of M.M.'s IEPs, assessments and reports. (Ex. Q 1-30). Dr. Davidson recommended that M.M. receive 15

---

<sup>5</sup>According to Dr. Eckman, ABA "is an approach that uses instructional technology designed to change behavior in a systematic and measurable way. ABA is a methodology that teaches children with autism functional and meaningful skills to use within the context of his/her daily life and community. ABA uses a set of teaching procedures based on the analysis of a behavior that is systematically applied to improve socially significant behavior." (Ex. O-10).

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

FILED

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007  
Title M.M., et al. v. East Whittier School District

hours per week of one-on-one behavior intervention in school and 12-15 hours of the same at home. (Ex. Q-76). She also suggested, among other things, that M.M. receive 27-30 hours per week of a language based ABA in school and at home, that his school program include at least 50% of the day with typically developing peers, that he have an experienced, one-on-one aide, that he receive an assistive technology evaluation to assist with the development and training of a functional communication system, and that the IEP incorporate a variety of indicated goals. (Ex. Q-76 to 78).

On December 29, 2005, Dr. Lindquist issued an occupational therapy evaluation based on a clinical observation of M.M., assessments of M.M., and a review of records provided by M.M.'s parents. (Ex. P-2 to 3, 2/23/06 AR 10:19-23; 30: 23-25; 37:14-19). In his report, Dr. Lindquist recommended individual occupational therapy services, twice a week, emphasizing sensory integration procedures. (Ex. P-11). Dr. Lindquist opined that general deficits, such as those M.M. displays, "respond well to two hours weekly of clinic-based services from an occupational therapist . . ." (2/23/06 AR 30:7-9).

(9) *Due Process Hearing*

Between February 21, 2006 and May 10, 2006, pursuant to the District's and M.M.'s parents' requests, a seven-day due process hearing was held before an ALJ. The ALJ heard testimony from several witnesses, including M.M.'s father, Ms. Valadez, Ms. Camarena, Ms. Leigh, Ms. Khandpur, Nurse Shubin, Ms. Clark, Ms. Mata, Dr. Davidson, Dr. Eckman and Dr. Lindquist.

On June 30, 2006, the ALJ issued a 24-page decision holding that the District complied with the IDEA both procedurally and substantively, and that the March 15, 2005 IEP offered M.M. a FAPE. (ALJ Decision, p. 20-24, ¶¶ 16-36). The ALJ also determined that M.M.'s parents were not entitled to reimbursement of the costs for Dr. Davidson's independent psychoeducational assessment and Dr. Lindquist's independent occupational therapy assessment. (*Id.*, p. 20, ¶ 16, p. 22, ¶ 29).

B. Statutory Background

The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

FILED  
SEP 27 2007  
CLERK  
U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007

Title M.M., et al. v. East Whittier School District

services designed to meet their unique needs and prepare them for employment and independent living.” 20 USC § 1400(d)(1)(A). Accordingly, the IDEA “confers upon disabled students an enforceable substantive right to public education in participating States, and conditions federal financial assistance upon a State’s compliance with the substantive and procedural goals of the Act.” *Honig v. Doe*, 484 U.S. 305, 310, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988).

To achieve FAPE for disabled children, schools must provide an IEP, see 20 U.S.C. § 1401(11), formulated by an IEP team made up of the parents, at least one regular education and one special education teacher of such child, a representative of the local educational agency, and at the discretion of the district or parent, others knowledgeable about the child. 20 U.S.C. § 1414(d)(1)(B). An IEP is a written statement for each disabled child that includes a statement of the child’s present levels of academic achievement and functional performance, a statement of measurable annual goals, a description of how the child’s progress toward meeting annual goals will be measured, a statement of the special education and related services to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided for the child. 20 U.S.C. § 1414(d)(1)(A); see also *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993). The IEP team reviews the child’s IEP at least annually to determine whether the annual goals for the child are being met, and revises the IEP as appropriate. 20 U.S.C. § 1414(d)(4).

A child receives FAPE if the program (1) addresses the student’s unique needs; (2) provides adequate support services so the student can take advantage of educational opportunities; (3) is in accord with the IEP; and (4) is the least restrictive environment. *Park v. Anaheim Union High School District*, 444 F.3d 1149 (9th Cir. 2006).

The parents or the local education agency may file a due process hearing request if either party disagrees with the IEP or believes that the child has been denied procedural or substantive rights to a FAPE. 20 U.S.C. § 1415(f). After such a proceeding, “any party aggrieved by the findings and decision” of the administrative proceedings may file a civil action in state or federal court. 20 U.S.C. § 1415(i)(2)(A).

II. STANDARD OF REVIEW

The standard of review for a district court in an IDEA case is less deferential than the standard applied in other administrative review cases. *Ojai*, 4 F.3d at 1471. The statute provides

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

“the court shall receive the records of the administrative proceedings; shall hear additional evidence at the request of a party; and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C). “The Ninth Circuit has interpreted this as calling for de novo review.” *Seattle School Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1499 (9th Cir. 1996) (citing *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1993), cert. denied, 513 U.S. 965, 115 S.Ct. 428, 130 L.Ed.2d 341 (1994)).

The preponderance of the evidence standard “is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Thus, in recognition of the expertise of an administrative agency, the court may increasingly defer to the findings of the hearing officer when “they are thorough and careful.” *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir.1995). Nevertheless, while the district court must carefully consider the administrative agency’s decision, after such consideration, the court is free to accept or reject the agency’s findings. *Adams by & through Adams v. Oregon*, 195 F.3d 1141, 1145 (9th Cir. 1999) (citing *Gregory K. v. Longview School Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987)). The court has the discretion to decide the amount of deference it gives to the administrative findings. *County of San Diego v. California Special Educ. Hearing Office*, 59 F.3d 1458, 1466 (9th Cir. 1996).

### III. BURDEN OF PROOF

“The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief,” whether that is the disabled child or the school district. *Schaffer v. Weast*, 546 U.S. 49, 62, 126 S.Ct. 528 (2005).

Here, the burden of proof lay with the District on the three issues for which it sought relief:

1. Whether the District’s psychoeducational assessment of M.M. was appropriate?
2. Whether the District’s physical therapy assessment of M.M. was appropriate.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

SEP 27 2007

Case No. CV 06-6104 PSG (VBKx)

Date: September 27, 2007

Title M.M., et al. v. East Whittier School District

- 3. Whether the District offered a FAPE to M.M. in the March 15, 2005 IEP?

(ALJ Decision, p. 3).

Plaintiff had the burden of proof on the five issues identified in his request for an administrative hearing:

- 4. Whether the District failed to offer M.M. a FAPE in the March 15, 2005 IEP by failing to offer DIS/related services appropriate to Plaintiff's needs in speech and language, occupational therapy, and physical therapy, and by failing to offer placement in the least restrictive environment?
- 5. Whether the District appropriately assessed M.M. in the area of occupational therapy?
- 6. Whether the District committed procedural violations, resulting in substantive denial of FAPE, by failing to provide written notice to M.M.'s parents of the denial of their requests for (i) a sensory integration assessment, (ii) a behavior assessment, (iii) mainstreaming, and (iv) to allow East Los Angeles Regional Center to provide oral motor therapy and feeding/swallowing services to M.M. during the school day, and by failing to conduct a review of previous IEP goals?
- 7. Whether the District denied M.M. a FAPE when it refused to allow ELARC time during the school day to provide Plaintiff, free of charge to the District, oral motor therapy and feeding/swallowing services that he required?; and
- 8. Whether the District appropriately assessed M.M.'s behavioral needs and provided M.M. appropriate services to meet those needs?

(Id.).

IV. DISCUSSION



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CIVIL MINUTES - GENERAL

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

expressed concern regarding M.M.'s "lack of educational and social benefit in the first grade classroom for instructional periods." (*Id.*). The MPE team therefore recommended the IEP team consider full-time placement for M.M. "in a classroom designed for children of primary elementary school age who have moderate to severe disabilities." (Ex. E-53).

Ms. Balandran, a fully credentialed school psychologist, observed M.M. in the first grade general education classroom on February 8 and 11, 2005. (Ex. E-31 to 32). She also administered the cognitive adaptive and visual motor assessment. (Ex. E-24 to 25). After each test session, Ms. Balandran met with Ms. Leigh to discuss the behaviors she observed and how she administered the test. (2/24/06 AR 118:12-119:2). Ms. Balandran also asked Ms. Leigh for any feedback in terms of assisting M.M. to be more comfortable or to access the test. (*Id.*).

Ms. Clark, a fully credentialed inclusion specialist with a Masters degree, worked for the District between 2000 and 2005. (5-04-06 AR 45:16-46:2). Her duties included going into the classroom and modifying curriculum for her students, creating behavior plans, collecting data, and discussing students' progress with parents and teachers. (*Id.* at 46:3-11). As of June 2005, Ms. Clark opined that M.M. did not need behavior services as long as he was receiving material and tasks at his level and was given positive reinforcement for appropriate behavior. (*Id.* at 59:3-19).

The resulting MPE was comprehensive, and included observations, interviews, a review of prior assessments, parent and teacher rating scales, and informal and standardized assessments. (Ex. E). Nonetheless, M.M.'s parents argue that the psychoeducational evaluation was not appropriate because Ms. Leigh did not provide input and guidance to Ms. Balandran during the assessment, did not administer most of the assessments to M.M., and did not consult with the assessor, Ms. Balandran, on her findings or results.

The record does not support M.M.'s parents' contentions. To the contrary, the record shows that Ms. Balandran administered the assessments with input and guidance from Ms. Leigh. (2/24/06 AR 118:12-119:2). For example, after Ms. Balandran administered the Beery Buktenica Developments Test of visual motor integration, she met with Ms. Leigh after each session to discuss how she administered the test and what behaviors she observed. (*Id.* at 118:19-119:2). Ms. Leigh administered the PEP-R test of development and behavior, with both Ms. Balandran and M.M.'s one-on-one aide present, and reviewed the findings with a representative of the LAUSD. (*Id.* at 134:5-19; 136:15-17). Additionally, Ms. Leigh personally conducted two of the four observations of M.M. in the classroom. (*Id.* at 124:21-22).

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

SEANES

Case No.	CV 06-6104 PSG (VBKx)	Date	September 27, 2007
Title	M.M., <i>et al.</i> v. East Whittier School District		

M.M.'s parents assert that Dr. Davidson's independent psychoeducational evaluation is more appropriate than the District's. However, as noted by the ALJ, Dr. Davidson's and the MPE team's recommendations were essentially the same. (ALJ Decision, ¶ 16). The District's team recommended 52% of the day in the special day class with the remainder of the day mainstreaming in a general education classroom, while Dr. Davidson recommended 50% of the day in the special day class, and 50% of the time mainstreaming. (Ex. Q-76 to 78). Both Dr. Davidson and the MPE team recommended various DIS services, though they disagreed on the amount of time allotted for these services. Like the MPE team, Dr. Davidson opined that a second-grade general education class would not be an appropriate placement for M.M. (*Id.*). Lastly, with respect to the IEP's offer of 52% in the special day class, the Court concludes that the District's IEP sufficiently conveyed that 52% of the instructional day would take place in a special day class, and that the remaining 48% of the instructional day would take place in mainstreaming activities such as recess, lunch, music, art and general assemblies. While M.M.'s parents point to Dr. Davidson's testimony that "you can't just come up with a number, 52, you have to say what it is going to be" in the IEP document (*Id.* at 219:12-220:2), the Court does not find it necessary for the District to indicate in minutes what it can indicate in percentages, or visa versa. Consequently, the Court affirms the ALJ's determination that the District's psychoeducational assessment was appropriate and in accordance with the requirements of Cal. Educ. Code §§ 56320 and 56322.

(2) *Speech and Language Assessment*

M.M.'s parents also take issue with the District's speech and language assessment conducted by Ms. Mata, a speech and language specialist with a B.A. in speech and language pathology and audiology. (5-4-06 AR 111:2-24; 122:23-121:4). They contend that Ms. Mata's recommendations were incomplete and failed to identify M.M.'s unique educational needs. For example, despite identifying M.M.'s needs in receptive language, Ms. Mata admitted there was no separate goal that measured or addressed that skill. (5/4/06 AR 144:17-19). In addition, while Ms. Mata reported that M.M. was unable to communicate his basic needs and wants at school (*Id.* at 135:25-136:5), when M.M. first entered the District, he could communicate some wants with sign language. (2-21-06 AR 100:4-25, 101:1-11; 2-24-06 AR 144:1-2). M.M.'s parents further point out that in contrast to the District's claim that M.M. had no need for assistive technology (Ex. B-12), Dr. Davidson recommended that he be evaluated, using assistive technology such as the Mini-Mo, the Seven Level Communicator, Hip Talk or Chat PC, to aid M.M. in communicating his needs and wants. (2-22-06 AR 208:12-211:4)

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

RECORDED

Under 20 U.S.C. § 1414 (d)(3)(B), the IEP team must consider the communication needs of the child, including the child's communication mode and whether the child needs assistive technology services. Evidence in the record shows the District did just this. The District properly assessed M.M. in the area of speech and language in February 2003, when Ms. Mata conducted a language sample and Preschool Language Scale assessments of M.M. (5-4-06 AR 112:11-113:6). Ms. Mata indicated that M.M. had severe expressive and receptive language disorder, but that by March 2006, the goal was for M.M. to be able to produce word sounds to help build his vocabulary, expressive language and articulation. (*Id.* at 133:1-14). At the hearing, Ms. Mata testified that although M.M. could express his needs at home and to familiar people, he had difficulty expressing his basic needs and wants in the school setting. (*Id.* at 135:25-136:5). Furthermore, while Ms. Mata stated that she did not write a separate goal for receptive language (*Id.* at 144:17-20), she explained that M.M.'s receptive language goals were incorporated into other goals recommended in her report. (*Id.* at 142:16-21).

M.M.'s parents did not produce any witnesses to contradict Ms. Mata's testimony, or to support a finding that Ms. Mata was unqualified to conduct M.M.'s speech and language assessment. Moreover, when the IEP team offered DIS/related services for speech and language in a group twice a week for 15 minute sessions, and individually once a week for 30 minutes, M.M.'s parents expressed their written agreement to these services both on the IEP and in an addendum letter dated the next day. (Ex. 3-40 to 41). Hence, the record supports the ALJ's and this Court's conclusion that the District's speech and language assessment was appropriate and in accordance with the statutory requirements.

- B. Issues No. 3 and 4: Whether the District Offered M.M. a FAPE in the March 15, 2005 IEP, and Whether the District Failed to Offer M.M. a FAPE in the March 15, 2005 IEP by Failing to Offer of DIS/Related Services Appropriate to M.M.'s Needs in Speech and Language, Occupational Therapy, and Physical Therapy, and By Failing to Offer Student a Placement in the Least Restrictive Environment?

In determining whether the District denied M.M. a FAPE, the court must engage in a two-step inquiry. First, the court examines "whether 'the State complied with the procedures set forth in the Act' and second, whether 'the individualized educational program developed through the Act's procedures [was] reasonably calculated to enable the child to receive educational benefits.'" *Amanda J.*, 267 F.3d at 890 (quoting *Rowley*, 458 U.S. at 206-07). The court need not reach the question of substantive compliance, however, if the court finds procedural inadequacies that result in the loss of educational opportunity, or seriously infringe

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

GENERAL  
MINUTES

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007

Title M.M., et al. v. East Whittier School District

the parents' opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits. *Amanda J.*, 267 F.3d at 892.

Furthermore, "[a]n 'appropriate' public education does not mean the absolutely best or 'potential-maximizing' education for the individual child . . . The states are obliged to provide a basic floor of opportunity through a program individually designed to provide educational benefit to the handicapped child." *Seattle School Dist.*, 82 F.3d at 1500 (citing *Union Sch. Dist.*, 15 F.3d at 1524).

(1) *Procedural Compliance with the IDEA*

One of the procedural safeguards in the IDEA is the parent's right of involvement in the development of their child's IEP. *Amanda J.*, 267 F.3d at 882. The IDEA provides that the parents of a child with disabilities must be afforded "an opportunity. . . to participate in meetings with respect to the identification, evaluation, and educational placement of the child." 20 U.S.C. § 1415(b)(1). The regulations promulgated under the IDEA place the burden on the District to "take steps to ensure that one or more of the parents of a child with a disability are present at the IEP meeting or are afforded an opportunity to participate [.]" 34 C.F.R. § 300.345(a). Notice of any changes in the child's educational placement, or their FAPE, and the ability to "bring a complaint about 'any matter relating to' such evaluations and educational placement" are also aspects of the IDEA's procedural safeguards. *Ojai*, 4 F.3d at 1469 (quoting 20 U.S.C. § 1415(b)).

M.M.'s parents contend the District violated the procedural safeguards of the IDEA because the March 15, 2005 IEP was developed without their meaningful participation or the meaningful participation of M.M.'s current service providers. M.M.'s parents assert that in failing to identify the specific amount of time and duration of mainstreaming for M.M., the District failed to present a full written offer of FAPE as required by statute. They claim that they did not understand the District's offer of placement, that there was no discussion about the placement, and that at the meeting, the District did not state any specific amount of time that M.M. would spend in a regular education class.

M.M.'s parents contention that they were deprived of meaningful participation is in the IEP process is simply not supported by the record. Both parents were present at the March 15, 2005 IEP meeting; the parents expressed their concerns and disagreements with the IEP team's conclusions, including their disagreement with the psychoeducational and physical therapy

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

SCANNED

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

evaluations (2-21-06 AR 78:23-79:5); the parents took the written IEP home for review and subsequently signed it in areas of agreement and disagreement (2-21-06 AR 70:3-71:4; 3-40); and M.M.'s father initialed next to paragraph 2 of the IEP, "Consent for Special Services," stating "I participated in the development of the goals and objectives." (2-21-06 AR 77:24-81:21; Ex.3-40). Moreover, notes from the IEP meeting further indicate that M.M.'s father meaningfully participated in the meeting. (Ex. 3-28 to 37). M.M.'s father requested that the explanatory reference to "psychosis" in the Multidisciplinary Report be removed; he questioned certain observations in the area of occupational therapy; he asked Ms. Mata if she had goals in the areas of augmentative communication; he disagreed with the physical therapy recommendation since the goal of using stairs with alternating feet had not been met; and he and his wife expressed their disagreement with the recommendation for placement in the special day class. (Ex.3-35 to 37). Finally, since M.M.'s father participated in at least one prior IEP meeting in the LAUSD, he was certainly no stranger to the IEP process. (2-21-06 AR 91:15-102:4). Thus, the Court rejects M.M.'s parents' procedural challenges of the March 15, 2005 IEP meeting.

(2) *Substantive Compliance*

Because the Court rejects M.M.'s parents' procedural challenges and concludes there was no denial of FAPE on that ground, the Court next considers whether M.M.'s IEP was reasonably calculated to enable M.M. to receive educational benefits. The Court concludes that it was.

In order to comply with the requirement of providing a FAPE, a child receives a FAPE if the program (1) addresses the child's unique needs; (2) provides adequate support services so the child can take advantage of the educational opportunities; and (3) is in accord with the IEP. *Rowley*, 458 U.S. at 188-189. Whether the school district provides a substantively adequate FAPE is based on the appropriateness of the educational program it offers to the disabled student. *Rowley*, 458 U.S. at 198-200. The United States Supreme Court has held that a school district is not required to provide a student with the best education available or "every special service necessary to maximize each handicapped child's potential." *Id.* at 199. Instead, the school district is only required to provide "a basic floor of opportunity" consisting of access to specialized instruction and related services that are individually designed to meet the student's needs, and reasonably calculated to provide the student with some educational benefit that comports with the student's IEP. *Id.* at 201.

M.M.'s parents argue the District substantively denied M.M. a FAPE in the March 15,

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

SERIES  
SCANNED

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

2005 IEP, by failing to offer DIS/related services appropriate to Plaintiff's needs in speech and language, occupational therapy, and physical therapy, and by failing to offer placement in the least restrictive environment.

*a. The District's Assessments in Speech and Language, Occupational Therapy, and Physical Therapy Were Appropriate.*

As discussed previously, the Court finds that the District appropriately assessed M.M. in the area of speech and language, and that the IEP's offer of DIS/related services in speech and language met M.M.'s unique needs. The Court further concludes that the District's psychoeducational assessment appropriately addressed M.M.'s needs in the areas on occupational and physical therapy.

*1. Occupational Therapy*

M.M.'s parents contend the District conducted no assessment whatsoever in the area of occupational therapy and sensory integration. They assert that only after they obtained an independent assessment from Dr. Lindquist were M.M.'s needs identified. (Ex. P). According to Dr. Lindquist, M.M. exhibited moderate to severe sensory processing deficits, affecting his visual, tactile, proprioceptive and vestibular sensory systems. (Ex. P-10). Dr. Lindquist recommended that M.M.'s occupational therapy services emphasize sensory integration procedures. (Ex. P-11).

The District responds that it was not required to carry out a formal occupational therapy assessment, since M.M.'s needs had already been addressed through Gallagher's informal, 30-day review of the occupational therapy goals and objectives set forth in the December 2004 IEP from LAUSD. (5/5/07 AR 50:9-12; Ex. F). Ms. Kandpur, the supervising occupational therapist on M.M.'s case, conducted the review in March 2005. (Ex. F-4).

The Court finds that the District adequately assessed M.M.'s unique occupational therapy needs through Gallagher's review. Although the District did not conduct a formal assessment, Gallagher's informal 30-day review was appropriate since it identified the IEP goals, outlined M.M.'s status in reaching those goals, and made a recommendation of continued occupational therapy based on his status. (Ex. F). The progress report from the review noted that M.M. was making "minimal progress toward his occupational therapy goals," and recommended he continue occupational therapy services, one time a week for 60-minute sessions, until his next

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

SCANNED

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007

Title M.M., et al. v. East Whittier School District

annual IEP meeting. (Ex. F-3). While M.M.'s parents challenge the review because Gallagher did not conduct the Sensory Integration and Praxis Test, used to measure sensory integration (5/5/06 AR 52:20-53:4), Ms. Khandpur, the supervising occupational therapist on M.M.'s case, testified that she conducted observations in the classroom and on the playground, related to sensory integration issues. (*Id.* at 55:5-19). Furthermore, when the IEP team presented the occupational therapy goals and services at the March 15, 2005 IEP meeting, M.M.'s parents subsequently agreed in writing to the goals and services offered. (Ex. 3-40 to 41). The record contains no evidence that M.M.'s parents ever revoked their consent to District's offer regarding occupational therapy goals and services.

M.M.'s parents further contend the occupational therapy review was deficient because it failed to address M.M.'s feeding needs. Indeed, Ms. Khandpur's review indicates the existence of feeding issues. (Ex. F-3). For example, Ms. Khandpur reported that "[M.M.] is able to self feed using a spoon during lunch," but that "he does not drink any liquids in school." (*Id.*). Despite this, Ms. Khandpur did not identify any feeding goals for M.M. in her occupational therapy review.

The record nevertheless supports the ALJ's determination that at the time of the March 15, 2005 IEP meeting, "[M.M.'s] feeding needs were being addressed by ELARC." (ALJ Decision, p. 22, ¶ 28). At the IEP meeting, Ms. Clark stated that M.M. was now drinking from a water fountain at school. (Ex. H-31). M.M.'s father reported that M.M. was drinking from a water bottle at home, and was eating increased textures as recommended by the oral motor team working with M.M. in the home. (*Id.*). M.M.'s father also stated that their family was meeting with a nutritionist on a regular basis to support M.M.'s nutritional needs. (*Id.*). Moreover, at the administrative hearing, Ms. Khandpur testified that the goals did not address feeding because "[M.M.'s parents] wanted [ELARC] to do the feeding therapy" (5/5/06 AR 80:17-21), and "the [IEP] team decided that [ELARC] was addressing that area of need." (*Id.* at 57:7-13). Such evidence corroborates the ALJ's legal conclusion that "[t]he March 15, IEP did not need to address the feeding as an occupational therapy goal, because at the time of the March 15th meeting, Student's feeding needs were being addressed by ELARC." (ALJ Decision, p. 22, ¶ 28).

Accordingly, the Court concludes that the District substantively complied with the requirements of the IDEA, and that the District's offer of DIS/related services in occupational therapy at the March 15, 2005 IEP meeting did not deny M.M. a FAPE.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

SCANNED

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

2. *Physical Therapy*

The Court also determines that the District's physical therapy assessment was appropriate. Moreover, the weight of evidence in the record supports the District's ensuing decision not to provide DIS/related services to M.M. in the area of physical therapy.<sup>6</sup> In the physical therapy assessment conducted on February 16, 2005, Ms. Camarena observed M.M. both in the classroom and playground, and spoke to his teacher and classroom assistant. (2/22/06 AR 10:9-23; Ex. D). Ms. Camarena found that M.M. could walk independently across different surfaces on the playground (*Id.* at 14:9-18), go up and down stairs holding the handrail (*Id.* at 14:19-15:5), climb the ladder and slide down the slide independently (*Id.* at 15:11-16), climb down spiral bars and access U-shaped bar (*Id.* at 15:17-21), and kick and throw a ball overhead. (*Id.* at 15:24-15). Ms. Camarena also determined that M.M.'s balance was adequate, and that he could maintain single-leg balance. (*Id.* at 17:11-17). Based on these observations, Ms. Camarena stated in her report that "physical therapy intervention is not indicated, as [M.M.] was able to participate in appropriate playground and classroom activities by independently ambulating and climbing on the equipment with the supervision of the school staff." (Ex. D-3). Plaintiff has offered no persuasive evidence to contest these findings.

b. *Least Restrictive Environment*

M.M.'s parents contend that by offering M.M. placement in the special day class, the District failed to place him in the least restrictive environment as required by the IDEA. The mainstreaming provision of the IDEA requires a disabled child to be placed in the "[l]east restrictive environment" and that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary

---

<sup>6</sup>Plaintiff does not address the issue of physical therapy in their brief. However, because M.M.'s parents raised this issue during the due process hearing, the Court finds it appropriate to address in this appeal.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

SCANNED

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007  
Title M.M., et al. v. East Whittier School District

aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A); see also *Rowley*, 458 U.S. at 202 (the IDEA “requires participating States to educate handicapped children with non-handicapped children whenever possible”).

However, “[t]he IDEA’s preference for mainstreaming is not an absolute commandment.” *Poolaw v. Bishop*, 67 F.3d 830, 836 (9th Cir.1995). “In some cases, such as where the child’s handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In these situations continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment.” *Id.* at 834.

The Ninth Circuit has adopted a four-factor balancing test to determine whether a school district has complied with the IDEA’s mainstreaming requirement. *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. ex rel. Holland*, 14 F.3d 1398, 1404 (9th Cir. 1994). The court must consider “(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student] ha[s] on the teacher and children in the regular class; and (4) the costs of mainstreaming [the student].” (*Id.*).

Applying these elements to the instant case, the Court concludes that the special day class was the least restrictive environment. As to the first *Rachel H.* factor, the record indicates that M.M. was receiving little academic benefit from his mainstream placement. M.M.’s developmental and cognitive levels were the main impediment preventing him from accessing the curriculum. (2/24/06 AR 214:23-215:13). The MPE team determined that M.M.’s abilities were below kindergarten level, and that his workbooks and worksheets revealed that M.M. was not able to begin even the earliest and beginning levels of the curriculum. (Ex. 3-30 to 31). In their observations, the team found that M.M. did not consistently respond to overtures from his peers, did not actively attend to any first-grade classroom activity for more than a few seconds, and did not know yet how to play with peers. (Ex. E-52). In sum, the MPE team felt that M.M.’s behavior “was in a sense artificially controlled by the demands of the setting that he was in, to which he could not meet.” (2/24/06 AR 141:23-142:1 ).

Furthermore, M.M.’s parents have not adduced any evidence that there would be an educational benefit in placing M.M. in a regular classroom. To the contrary, the record supports the conclusion that M.M. would receive significant academic benefits from the special day class. M.M. has very few communication skills and a cognitive ability that places him below

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

SCANNED

Case No. CV 06-6104 PSG (VBKx) Date September 27, 2007  
Title M.M., et al. v. East Whittier School District

kindergarten level. (Ex. 3-30 to 31). The District presented testimony from Yvonne Canales, the special education kindergarten teacher at La Colima Elementary School, that in her opinion, her special day class was appropriate for M.M. since she was already using methods suggested for M.M. in his IEP. (2/22/06 AR 92:12-21). M.M.'s parents offered no testimony in rebuttal. In fact, their own independent assessor, Dr. Davidson, testified that she liked Ms. Canales' special day class, and that "there were a lot of good plusses that they had going on in the classroom." (*Id.* at 226:5-14). Accordingly, the first factor weighs against placing M.M. in a regular education classroom full-time.

The second *Rachel H.* factor also weighs against placing M.M. full-time in a regular education classroom. M.M.'s parents assert that M.M. would derive significant non-academic benefits from his ability to interact with other children of the same age in a regular education classroom. However, while the District's psychoeducational report noted that M.M. was receiving social benefit from being in the general education class some of the time, it also reported that M.M. had a difficult time initiating or responding to peers if the peer interaction occurred in a least preferred area or task. (Ex. 2-50). During these times, M.M. ignored his peers, pulled away or pushed them away. (*Id.*). Yet, M.M. was motivated to give and receive social interaction when he felt comfortable with an activity. (*Id.*). This evidence supports the IEP's offer of mainstreaming for activities such as recess, lunch and general assemblies, and in M.M.'s preferred areas such as music and art.

With respect to the third *Rachel H.* factor, the record shows that M.M.'s behavior had a somewhat disruptive effect on the teacher and other students. The MPE team reported "maladaptive behavior of guttural sounds, blowing noises, vocalizations, throwing objects, standing still, dropping to the ground, and crying . . ." (Ex. 2-49). M.M. seemed to throw objects when he was presented with materials he did not like or that were too hard for him. (*Id.*) M.M. would drop to the ground or cry loudly when he was prompted to move to an area he did not like or when he was frustrated. (*Id.*)

While M.M.'s parents highlight the testimony of Dr. Davidson, who observed no disruptive behavior in January 2006 (2/22/06 AR 198:14-18), the Court finds this evidence to have little probative value. Dr. Davidson only observed M.M. once in the classroom setting, and this observation took place nearly eight months after the March 15, 2005 IEP. Accordingly, the third factor weighs also weighs in favor of partial placement in the special day class.

Finally, neither party has offered evidence regarding the cost of split-placement in the

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SCANNED

CIVIL MINUTES - GENERAL

Case No.	CV 06-6104 PSG (VBKx)	Date	September 27, 2007
Title	M.M., et al. v. East Whittier School District		

special day class and general education class, versus placement solely in the general education class. Hence, this factor weighs neither in favor of nor against M.M.'s parents claim that the District failed to offer M.M. placement in the least restrictive environment.

In sum, the record shows there would be some non-academic benefit to placing M.M. in a regular education classroom. However, in contrast, the program offered in the special day class with mainstreaming opportunities in general education classes would offer him substantial academic and benefits in all developmental areas. After balancing the three relevant *Rachel H.* factors, the Court concludes that the District did not violate the IDEA's mainstreaming requirement by offering placement placing M.M. in the special day class.

C. Issue 5: Whether the District Appropriately Assessed M.M. in the Area of Occupational Therapy?

As discussed previously in Section IV (B)(2)(a)(1), the Court concluded that the District appropriately assessed M.M. in the area of occupational therapy when Gallagher conducted the 30-day review. Therefore, this issue has already been determined in favor of the District.

D. Issue 6: Whether the District Committed Procedural Violations, Resulting in Substantive Denial of FAPE, by Failing to Provide Written Notice to M.M.'s Parents of the Denial of Their Requests for (i) a Sensory Integration Assessment, (ii) a Behavior Assessment, (iii) Mainstreaming, and (iv) to Allow ELARC to Provide Oral Motor Therapy and Feeding/Swallowing Services to M.M. During the School Day, and by Failing to Conduct a Review of Previous IEP Goals?

M.M.'s parents contend the District committed procedural violations, resulting in substantive denial of FAPE, by failing to provide them written notice of the denial of their requests for (i) a sensory integration assessment, (ii) a behavior assessment, (iii) mainstreaming, and (iv) failing to allow ELARC to provide feeding services to M.M. during the school day, and by failing to conduct a review of previous IEP goals.

The Court determines that M.M.'s parents have not met their burden of proving a procedural violation with respect to their alleged request for a sensory integration. There is no evidence in the record that M.M.'s parents ever requested a sensory integration assessment in

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SCANNED

CIVIL MINUTES - GENERAL

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

connection with the March 2005 IEP. Moreover, that M.M.'s parents expressly agreed to the occupational therapy goals and services contained in the March 2005 IEP tends to indicate they were satisfied with those goals and services offered.

Similarly, M.M.'s parents have not met their burden of proving a procedural violation with respect to their alleged request for behavior assessment. As evidenced by the March 15, 2005 IEP and the parent's signature page addendum to the IEP, dated the next day (Ex. 3-40 to 41), M.M.'s parents requested independent assessments for physical therapy and psychoeducational assessments only. The records lacks any evidence that M.M.'s parents requested a behavior assessment.

Nor have M.M.'s parents met their burden of proving a procedural violation with respect to their alleged request for mainstreaming. The evidence shows the parents expressed their desire for full-inclusion placement, and not for mainstreaming. (Ex. 3-37). Furthermore, the District offered M.M. mainstreaming opportunities in the March 2005 IEP. (Ex. 3).

M.M.'s parents have not met their burden of proving a procedural violation with respect to the denial of their request to allow ELARC to provide feeding therapy at school. Because the March 2005 IEP did not identify feeding therapy as a necessary component of M.M.'s FAPE, the District was under no obligation provide M.M.'s parents with a written denial of ELARC's request.

Finally, M.M.'s parents have not met their burden of proving the District failed to review the goals and objectives from M.M.'s previous IEP conducted by the LAUSD. Ms. Leigh testified that at the March IEP meeting, each specialist reviewed their area of assessment and the LAUSD goals related to the specialist's area. Furthermore, the specialists' reports show that they considered the LAUSD goals in making their assessments.

- E. Issue 7: Whether the District Denied Plaintiff a FAPE When it Refused to Allow ELARC Time During the School Day to Provide Plaintiff, Free of Charge to the District, Oral Motor Therapy and Feeding/Swallowing Services That He Required?

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SCANNED

CIVIL MINUTES - GENERAL

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

In paragraph 35 of the conclusions of law, the ALJ stated:

... the District did not deny Student a FAPE when it denied ELARC's request to provide feeding therapy to Student during the lunch hour at school. Student's feeding therapy was an area addressed by ELARC, not the District. Student's evidence failed to establish feeding therapy was a related service the District was obligated to provide as part of the March 15, 2005, IEP.

(ALJ Decision, p. 23, ¶ 35). The ALJ reached this conclusion based on her factual findings concerning M.M.'s occupational therapy. (ALJ Decision, p.5, ¶ 6, pp. 13-14, ¶¶ 37-29).

M.M.'s parents assert that the District, by failing to provide M.M. feeding services during lunch periods at school, either by ELARC or through the District, denied M.M. a FAPE. They contend that M.M.'s feeding needs affected his nutrition; however, while the IEP team identified feeding as a need for M.M. at the March 15, 2005 IEP meeting, the team failed to create any goals for his feeding or offer feeding services.

The District, on the other hand, argues that at the time of March 15, 2005 IEP meeting, ELARC was handling M.M.'s feeding needs, and it was the parents' desire that ELARC continue handling the feeding services for their son. Given ELARC's involvement, the IEP team properly concluded that M.M.'s feeding needs were being met at home. According to the District, the parents' stated "inconvenience" of receiving feeding services in their home during the evening was not an appropriate reason for rendering feeding services in the school.

Having reviewed the record, the Court concludes that in October 2005, the District did not deny M.M. a FAPE when it refused to grant permission to ELARC to provide feeding services to M.M. during the non-instructional school day. Ms. Valadez, the Director of Special Education and chair of the IEP meeting, explained to the parents that the team would proceed in accordance with the information available to it at that time, but if new information about "hearing, vision, nutrition, [or] oral motor needs" became available, the IEP team would consider the new information. (Ex. 3 at 29). There is no indication in the record that after the March 2005 meeting, either M.M.'s parents, or the District, obtained new information about

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SCANNED

CIVIL MINUTES - GENERAL

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

M.M.'s nutrition or oral needs. In fact, evidence in the record shows that the District gave M.M.'s parents an authorization for release of information to obtain information from nutritionists and doctors, but as of the hearing, the District had received no releases. (*Id.* at 24:17-24). The school nurse even offered to work with M.M.'s nutritionist, but she never heard from the nutritionist. (*Id.* at 20:11-14).

Furthermore, Ms. Valadez testified that although she could have given permission to ELARC to provide feeding services during the non-instructional part of the day, she did not do so because that time "is very important to [M.M.] socially." (2/24/06 AR 98:17-25). Ms. Valadez emphasized that the non-instructional part of the day constituted time when M.M. integrated with his peers in a play period. (*Id.*). In her letter to ELARC dated October 25, 2005, Ms. Valadez wrote:

Other students who require functional skills such as feeding therapy sometimes have these needs addressed within a special day classroom setting, as an integral part of their curriculum. However, this is an IEP team decision . . . this program does not require feeding therapy as a necessary component of M.M.'s FAPE. In the meantime, we cannot [authorize] ELARC services to take the place of critical educational services while [M.M.] falls so far behind his peers. It is unfortunate that the scheduling of the this Regional Center service is offered at an inconvenient time for [M.M.'s parents]. However, we are confident that the Regional Center and [M.M.'s parents] will find a mutually convenient time after the school day to provide feeding therapy services for M.M.

(Ex. 8).

As Ms. Valadez discussed in the letter, she did not grant permission to ELARC because that was an IEP team decision. Since the parents did not offer new information regarding M.M.'s feeding needs, and did not request an IEP meeting, this Court agrees with, and the record supports, the ALJ's determination that District did not deny M.M. a FAPE by refusing to allow ELARC permission to provide feeding services during the instructional school day.

F. Issue 8: Whether the District Appropriately Assessed M.M.'s Behavioral Needs

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SCANNED

CIVIL MINUTES - GENERAL

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

and Provided M.M. Appropriate Services to Meet Those Needs?

M.M.'s parents contend the District was required to conduct an assessment in the area of behavior, since M.M. displayed some minor disruptive behaviors in his regular education classroom, such as touching other people or playing with their hair (5/4/06 AR 63:3-14), as well as non-disruptive behaviors that interfered with his education. (*Id.* at 85:18-86:6; 149:13-25; 150:1-17).

The District defends its decision not to conduct a behavior assessment, arguing that the MPE adequately addressed any concerns regarding M.M.'s behavior. According to the MPE, M.M.'s behavior needs were consistent with a child at approximately the 24 month level. (Ex. 2 at 45-50). The MPE found that M.M.'s behavior issues in the classroom were not the result of being a "bad child," but instead were a direct result of academic demands that far exceeded his cognitive abilities. (2/24/06 AR 205:8-106:19; Ex. 2 at 48). Consequently, the MPE team determined a behavior support plan was not necessary, as it would not address the instructional, environmental and developmental factors present in the general education setting, and instead recommended placement at least part time in a special day class. (*Id.*).

Having reviewed the record, the Court agrees with the District that the MPE sufficiently dealt with M.M.'s behavioral issues by recommending placement in a special day class. The MPE shows that the District used the Adaptive Behavior Assessment System - Second Edition ("ABAS-II") and Behavior Assessment System for Children ("BASC") to measure M.M.'s adaptive behavior. (Ex. 2 at 27-28). The District also conducted observations of Plaintiff in the classroom setting, using the BASC Structure Observation System, on February 8 and 11, 2005. (Ex. 2 at 30-31). The MPE contains detailed notes regarding survey ratings completed by M.M.'s classroom teacher and his father, as well as M.M.'s actions during the structured observations. (*Id.*). Additionally, Ms. Clark, the inclusion specialist, concluded that if a demand was too difficult, M.M. exhibited behavior issues; but remained in control if he was given materials and tasks at his level and received positive reinforcement. (5/4/06 AR 59:3-19). Ms. Leigh reached a similar conclusion, finding that M.M. appeared to function fairly well with few behavioral problems in the home-setting. (2/24/06 AR 123:2-20). In conclusion, given the behavior issues addressed in the MPE, the District was not required to conduct a separate, formal behavior assessment. Furthermore, while M.M.'s parents expressly contested the March 15, 2005 IEP's offer regarding the psychoeducational and physical therapy assessments, they made

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SCANNED

CIVIL MINUTES - GENERAL

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

no such challenge with respect to the lack of a formal, behavioral assessment.

M.M.'s parents, however, argue that M.M. needed a one-on-one behavior intervention program to address M.M.'s needs in learning, communication, play and social skills. In support of this contention, M.M.'s parents offered an independent assessment conducted by Dr. Eckman in November 2005. (5/10/06 AR 11:16-19; Ex. O). After observing M.M. in his home on November 11, 2005, Dr. Eckman recommended M.M. receive "an intensive one-to-one behavioral based intervention program at home and at school specifically designed to meet his needs." (Ex. O at 11). Dr. Eckman's recommendation included 22.5 hours per week (10 hours at school and 12.5 hours at home) of Applied Behavioral Analysis ("ABA"), "an approach that uses instructional technology designed to change behavior in systematic and meaningful way." (Ex. O at 10).

The ALJ concluded that Dr. Eckman's testimony lacked probative value and was less persuasive than the findings of the MPE and Ms. Leigh's testimony. (ALJ Decision at 23-24, ¶ 36). Dr. Eckman only observed Plaintiff on one occasion in a non-classroom environment, and never interviewed M.M.'s classroom teacher or visited the classroom. (5/10/06 AR 45:19-45:24). Moreover, M.M. was the only Down's Syndrome assessment Dr. Eckman ever conducted. (*Id.* at 45:12-18). Since the ALJ specifically cited a credibility determination in support of her conclusion, the Court accords deference to the ALJ's finding in this regard. See *Amanda J.*, 267 F.3d at 889 (noting that "[t]his standard comports with general principles of administrative law which give deference to the unique knowledge and experience of state agencies while recognizing that a [hearing office] who receives live testimony is in the best position to determine issues of credibility"). Thus, affording due deference to the ALJ's credibility determination, and based on the evidence and testimony from the hearing, the Court concludes that the District's MPE sufficiently addressed M.M.'s behavior issues by recommending placement for 52% of the instructional school day in a special day class.

G. Reimbursement for Independent Educational Assessments

Plaintiff seeks reimbursement of approximately \$6,000 M.M.'s parents paid for the

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

SCANNED

CIVIL MINUTES - GENERAL

Case No. CV 06-6104 PSG (VBKx)

Date September 27, 2007

Title M.M., et al. v. East Whittier School District

independent educational assessments conducted by Dr. Davidson, Dr. Lindquist and Dr. Eckman. Having determined that the District's psychoeducational, occupational therapy and behavioral assessments were appropriate, the Court denies Plaintiff's request for reimbursement of the same.

IV. CONCLUSION

Based on the foregoing, the Court AFFIRMS the ALJ's decision issued on June 30, 2006.

IT IS SO ORDERED.

Initials of Preparer