

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

POWAY UNIFIED SCHOOL DISTRICT,

Petitioner,

OAH CASE NO. N 2006010985

v.

STUDENT,

Respondent.

DECISION

Darrell L. Lepkowsky, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on June 5, 6, 7, 8 and 9, 2006, in Poway, California.

Petitioner, Poway Unified School District (Petitioner or the District), was represented by Emily Shieh, Esq., Assistant Director of the District's Special Education Department. Program specialist Betsy Johnson was also present during the hearing.

Respondent (or Student) was represented by his Mother. Student's Father was also present for the majority of the hearing. Student did not appear.

ISSUE

The following issues are addressed in this decision:¹

¹ The broad issue presented by the District in its prehearing conference statement was whether it offered Student a free and appropriate public education for the 2005-2006 school year and the 2006 extended school year. Student did not concretely identify specific reasons for his contention that the District's offer did not constitute a FAPE, other than his contention, as discussed below, that the District's offer of placement at a Non-Public School did not constitute a FAPE. Therefore, the issues addressed in this decision are extrapolated from Student's opening and closing statements and the portions of the IEPs with which he appeared to take issue at the due process hearing.

- a. What is Student's primary disability and, therefore, what are his unique needs?
- b. What is Student's primary language, and, therefore, in which language should Student have been assessed and in which language should he be taught?
- c. Where the goals listed in the IEP offers of December 5, 2005, and February 17, 2006, adequate?
- d. Did the failure to do a vision assessment of Student deny him a free and appropriate public education (FAPE)?
- e. Is the California Alternative Performance Assessment (CAPA) proper for Student?
- f. Did the offer of placement and related services made on December 5, 2005, by the District to Student constitute a FAPE in the Least Restrictive Environment (LRE)?
- g. Did the offer of placement at a Non-Public School, with related services, made by the District to Student on February 17, 2006, constitute a FAPE in the LRE?

PROCEDURAL BACKGROUND

The District filed its request for a due process hearing on January 30, 2006. Student requested a continuance of the proceedings as did the District; both requests for continuance were granted by the Office of Administrative Hearings on February 17, 2006. The District subsequently requested another continuance in the matter which was granted. The due process hearing originally scheduled for May 2, 2006, was continued until June 5, 2006.

The due process hearing was held on June 5, 6, 7, 8, and 9, 2006. At the request of the parties, post-hearing briefs were permitted. The District's post-hearing brief was timely filed by fax on June 16, 2006, and marked as petitioner's exhibit 21. Student's post-hearing brief was timely filed by fax on June 19, 2006, and was marked as respondent's exhibit D. The record was closed and the matter was deemed submitted as of June 19, 2006. A decision on the matter is therefore due by July 12, 2006.²

² On the first day of hearing, Student's Mother indicated that she wanted to call as a witness an aide who worked in Student's classroom. The District objected to having to produce the witness based upon lack of reasonable notice. The witness had not been previously identified by Student's Mother in a prehearing conference statement. Student's Mother had specifically stated at the prehearing conference that she did not intend to call any witnesses other than those listed by the District (See Prehearing Conference Order, dated April 21, 2006) and did not contact the District prior to the hearing to request that the witness be made available. Student's Mother was well aware of her obligation to identify witnesses in advance based upon her previous two due process hearings. Although appearing in pro per at her last hearing, Student's Mother had called several witnesses as part of her case-in-chief. (See *Student v. San Diego Unified School District* (August 1, 2005) SEHO Nos. SN05- 01018/05-01143.) Therefore, the District's objection to producing the witness was sustained. Student's Mother was informed that she could subpoena the witness but chose not to do so. Additionally, Student's Mother was informed several times

CONTENTIONS OF THE PARTIES

The District, as petitioner, requests a finding that it made a valid offer of FAPE to Student in the Individualized Education Program (IEP) that was developed over four sessions, culminating in an offer of placement and services to Student on December 5, 2005. The District contends that the goals it proposed for Student and its offer to Student of placement in a Critical Skills Class at Bernardo Heights Middle School (which included 76 percent of Student's time spent in Special Education), with designated instruction and services of direct and consultative Occupational Therapy (OT), Adaptive Physical Education (APE), Speech services, transportation to and from school, one-on-one instructional support throughout the entire school day, and Extended School Year (ESY) for six weeks, was designed to meet Student's unique needs in the least restrictive environment and was reasonably calculated to provide educational benefit to him.

The District further contends that its amended offer to Student during an IEP team meeting on February 17, 2006, where it offered the same services to Student but at a Non-Public School (NPS) rather than at Bernardo Heights Middle School, also constituted an offer of FAPE. The District contends that placement of Student at an NPS was appropriate due to the District's recognition of Student's lack of progress at a comprehensive campus at the public middle school and its belief that placement at an NPS was necessary in order for Student to access his education. The District contends that any procedural defects in the IEP process amount to harmless error.

Student contends that neither the District's offer of placement and services made on December 5, 2005, nor its amended offer of placement at an NPS, with corresponding services, made on February 17, 2006, constituted a FAPE. Contrary to the District's finding that Student is severely autistic but understands English, Student contends that his primary language is American Sign Language (ASL), that he has a hearing problem that has not been recognized, that he learns rapidly, and that he has not been given the proper environment in which to learn. Student also appeared to contend that, since the District has not properly identified his primary disability and his primary language, neither the goals it proposed in his IEPs nor the educational program and related services proposed, addressed his needs. Student further contends that he should be tested using the STAR assessments rather than the alternative CAPA assessments. Furthermore, Student alluded to the fact that the District committed several procedural violations during the IEP process, which therefore denied Student a FAPE. These procedural violations were: a) the lack of appropriate District staff at each IEP meeting; b) the failure to have appropriate personnel from the proposed NPS and the High School at the IEP meeting of February 17, 2006; c) the failure to include Student's Mother in the decision-making process, particularly with regard to the offer of an NPS placement; and d) the failure to adequately describe the NPS placement offered on February 17, 2006.

during the course of the hearing, including immediately prior to closing arguments being offered, that she could testify in support of Student's case. Student's Mother chose not to testify.

Based upon the exhibits admitted into evidence and the testimony of the witnesses, as elaborated below, it is determined that the offer made by the District to Student in the IEP dated September 27, 2005, as supplemented by the IEP team meeting notes dated October 4, 2005, October 11, 2005, and December 5, 2005, constituted a FAPE under the Individuals with Disabilities Education Act of 2004 (IDEA). However, also as discussed below, the subsequent offer of services and instruction to Student, to be provided at an NPS, as contained in the IEP dated February 17, 2006, did not constitute a FAPE under the IDEA due to significant and serious procedural violations, and therefore cannot be implemented by the District.³

FACTUAL FINDINGS

Prior Assessments and Eligibility Findings

1. Student is a young man who will turn fourteen years old on July 28, 2006. At the time of the hearing, he was just finishing eighth grade. There is no dispute that Student presently resides within the boundaries of the Poway Unified School District and that he is eligible for special education and related services under the IDEA and should spend most of his time in special education classes. However, as will be discussed below, the basis for Student's eligibility for those services, what constitutes his unique needs and, therefore, the proper instruction and related services to address those needs, is disputed by Student.

2. At the age of three, Student was found eligible for special education services based upon a diagnosis from San Diego Children's Hospital of Autism Spectrum Disorder and moderate to severe mental retardation.⁴ As defined by the Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) Autistic Disorder, section 299.00, page 70, the essential features of Autistic Disorder "are the presence of markedly abnormal or impaired development in social interaction and communication and a markedly restricted repertoire of activities and interests." Student exhibits significant delays in communication and is non-verbal. While Student can vocalize sounds, he cannot say words or word approximations.

³ The District's offer at the IEP meeting of February 17, 2006, was made after the District filed its request for a due process hearing in this matter. Title 20 United States Code section 1415, subsection (f)(3)(B), and California Education Code section 56502, subsection (i), provide that a petitioner is not permitted to raise at hearing issues that the party did not raise in the due process petition, unless the other party consents. Title 20 United States Code section 1415, subsection (c)(2)(E), and California Education Code section 56502, subsection (e), provide that a petitioner is permitted to amend a petition only if the Administrative Law Judge grants permission, or by consent of the opposing party to the filing of an amended petition. The District neither moved to amend its petition nor obtained the consent of respondent to the addition of the second placement offer. Therefore, although there was no specific objection by Student's Mother, the amplification of the issues to include the second offer of an NPS would generally not have been permitted. However, since the ultimate finding is that the District's offer of an NPS placement on February 17, 2006, did not constitute a FAPE, respondent has not suffered prejudice by the inclusion of that issue in this Decision.

⁴ The information concerning prior diagnoses and assessments of Student is taken from Student's exhibit A and prior due process hearing decisions in SEHO Nos. SN04-02742 and SN05-01018/01143, as neither party offered testimonial evidence of these facts. Judicial notice is taken of the SEHO decisions pursuant to Evidence Code section 451.

All assessments done of Student over approximately the last four years indicate that his cognitive abilities are, at best, at a pre-kindergarten stage. As a factor of his autism, Student has deficits in the areas of gross motor, fine motor, cognition, academics, speech and language, social/emotional functioning, self-help skills, and behavior.

3. Beginning in August 2002, while living within the boundaries of the San Diego Unified School District (SDUSD), Student received a series of assessments, including a comprehensive assessment at the California Diagnostic Center – Southern California, and an audiogram. Pursuant to his Parents' request, Student was also referred to the California School for the Deaf (CSD) in Riverside, California. Student's hearing was determined to be within normal limits. CSD rejected Student's application for admission based upon his lack of a significant hearing impairment and his inability to communicate using ASL. Further audiological screening performed on Student in January 2003 also indicated normal ear drum mobility in both ears. The assessments concluded that Student ASL and the Picture Exchange Communication System (PECS) were probably beyond Student's abilities. A further test of Student's hearing, an Audiological Brainstem Evoked Response Test, was later conducted. The test did not indicate any neurological abnormalities present in Student's hearing. Another audiological screening performed on Student in November 2004, again indicated that he had normal drum mobility in both ears.

4. SDUSD filed a request for a due process hearing (SEHO No. SN04-02742, resulting in a decision dated January 5, 2005) seeking authorization to reassess Student. Student defended the due process allegations, among other things, by asserting that he should be assessed at CSD in American Sign Language, which he still identified as his native language. Student also alleged that his vision should be tested. The Hearing Officer found, inter alia, that Student's primary language was English rather than ASL.⁵ She also concluded that, although Student had been prescribed corrective eyeglasses, his vision was not so impaired as to constitute a suspected area of disability and therefore no vision assessment was warranted.

5. Student subsequently filed due process requests against SDUSD (SEHO Nos. SN05-01018 and SN05-01143, resulting in a decision dated August 1, 2005) alleging that SDUSD had failed to properly assess him and had failed to offer him a FAPE for the 2004-2005 school year and extended school year. Again, Student asserted that the hearing assessments were not conclusive, that he should have been assessed in his primary language of ASL, that his primary disability was a hearing impairment, and that his vision should have been assessed. Student further asserted that he should be assessed academically pursuant to California's Standardized Testing and Reporting (STAR) program rather than SDUSD's recommendation for assessment pursuant to the California Alternative Performance Assessment (CAPA). The Hearing Officer found primarily for the school district. Applying the principles of collateral estoppel and res judicata, the Hearing Officer found, inter alia, that the issues of whether Student's primary language was ASL and whether he should have

⁵ Student's Mother conceded at this hearing that Student was not fluent in ASL and that she paired English language with natural gestures and some simple signs to communicate with Student.

been assessed for a suspected vision disability had already been determined in the prior due process hearing. He also found that the CAPA assessments were appropriate because of Student's significant deficits. The Hearing Officer found that the March 2005 IEP offer from SDUSD was appropriate, as modified.

The District's FAPE Offer of December 5, 2005

6. SDUSD never implemented the March 2005 IEP because Student moved into the Poway Unified School District sometime prior to the beginning of the 2005 – 2006 school year. On August 26, 2005, Student's Mother agreed to a thirty-day interim placement of Student at Bernardo Heights Middle School, with instruction and services based upon the March 2005 IEP that Student brought with him from SDUSD. Based upon SDUSD's placement of Student in its Special Day Class (SDC) entitled Integrated Life Skills, Student was placed in the District's equivalent SDC class entitled Critical Skills. Also based upon the prior IEP, Student was given supporting designated instruction and services in OT, Speech, and APE. Student's Mother informed District staff that Student's home and primary languages were English and ASL, both of which were noted on the Interim Placement. She also informed District staff that she felt Student was beyond the baseline goals of his former IEP and wanted to see him accelerated through them.

7. Although the District had a copy of Student's prior IEP, staff there did not initially have the prior assessments done on Student. Therefore, the District decided to conduct another series of assessments, designated as a triennial assessment (although the last triennial had been done less than a year before) to ensure that they were properly able to determine Student's then-present levels of performance and to make appropriate recommendations concerning Student's placement and services. An assessment plan was proposed by the District's educational professionals, with each specific area reviewed by the pertinent professional with recommendations as to specific assessment tools. Student's Mother was given a copy of her procedural safeguards along with the assessment plan on September 2, 2005. She consented to the assessment plan as proposed, requesting only that the District consider the previous assessment prepared by the Diagnostic Center in February 2003. On the same day, Student's Mother also consented to a Functional Analysis Assessment to be completed by the school psychologist.

8. An assessment of academic achievement was administered between September 7 and 27, 2005, by Tipton Roberts, Student's teacher in the Critical Skills class. Student's occupational therapist, Nami Suemori, and his APE teacher, Jean Young, administered assessments addressing Student's psycho-motor development and perceptual functioning. An assessment addressing Student's language and speech communication development was administered by speech and language pathologist Robyn Hennessy and reviewed by speech and language pathologist Lynn Rozelle. An assessment in the area of intellectual development and social and emotional adaptive behavior was administered by school psychologist LaShawn Summerour. Finally, a prevocational/vocational assessment was administered by autism specialist Nicole Neal. Each professional prepared a report specifying the results of her respective tests, interviews and/or observations, and each

incorporated her findings into recommended goals and recommendations regarding academic placement and related services for Student.

9. Several common threads run through each assessment conducted by District staff. First, that Student is non-verbal and primarily uses gestures and pointing to communicate his needs to others. Second, that Student understands some verbal requests and will sometimes respond and sometimes ignore a request but generally will respond to his name even if his back is to the speaker. The assessments also noted that Student becomes frustrated easily and does not like being re-directed to other tasks or prevented from going into classrooms or in a specific direction. Student exhibits several injurious behaviors, to himself and to others. When frustrated, or when re-directed against his will, Student will bite his fingers while making sounds, or, at times, will grab the arms of the adult with him, pinching and scratching hard enough to break the skin and draw blood. Student will often run away from a task he is being directed to do, or even run away from an adult who is taking him from one area of the school to another. As in prior assessments, Student was noted as exhibiting autistic-like behaviors. The District's psychologist concurred in the prior diagnosis of autism as Student's primary disability. The District's assessments came to the same conclusions as did the prior assessments conducted of Student: that he has significant deficits in the areas of gross motor, fine motor, cognition, academics, speech and language, social/emotional functioning, self-help skills, and behavior, with the behavioral problems most likely related to his autism.

10. The first IEP meeting held by the District took place on September 27, 2005. In attendance were Student's Mother and Father, former program specialist Melanie Black, Bernardo Heights Principal Elaine Johnson, school psychologist Lashawn Summerour, the Critical Skills classroom teachers, Tipton Roberts and Leonora Persichina, autism specialist Nicole Neal, general education Band teacher Pauline Crooks, speech pathologist Lynn Rozelle, APE teacher Jean Young, and occupational therapist Nami Suemori, who participated by telephone.

11. The IEP meeting on September 27, 2005, lasted for about two hours. Student's present levels of performance, including Student's strengths, interests, and learning preferences, were noted. Also noted were Student's functional skills and the development of his communication abilities, which focused on reaching, simple gestures, and some signs. The IEP team also noted that Student could follow simple classroom directives and would greet others, but only if prompted. Gross motor and fine motor deficits were also described. Finally, the IEP noted that a screening of Student's hearing was again attempted but the testing could not be completed because of Student's lack of response. The educational staff noted, however, that Student was able to hear them in class since he responded and listened to directions, including directions that were whispered to him. Pre-vocational skills were noted as well as the fact that Student was quite independent with regard to several self-help skills.

12. OT Nami Suemori reviewed her assessment with the IEP team. She stated that Student was in need of a structured, hourly sensory diet that should be incorporated throughout his school day. Ms. Suemori also opined that Student had not met the goals of his previous IEP. The levels of OT services were discussed and agreed to by the entire IEP team.

13. General education teacher Pauline Crooks, who taught the elective Band class in which Student was supposed to participate, indicated that band was slowly being phased into Student's day. APE teacher Jean Young also reviewed her assessment with the IEP team and noted that Student demonstrated delays in his gross motor skills and requires direct APE services. The proposed goals were reviewed and accepted by the team as were the levels of APE services.

14. In discussing her observations regarding Student and her recommendations for his program, speech pathologist Lynn Rozelle reviewed the assessment results completed by her colleague Robyn Hennessy as well as prior assessments of Student. She stated that all the assessments indicated that Student's communication remained significantly impacted and, thus, remained a priority in determining Student's goals, programs, and placement. Especially significant, with regard to his communication abilities, was the fact that Student did not have a symbolic relationship with line drawings and photographs.⁶ Therefore, the PECS methodology of using either line drawings and/or photographs was not resulting in a response from Student and would need to be modified. Ms. Rozelle, along with the Critical Skills classroom teacher and the OT, recommended that the system be modified to use actual objects, to which Student related, and which appeared to have meaning for him where photographs and pictures did not.

15. School psychologist LaShawn Summerour reviewed her assessment results which concluded, as had past assessments, that Student demonstrates Autism Spectrum Disorder and continues to require special education services.

16. Although the IEP meeting on September 27, 2005, lasted about two hours, discussion of the assessments done for Student, his goals, and possible program placement and services was not concluded. However, the team did agree that OT services would be provided at a rate of direct services for 30 minutes a week and consultative services, also at a rate of 30 minutes a week. Also agreed upon were the proposed goals and levels of services for APE, with services increased from the prior IEP's level of 30 minutes per week to that of 60 minutes per week. Speech and language goals were revised, with input from teachers and Student's Mother.

⁶ In their observations of Student and his responses to their teaching methods, including use of the PECS, the District's staff noted that Student does not appear to understand that a drawing or a photograph is supposed to symbolize a tangible item. Therefore, he is unable to use the PECS unless actual items are shown to him. As a result, Student's teacher has created a PECS board that has specific items attached to it, such as a cracker and piece of licorice. If Student wants something, like a cracker, he can remove the item from the Board and bring it to his teacher. This methodology has proven successful in that Student can now identify some six objects and bring them to his teachers if he wants them.

17. Also included in the IEP was an Individualized Transition Plan (ITP) for Student since he was approaching his fourteenth birthday. The interview for the ITP was completed with Student's Mother since Student was not able to indicate answers to the subjects contained in the ITP. Transition services recommended focusing on task completion, walking in the community accompanied by an adult, expressing emotions through the use of photographs, setting the table for a meal, giving a sign when Student needed to use the bathroom, and focusing on Student being able to use "universal" signs for "yes" and "no". However, in spite of his significant deficits, including the inability to verbalize or effectively communicate by any means, verbal or otherwise, and in spite of Student's inability to read or write or do any sort of arithmetic or mathematics, Student's Mother proposed that Student's ITP include his possible employment in something creative, that he attend a full-time college, that he engage in sports, attend the theater and travel, and that he begin dating.

18. A Behavioral Support Plan was also included with the IEP of September 27, 2005. However, as discussed below, it was replaced by a Behavioral Intervention Plan dated December 5, 2005, due to increased injurious and detrimental behaviors by Student.

19. The IEP meeting was continued until October 4, 2005. Both of Student's parents attended that meeting, as did former program specialist Melanie Black, Critical Skills classroom teachers Tipton Roberts and Leonora Persichina, speech and language pathologist Lynn Rozelle, and autism specialist Nicole Neal. Since their assessments and recommendations had already been reviewed and adopted, neither the school psychologist, general education teacher, occupational therapist, nor the APE teacher, attended this continued IEP meeting. Since the District was adequately represented by former program specialist Melanie Black, the Bernardo Heights Principal did not attend either.

20. At this meeting, autism specialist Nicole Neal reviewed the results of the assessment she had conducted of Student. She corroborated the findings that Student presented on the Autism Disorder Spectrum, and agreed with her colleagues that Student's lack of communication skills and academic deficits required that his schooling focus on functional skills with a photo/picture communication system complementing gestures and pointing. Ms. Roberts, the Critical Skills classroom teacher, reviewed her assessment results, and also recommended stressing a functional skills education for Student. The concerns expressed by Student's parents were also discussed. Speech goals were reviewed and revised, and consented to by the IEP team. The team reviewed the classroom goals and agreed to them. The team concurred that another IEP meeting was needed to complete the process. In the interim, Student's parents agreed to the implementation of all goals stated on the IEP.

21. There are 12 pages of goals stated in the IEP. At the IEP meeting of October 4, 2005, Student's parents agreed to implement all the goals. Each goal addresses an area of Student's need; each includes a measurable long-term annual goal; each includes either two or three intervening benchmarks (or short-term objectives); and each was either designed to

enable Student to be involved in and to progress in his curriculum, or to address another educational need resulting from Student's disability.

22. Two goals address Student's self-help needs. Although independent in some areas, such as his ability to self-toilet, Student was still resistive to brushing his teeth and washing his face, often becoming frustrated when required to do either task. The goals for the year sought to make Student perform the tasks independently and without resistive behaviors.

23. To address functional academic goals and to combat self-stimulatory behavior, a sorting goal was proposed which would help Student demonstrate an ability to follow visual and verbal cues to start and complete tasks. To assist Student with his academic schedule, a visual picture schedule was proposed that would enable him to determine from pictures what Student was to do for each successive task of the day. The goal was to have Student be able to go to the scheduled activity area with at least 80 percent accuracy by the end of a year. The goal was revised to use photographs rather than pictures when the educational staff realized that the pictures had no meaning for Student. That is, he did not register what the picture stood for and was unable to identify it with anything tangible. Later, the staff determined that not even the photographs had any meaning for Student. They realized that only three-dimensional objects meant anything to him and thereafter devised a picture board to which they affixed actual objects for Student to identify and request, such as a cracker or piece of candy.

24. Daily Living Skills and Vocational Skills each had goals focusing on Student being able to independently complete tasks, such as setting up his lunch and doing classroom chores, with minimal prompting and without engaging in self-stimulatory behaviors. An additional goal concentrated on helping Student become independent with his food choices rather than depending on his mother to make the choices for him. The IEP also included a "personal information" goal which focused on teaching Student to identify a card in his wallet that contained his personal information, such as his name or telephone number, and learning to hand the appropriate information to someone in response to their requesting it.

25. Two goals focused on working with Student to increase his ability to take turns, stay on task, and deal with his frustrations. To combat Student's aggressive behavior, the goal was defined as teaching Student to "take a break," going to a specific break area when frustrated, rather than grabbing, pinching, or scratching the adult with whom he was working at the moment.

26. Several goals focused on increasing Student's functional academic abilities, which included fine motor skills. Student was only able to distinguish between a penny and a dollar; his mathematics goal was to ultimately be able to discriminate between all other coins as well. His fine motor goals focused on increasing Student's ability to cut paper with fewer prompts, in order to create square pictures to be used for his daily schedule or communication needs. An initial goal focusing on pre-writing skills was modified during the course of the IEP process based upon classroom observations of Student; the revised goal

was to have Student learn to use a stencil with letters less than four inches tall, to write his name. And, based upon Student's recurring difficulty with remaining on task, one of his goals was to enable Student to stay on task for up to ten minutes, once his sensory diet was fully in place. His gross motor goals were to improve Student's active participation and ability to stay on task in physical education activities with less prompting from his teacher.

27. Since Student's communication needs is one of his most significant deficits three goals address that area of need. Student's inability to meaningfully interact with pictures was of great concern; the goal was to have Student learn to identify the photograph and sign of twenty different objects by pointing to them or placing them in the proximity of the object.⁷ A further communication goal is designed to improve Student's interaction with other people, teaching him to take the initiative to greet or take leave of others without prompting from one of the adults working with him. Finally, to address Student's inability to fully communicate his needs to others without reaching for an item he wants, the recommended goal is to have Student learn to select a choice from a field of three photos and then bring it back to the "listener" to indicate his wants.

28. There is no evidence that Student's parents were unable to participate in discussion of any of these goals at the IEP team meetings. The description of Student's present level of performances is specific and detailed. The goals are clearly written and provide a standard by which to evaluate Student's performance. Student's performance on these goals can be tracked using goal charts found in the IEP or other teaching records.

29. Another IEP team meeting was held on October 11, 2005. Student's Mother attended, as did the program specialist, the two Critical Skills classroom teachers, the speech and language pathologist, and the autism specialist. A sense of frustration underlies this meeting because Student's Mother, in keeping with the similar stance she has taken over approximately the last four years with regard to Student's disability, insisted that Student work toward receiving a High School Diploma; District staff pointed out that Student's focus needed to be on learning independent skills given his unique educational needs. Student's Mother also insisted that Student's vision be tested by a deaf/blind school; District staff explained that Student did not meet the criteria for those services; the staff emphasized that Student's communication skills should be the focus of his present goals. Student's Mother also questioned the lack of speech goals; District staff referenced both the prior school district's assessments and goals as well as its own assessments and proposed goals to emphasize that there was no support for a vocalization goal. Despite a certain frustration with the process, which was now on its third meeting, District staff noted the concerns Student's Mother expressed and the issues she wanted to discuss.

30. A Functional Analysis Assessment (FAA) was completed for Student by school psychologist LaShawn Summerour on October 20, 2005, in preparation for

⁷ As discussed above, Student's teacher and OT eventually discovered that Student only responded to the actual objects. Therefore, the photograph and line-drawings were eventually supplanted by a PECs board to which actual items were affixed.

consideration of a Positive Behavioral Intervention Plan (BIP) to address Student's injurious behaviors. The assessment was completed using interviews with staff and Student's Mother, direct observation of Student in his classroom, and review of previous assessments and classroom behavioral data. The FAA noted that Student had random acts of aggression where he would hit, scratch, or pinch. The aggression was triggered when Student became frustrated; before resorting to aggression, he would often bite his finger or engage in self-stimulatory behavior such as hitting himself on the back. Student was often unable to remain in his seat, and would run into the school hallway or into the kitchen adjacent to his classroom ten to thirty times a day. This behavior was often triggered when Student was asked to complete an undesirable task. The FAA noted that fewer incidents occurred when Student was in a structured one-on-one environment with frequent verbal prompting and frequent breaks. Also noted was the fact that these behaviors had decreased during the weeks of observation.

31. Based upon the FAA, a proposed BIP was developed, also on October 20, 2005. The aggressive behaviors and running away were determined to impede Student's learning and to interfere with the education of other students in the same class and on the campus. To redirect the behavior, the BIP suggests that Student needs a structured environment based on consistency, with a one-to-one aide, with a specific communication system and frequent sensory breaks, concentrating on easing Student's frustration with lack of communication by increasing his ability to use the PEC system and his sensory diet and visual scheduling. The use of verbal and tangible praises and rewards was suggested to reinforce good behavior. The BIP also indicated that school staff would communicate daily, if necessary, with Student's Mother by phone, e-mail, or communication logs.

32. A further IEP meeting was held on December 5, 2005. Present were former program specialist Melanie Black and the new program specialist, Betsy Johnson, in addition to school psychologist LaShawn Summerour and the Critical Skills classroom teacher, Tipton Roberts. At her request, Student's Mother appeared by telephone. The FAA and BIP were reviewed. The educational IEP team members were in agreement with the proposed BIP; Student's Mother apparently was not. Although she had previously agreed to the goals stated on the IEP, at this meeting Student's Mother voiced her disagreement with the entire IEP and refused to sign it. The District made its offer of a FAPE at this meeting, to encompass all the goals, as revised, as well as the designated instruction and services indicated on the IEP document. The offer of placement for Student was comprised of 1) placement in the Critical Skills Class at Bernardo Heights for 76 percent of Student's school day;⁸ 2) direct OT services and consultative OT services, thirty minutes a week each; 3) APE

⁸ Student was also placed in a general education P.E. class for some of his week, integration into a general education band class was attempted various times, lunch was eaten with general education students, assemblies, some field trips, and appropriate extra-curricular activities were also indicated with general education students. There appeared to be some dispute about the extent to which Student was permitted to participate in field trips or extra-curricular activities, However, Student only elicited testimony from teacher Ms. Roberts concerning one field trip that Student was unable to attend, and that Ms. Roberts did not feel that Student should attend school dances because of his behaviors. The lack of attendance at one school event and Ms. Roberts' feelings about attendance at school dances does not invalidate what otherwise constitutes a valid offer of FAPE by PUSD.

twice a week for thirty minutes; 4) Speech instruction twice a week for thirty minutes each session at the school; 5) transportation to and from the school; 6) extended school year services for six weeks; and 6) one-to-one instructional support throughout the entire school day. Student's Mother declined the offer without specific reasons why each portion of the IEP was deficient.

The IEP of February 17, 2006, and the District's Offer of NPS Placement

33. Another IEP meeting was not held until February 17, 2006.⁹ In the intervening months, Student's teachers and service providers had become concerned over his continuing behavioral issues and lack of progress toward his goals. They believed that much of the lack of progress was due to Student's resistance to taking direction. Significantly noted was the fact that it took two adults to assist Student: one to instruct him and another to help him maintain proper boundaries in the area of instruction. The adult instructing Student was required to do so on a one-to-one basis as Student's behaviors prevented the teacher from including more students. Student continued to run away, to throw and slam down items, and to bite his fingers in frustration and make distress vocalizations. It also required two people to assist Student to take a break when he was frustrated. Student also required two adults to keep him safe in outdoor settings, such as APE. Although progressing somewhat on his OT goals, the OT predicted that, due to slow progress, Student would probably not reach his annual OT goal. Student was not participating in band due to his resistance to being in that class, lack of interest in manipulating any of the instruments, failure to remain seated, and behaviors that distracted the other class members.

34. Student had engaged in other behaviors at school which concerned the educators at the District. He consistently ran away, both from class and while walking between classrooms. The adults often could not keep up with him to redirect him back to where he should be. One such incident resulted in Student running into a tree-filled area on campus where he consumed some mushrooms before the adult was able to reach him. Student's Mother was contacted and Student was taken to a poison control hospital. Also, although Student could use the toilet, he often would have trouble adjusting his pants or zipping them up and often would not wash his hands after using the bathroom. He would also play with the toilet by flushing it for the sensory stimulation. The most serious of the toileting problems occurred when Student ran outside the class and urinated and defecated outside, in view of other students, before he could be caught. Student's Mother was not informed of this incident until testimony of it was offered at this hearing.

35. Due to his continued behavioral issues and his lack of progress on goals, the District's educators felt that another environment would be more beneficial to Student. They felt that he needed more structure and less distraction than the Critical Skills Class could offer, that he needed more consistency, and an environment that could address the communication skills Student required. The District's educators therefore modified the prior

⁹ Present at this IEP meeting were the two teachers from the Critical Skills classroom, the Bernardo Heights Principal, the school psychologist, the new program specialist, the APE teacher, and the OT.

offer of FAPE made on December 5, 2005, and offered instead, at the IEP meeting held on February 17, 2006, placement for Student at a Non-Public School, to include all the previously-offered related services and instruction. Although not indicated on the IEP, the District suggested three different schools, one located in Oceanside, California, and two located near or in Mission Valley, California, with Student to be transported daily by bus from his home. It was explained to Student's Mother that she would need to sign an authorization to permit the District to send Student's information to each school for each school's review. The schools would then inform Student's Mother and the District if it was accepting him for its program. Student's Mother was also told she could observe the schools.

36. However, none of the special education teachers, general education teachers (if there were any), or any of the administrators from the three Non-Public Schools was present at this IEP meeting. No one present from the District gave Student's Mother any specific information about the programs available at the schools, the type of instruction used, the specific type of related services Student would receive, what type of professionals would provide them, or the classroom settings into which Student would be placed. No District employee present at this IEP had direct knowledge of the programs at the schools, which one would be more appropriate for Student, or even the basis for recommending these particular schools over other Non-Public schools in the area. Nor did the District suggest to Student's Mother that this IEP meeting was merely to discuss the possibility of an NPS placement for Student, with further discussion to be continued after determining if any of the schools would accept Student and after Mother had an opportunity to observe their programs.

37. Although Student was only four months away from promoting from Middle School to High School, no one from the High School was present to discuss why the Critical Skills class there would also not be appropriate for Student and why a Non-Public School would better address his unique needs.

38. Unlike the IEP process that culminated in the District's offer of FAPE on December 5, 2005, the IEP meeting held on February 17, 2006, was not the beginning of open discussion regarding the possible programs and services available for Student, what would be more appropriate to address his needs, and where his placement should be. The first IEP process included discussion between all parties, including Student's Parents, with his Parents' concerns noted and discussed, as well as modifications made to goals and services as the IEP process progressed. Instead, the IEP meeting of February 17, 2006, was a "take it or leave it" offer by the District, with no input contemplated from Student's Parents, and no further IEP meetings offered or even contemplated, to discuss the placement.

39. Student's Mother declined to sign the authorizations to exchange information with the three Non-Public Schools and declined to accept the offer of an NPS placement.¹⁰

¹⁰ At hearing, it was disclosed that Student's Mother had signed an authorization for one of the schools and had gone to observe it. She did not testify or otherwise offer any evidence as to whether the school would be inappropriate for Student.

40. Between February 17, 2006, and the date of this hearing, no further IEP meetings have been held between the parties.

APPLICABLE FEDERAL AND STATE LAW

The General Principles of the IDEA

1. Under both the federal Individuals with Disabilities Education Act (IDEA) and State law, students with disabilities have the right to a free appropriate public education. (20 U.S.C. § 1400; Ed. Code, § 56000.) The term “free appropriate public education” means special education and related services that are available to the student at no charge to the parent or guardian, that meet the State educational standards, and that conform with the student’s individualized education program. (20 U.S.C. § 1401(a)(9).) “Special education” is defined as specially designed instruction to meet the unique needs of the student. (20 U.S.C. § 1401(26); Ed. Code, § 56031.) The term “related services” includes transportation and other services that may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

2 In guaranteeing disabled children a right to a FAPE, Congress set forth a system of procedural and substantive requirements. Federal special education law requires states to establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which he/she is entitled and that parents are involved in the formulation of the student’s educational program. (*Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 205; *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483.) In *Rowley*, the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district was required to comply with statutory procedures. Second, the IEP was examined to determine if it was reasonably calculated to enable the student to receive some educational benefit.

3. Accordingly, the right to a FAPE includes the important entitlement to certain procedural protections during the process of developing an individualized education program for a disabled child. (*W.G. v. Bd. of Trustees, supra*, at p. 1483.) In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA as part of the provision of FAPE. (*Rowley, supra*, 960 F.2d at p. 205.) Procedural flaws do not automatically require a finding of a denial of a FAPE and mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892; 20 U.S.C. § 1415(f)(3)(E)) However, procedural violations that result in the loss of educational opportunity to the student or seriously infringe on the parent’s opportunity to participate in the IEP process may result in a denial of FAPE. (*W.G. v. Bd. of Trustees, supra*, at p. 1484; *Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 994.) One of the procedural prerequisites determined to be of paramount importance by the Ninth Circuit is that an offer of FAPE to a student be specific and be made in writing. (*Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526; 20 U.S.C. § 1415(b)(3).)

4. To determine whether a school district substantively offered FAPE to a student, the adequacy of the school district's proposed program must be determined. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F. 2d 1307, 1314.) Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and, (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 133.) The requirement that children be educated in the least restrictive environment means that children should only be removed from general education classes when the nature and severity of the children's disabilities is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301.)

Requirements of an IEP

5. An IEP must include in pertinent part a statement of the child's present levels of educational performance; a statement of measurable annual goals; a statement of the special education and related services and supplementary aids and services to be provided; and a statement of how the child's progress toward the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i), (ii), (iii) and (vii)(I); 34 C.F.R. § 300.347(a)(1), (2), (3) and (7)(i); Ed. Code, § 56345, subd. (a)(1), (2), (3) and (9).)

6. Measurable annual goals enable the student, parents, and educators to monitor progress and to revise the IEP consistent with the student's instructional needs. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12471 (Mar. 12, 1999).) While the required elements of the IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*W.G. v. Bd. of Trustees, supra*, 960 F.2d at p. 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190-1191.)

7. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)¹¹ "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist, supra*, 811 F.2d at p. 1314.)

¹¹ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212), and District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236).

8. Accordingly, the analysis of whether a student has been offered a FAPE is twofold, first focusing on whether procedural requirements have been followed and then focusing on whether the program(s) that has been offered is substantively appropriate. At the administrative hearing, the burden of persuasion is on the petitioner, in this case the District, to establish that it complied both procedurally and substantively with the IDEA and *Rowley*. (*Schaffer v. Weast* (2005) 126 U.S. 528 [_ S.Ct _ , 163 L.Ed.2d 387].)

Parental Participation in the IEP Process

9. A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. §§ 300.344(a)(1); Ed. Code, §§56341, subd. (b)(1) [parents are members of IEP team].) The IEP team must consider the concerns of the parents for enhancing their child's education throughout the child's education. (20 U.S.C. §§ 1414(c)(1)(B) [during evaluations], (d)(3)(A)(i) [during development of IEP], (d)(4)(A)(ii)(III) [during revision of IEP]; 34 C.F.R. §§ 300.343(c)(2)(iii) [during IEP meetings], 300.346(a)(1)(i) [during development of IEP], (b) [during review and revision of IEP], 300.533 (a)(1)(i) [during evaluations]; Ed. Code, §§ 56341.1, subd. (a)(1) [during development of IEP], subd. (d)(3) [during revision of IEP], and subd. (e) [right to participate in IEP].)

10. The IEP process provides that the parents and school personnel are equal partners in decision-making; the IEP team must consider the parents' concerns and information they provide regarding their child. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12473 (Mar. 12, 1999).) While the IEP team should work toward reaching a consensus, the school district has the ultimate responsibility to determine that the IEP offers a FAPE. (*Ibid.*)

11. School district personnel may bring a draft of the IEP to the meeting; however, the parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized. (Appen. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12478 (Mar. 12, 1999).) A parent has meaningfully participated in the development of an IEP when the parent is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) A 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. (*Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

Principles of Res Judicata and Collateral Estoppel

12. Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their agents from re-litigating issues that were or could have been raised in that action. (*Allen v. McCurry* (1980) 449 U.S. 90, 94, [101 S.Ct. 411]; see 7 Witkin, California Procedure (4th Ed.), Judgment § 280 et seq.) Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may

preclude re-litigation of the issue in a suit on a different cause of action involving a party to the first case. (*Id.*; see also *Levy v. Cohen* (1977) 19 Cal. 3d. 165, 171.) The doctrines of res judicata and collateral estoppel serve many purposes, including relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and, by preventing inconsistent decisions, encouraging reliance on adjudication. (*Id.*) While collateral estoppel and res judicata are judicial doctrines, they are frequently applied to determinations made in the administrative settings. (See *Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control* (1961) 55 Cal.2d 728, 732, 361 P.2d 712; *People v. Sims* (1982) 32 Cal.3d 468, 479, 651 P.2d 321.) The United States Supreme Court has found that giving preclusive effect to the findings of an administrative agency serves the underlying purposes of issue preclusion which includes the parties' interest in avoiding the cost and "vexation" of repetitive litigation as well as the public's interest in conserving judicial resources. (*University of Tennessee v. Elliott* (1986) 478 U.S. 788, 798.)

LEGAL CONCLUSIONS

Did the District's Offer to Student on December 5, 2005 Constitute a FAPE?

Did the failure of attendance of required IEP team members at some of the IEP meetings deny Student a FAPE?

13. No, it did not. As stated in Factual Findings 19, 29 and 32, several of the District's IEP team members who attended the first IEP meeting on September 27, 2005, did not attend the subsequent IEP meetings. However, as stated in Factual Findings 11 through 16, 19, 20, and 29, the IEP team members absent from the subsequent meetings gave their review of their respective assessment reports and proposed goals at the meeting held September 27, 2005. Those members who were unable to give reports or recommendations that day based upon time constraints returned for the subsequent meetings. Further, as stated in Factual Findings 26, the report and recommended goals of each educational professional had been given initial approval by the entire IEP team, including Student's parents. As stated in Applicable Law paragraph 3, in order for these procedural violations to constitute a denial of a FAPE, they must result in a deprivation of educational benefits to Student, or result in a serious infringement on Student's Parents' opportunity to participate in the IEP process. Relying on Applicable Law paragraphs 10 and 11, there is insufficient evidence that these procedural violations resulted in either of these circumstances occurring in this case.¹²

Did the offer of December 5, 2005 address student's unique needs?

14. Yes, it did. What constitutes Student's primary disability and thus what constitutes his unique needs is the crux of this case and the apparent basis for Student's

¹² In any case, Student's Mother has not indicated, through testimony, documentary evidence, or even argument, how the absence of the professionals resulted in educational loss to her son or infringed on parental participation in the IEP process.

disagreements with the IEP, including recommended goals, placement, and educational and related services for Student. For at least four years, Student's Mother has insisted that he has a hearing impairment which is his primary disability, rather than Autistic Spectrum Disorder being the primary eligibility category. Student's Mother does not accept the diagnoses and findings of all professionals who have assessed or worked with Student. This has resulted in the District taking the position that she was deliberately hindering the IEP process.

15. Student's Mother's demeanor at hearing does not support a finding that she is willfully interfering with her son's ability to receive an appropriate education. Rather, it was apparent that she has convinced herself that her son's "problems" would be solved if his educators would just recognize his hearing impairment. It is not difficult to understand Student's Mother's perspective: if Student's only disability was deafness, he could be taught sign language and thus be able to communicate with the world and enter it fully, could potentially be taught to speak, and, like Helen Keller, could be drawn out of the isolated world in which he sometimes lives, living there due only to Student's inability to communicate with the rest of the world around him. A finding that Student is "merely" deaf would mean that there are "simple" solutions to his special education needs and, therefore, that Student's potential to be fully integrated into society as a "normal" person would be unquestioned. A finding that Student is Autistic with many related deficits could severely limit the future which Student's Mother appears to envision for her son.

16. However, the evidence does not support a finding Student is hearing impaired or is conversant in ASL. Student presented no evidence that he had suffered a hearing loss or become conversant in ASL between the prior due process hearing held in May 2005, and the dates of the instant hearing. The evidence supports the District's determination that Student does not suffer from a hearing loss and that his primary eligibility for special education services is based on the fact that he suffers from autism. Therefore, the assessments, goals, proposed placement and proposed related services in the IEP all addressed Student's unique needs.

17. The District properly identified Student's unique needs, based upon his Autistic Spectrum Disorder, in the areas of gross motor, fine motor, self-help skills, behavior, cognition, academics, speech and language, and social/emotional functioning, and developed a program to address those needs. The District, as did Student's prior school district, found that Student has significant cognitive delays and behaviors that impact his ability to learn. To address his educationally-related deficits, Student needs a program that addresses his behaviors and that provides academic instruction focused on functional skills. Student's lack of a viable method of communicating his needs is an important area on which his proposed program focuses, and he requires adaptive physical education and occupational therapy to address his motor-related needs. Regarding adaptive functioning, Student needs to develop more independence with his hygiene. Based upon Factual Findings 2 through 5, 9, 11 through 16, and 20, and Applicable Law paragraphs 1, 2 and 4, the District's proposal appropriately recognizes and addresses Student's unique needs.

Were the goals in the District's proposal designed to provide some educational benefit to Student?

18. Yes, they were. To address Student's needs, the District offered him 18 annual goals with two or three interim benchmarks (or short-term objectives.) The goals and objectives covered some twelve categories of determined deficits that needed to be addressed through placement in the Critical Skills Class at Bernardo Heights Middle School and the offer of related services along with a one-to-one instructional aide. The District also offered a plan to transition Student from Middle School to High School and a BIP to address the behavioral concerns that were interfering with Student's ability to access his education. The Transition Plan included the involvement of Student's Parents and the BIP included specific recommendations for communicating with Student's Parents concerning his progress.

19. Based upon Factual Findings 17, 21 through 28, 30, and 31, and Applicable Law paragraphs 4, 5, 6 and 7, all goals in the IEP offered on December 5, 2005, comply with the procedural and substantive requirements of state and federal law, as well as their substantive requirements. All goals include Student's present levels of performance as a "baseline," all are clearly defined and can be accurately measured, and all are designed to meet Student's unique needs and are reasonably calculated to give him at least some educational benefit.¹³

Did the District adequately describe the related services to be provided to Student?

20. Yes, it did. Based on Factual Findings 12, 14, and 16, and Applicable Law paragraph 5, the description of services to be provided by the occupational therapist, the APE teacher, and the speech and language pathologist in the December 5, 2005, offer of placement and services is adequate.

Did the District provide Student's Parents with an opportunity to meaningfully participate in the December 5, 2005, IEP process?

21. Yes. Based on Factual Findings 11, 13, 16, 17, 20, 28, 29, and 32, and Applicable Law paragraphs 9 through 11, Student's Parents (his Mother, in particular) were provided an opportunity to meaningfully participate in the IEP decision-making process leading up to the District's offer of placement and services on December 5, 2005.

¹³ Student's Mother indicated on the Interim Placement that she felt Student was beyond the baselines of his prior IEP and wanted to see him accelerated through his then-present goals. However, she offered no evidence of this at hearing. On the contrary, the evidence offered by the District supports its position that Student had not met his prior goals and was not on track, at the time of the IEP sessions, to meet the new goals the District had proposed.

Did the District's offer of CAPA assessment rather than STAR assessment violate any of Student's procedural or substantive rights to a FAPE?

22. No, it did not. Based on Factual Findings 5 and 9, and Applicable Law paragraphs 1, 4, and 12, given Student's significant deficits and present levels of performance, it would not have been appropriate to assess him using the standardized academic tools of the STAR assessment. The alternate CAPA assessment is more appropriate for Student.

Did the District's failure to perform a visual assessment of Student violate his rights to a FAPE?

23. No, it did not. Based upon Factual Findings 3 and Applicable Law paragraph 12, as well as the fact that Student presented no evidence to demonstrate that his vision problem was not adequately resolved by his prescription eyeglasses, Student does not presently have a vision disability that interferes with his access to his education.

Was the offer of placement in the Critical Skills Class at Bernardo Heights the Least Restrictive Environment for Student?

24. There does not seem to be much dispute that Student cannot spend his full day in a general education class. Based upon Factual Findings 2, 6, 9, 11 through 14, 27, 30 and 31, as well as Applicable Law paragraph 4, the Critical Skills Class is found to have been the least restrictive environment for Student at the time the program was offered on December 5, 2005.

Did the District's Offer of Placement in a Non-Public School at the February 17, 2006 IEP Meeting Meet the Requirements of a FAPE?

25. No, it did not. Numerous procedural violations occurred which resulted in the loss of educational opportunity to Student and which seriously infringed on his Parents' opportunity to participate in the IEP process. A procedural violation that may constitute a denial of FAPE is the failure of a school district to make a formal, written offer that specifically delineates the details of the placement offer in compliance with the IDEA's procedural requirements. (*Union v. Smith, supra*, 15 F.3d at p. 1526) As the Ninth Circuit stated in *Union*, "this formal requirement [of a written offer of placement] has an important purpose that is not merely technical, and we therefore believe that it should be enforced rigorously."

26. By the time a further IEP meeting was held for Student on February 17, 2006, the District's personnel had determined that Student was not progressing in his Critical Skills classroom at Bernardo Heights and that his behaviors were impeding his access to his education. The District's staff therefore offered a Non-Public School as an appropriate placement for Student, with the same goals and levels of related services as had been offered at Bernardo Heights the previous December. The District mentioned three possible NPS placements, asked for Student's Mother to sign a release form for Student's records to be

sent to the schools, and suggested that Student's Mother contact the Schools to arrange visits to observe the programs. However, rather than this IEP meeting being the beginning of the IEP process to determine if any of the three Non-Public Schools offered would be appropriate for Student, the meeting was the beginning *and* the end of the discussions, with no opportunity given to Student's Mother to offer her concerns about the placement or to give any input about whether it was appropriate. Furthermore, the District's employees had no specific information about the programs at the schools that would support its opinion that any of the three would be appropriate to address Student's unique needs, should any of the schools be willing to accept him as a student.

27. As stated in California Code of Regulations, title 5, section 3001, subdivision (ab), and section 3042, a special education placement is a unique combination of facilities, personnel, location or equipment necessary to provide instructional services to a Student with exceptional needs. The testimonial and documentary evidence offered in the instant case indicate that, in making its offer of an NPS, the District did not provide any specific information regarding the classroom in which Student would be placed, the teacher or type of curriculum that he would have, or the contents of his program at any of the schools mentioned. No representative from any of the schools was present at the IEP meeting to provide the information to Student's Mother or to answer any questions or concerns she might have. Nor did any of the District staff present at the IEP meeting appear to have independent knowledge of the programs at any of the schools.

28. Instead of providing the information to Student's Mother, the District merely gave her the names (and, presumably, the addresses) of the schools and expected her to determine, without specific information and without educational guidance from the District's educational professionals, which of the three schools would best serve Student's unique needs. The District thus left it entirely up to Student's Mother to decide whether a particular school was appropriate for her son.

29. Ordinarily, it could be inferred that a District offer, such as the one made here, is merely the start of a process to analyze and discuss a possible placement. The fact that a District makes a nebulous suggestion at a given IEP meeting does not mean it has failed to meet the requirements of *Union*, or of the IDEA. However, in this particular case, given the evidence presented at hearing, it is apparent that the offer of an NPS made by the District to Student on February 17, 2006, was not contemplated as a springboard to further discussion at subsequent meetings. Rather, the District made a "take it or leave it" offer to Student. The concrete, and absolute, nature of the offer is corroborated by the fact that, as of the date of this hearing, no further IEP meetings had been held and none offered to be held, since then February 17, 2006.

30. The type of offer made by the District on February 17, 2006, therefore violates the requirement of *Union* of a "formal, specific offer from a school district," and improperly asks a parent to substitute his or her judgment for that of a school district. (*Union v. Smith, supra*, 15 F.3d at p. 1526.). Giving the parent multiple choices of schools, without any detail regarding the proposed placements, is contrary to the underlying rationale of *Union* that a specific offer of placement be made. Therefore, based upon Factual Findings 35 through 38,

and Applicable Law paragraphs 3, and 9 through 11, the District committed serious procedural violations in its offer of an NPS to Student, which substantially impacted on his educational opportunities and substantially infringed on his Parents' right to participate in the IEP process.¹⁴

31. Further, by failing to provide specific information about the schools to Student's Mother, the District substantively failed to provide Student with a FAPE pursuant to the standards set forth in *Rowley* and federal and state law. The lack of an offer of a specific placement at a specific school failed to meet Student's unique needs and failed to provide him with educational benefit. Without specific details about the placement, the parental component of the IEP team could not make an informed decision as to whether they believed Student's unique needs could be met at the NPS, resulting in a complete loss of educational opportunity for Student. (*Rowley, supra*, 485 U.S. at 188.) Therefore, based upon Factual Findings 35 through 38, and Applicable Law paragraphs 2, 3, and 9 through 11, the District's offer on February 17, 2006, of placement for Student at an NPS also failed to substantively offer FAPE to him.

ORDER

The District's request for a determination that it offered Student a FAPE based upon the IEP offer of December 5, 2005, is granted.

The District's request for a determination that its offer of placement at a Non-Public School of February 17, 2006, constituted a FAPE, is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided.

The District prevailed as to its offer of placement and services made at the IEP meeting of December 5, 2005.

Student prevailed as to the offer of a Non-Public School placement made at the IEP meeting of February 17, 2006.

¹⁴ Other, less serious, procedural defects also impacted on this particular IEP offer. Student's Mother was not informed about all his negative behaviors (such as going to the bathroom in front of other students) which influenced the District's decision to offer an NPS. Also, at the hearing, there was a hesitancy on the part of the District staff to allow for the possibility of considering a school that Student's Mother might want to offer. Also, although Student was barely four months from promoting to High School, no one from the High School was at the IEP to offer recommendations, reasons that the High School would not be appropriate for Student, or to answer his Parents' questions. If the District chooses to revisit the issue of an NPS placement, all these procedural errors should be remedied.

RIGHT TO APPEAL THIS DECISION

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

Dated: 7/10/2006

A handwritten signature in black ink, appearing to read "Darrell L. Lepkowski", written over a horizontal line.

DARRELL L. LEPKOWSKY
Administrative Law Judge
Special Education Division
Office of Administrative Hearings