

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

TWIN RIVERS UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2008110275

DECISION

Administrative Law Judge Deidre L. Johnson, Office of Administrative Hearings (OAH), State of California, heard this matter in Sacramento, California, on August 19, 2009.

Student and his mother (Parent) were represented by Robert E. McCann, Coker and Associates, Attorneys at Law. Parent was present during the hearing. Student did not attend the hearing.

Twin Rivers Unified School District (District) was represented by Heather Edwards, Girard & Edwards, Attorneys at Law. Pam Nolan, Director of Special Education for the District, was also present during the hearing.

Student filed his request for a special education due process hearing (complaint) with OAH on November 6, 2008.¹ On January 20, 2009, OAH granted Student's motion to file a second amended complaint, and all statutory timelines recommenced as of that date. On February 23, 2009, OAH granted a continuance of the hearing. At hearing, oral and documentary evidence were received. At the request of the parties, the record remained open until August 31, 2009, for their submission of written closing arguments. On August 31, 2009, the parties timely submitted closing briefs, the record was closed, and the matter was submitted for decision.²

¹ Student's complaint named the North Sacramento School District as the public educational agency involved. However, the North Sacramento School District merged with several other school districts to form the Twin Rivers Unified School District prior to November 2008. There is no dispute that Twin Rivers Unified School District is the proper party to this action.

² On September 24, 2009, Parent, without her attorney, filed a letter with OAH requesting to submit an additional document into evidence. On September 28, 2009, OAH notified both Parent and Mr. McCann that OAH

ISSUES³

1. From December 2006 to the present, did the District deny Student a free appropriate public education (FAPE):
 - (a) By failing to implement a provision in Student's individualized education programs (IEPs) to increase his speech and language therapy services to more than two weekly 30-minute sessions, and/or
 - (b) Because Student required additional weekly speech and language therapy services in order to receive educational benefit?
2. From December 2006 to the present, did the District deny Student a FAPE because the District's transportation services did not meet his unique needs?⁴
3. For the 2007-2008 and 2008-2009 school years, did the District deny Student a FAPE by failing to provide Student with a safe learning environment because he was assaulted at school and on the school bus?⁵
4. For the 2008-2009 school year, did the District significantly impede Parent's right to participate in the IEP decision making process, and thereby deny Student a FAPE, because the District did not provide Parent with written monthly progress reports?⁶

REQUESTED REMEDIES

Student requests a change to a different school site with school staff who are properly trained and aware of his needs; one more weekly hour of speech and language therapy services, plus additional speech and language services as compensatory education; increased

had not received proof of service that the motion had been served on the District. OAH does not consider motions unless they have been served on the opposing party. To date, no proof of service has been filed with OAH. Therefore, the motion is deemed withdrawn and has not been considered.

³ The ALJ has reframed and reorganized the issues for purposes of clarity, consistency, and chronological organization.

⁴ While the OAH Order Following Prehearing Conference dated August 12, 2009 (PHC Order), included "classroom placement" as an issue, in addition to transportation, the second amended complaint does not contain such an issue, and the parties stipulated that Student's classroom placement during this time period was not at issue in this case.

⁵ Student's second amended complaint was ambiguous as to which school years were involved with this problem regarding a safe environment. District did not object to Student's assertion at the outset of the hearing that this problem encompassed both the 2007-2008 and 2008-2009 school years.

⁶ At the outset of the hearing, the parties stipulated that the fourth issue regarding written progress reports was limited to the 2008-2009 school year as set forth in the PHC Order.

staff supervision of the school grounds with behavioral management training and skills; and monthly written reports to Parent of Student's educational progress.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student was born in 1998, is eleven years of age, and lives with Parent within the geographical boundaries of the District. He now attends sixth grade at Northwood Elementary School (Northwood), his school of residence in the District.

2. Since preschool, Student has been eligible for, and received, special education and related services under the primary disability category of Mental Retardation, due to Down syndrome. In addition, secondary to Mental Retardation, he has a severe Speech and Language disability due to articulation and communication deficits.

3. A pupil with a disability has the right to a FAPE under the federal Individuals with Disabilities in Education Improvement Act (IDEA 2004), which includes special education and related services. In California, related services are referred to as "designated instruction and services" (DIS), and include transportation and other developmental, corrective, and supportive services as may be required to assist a pupil to benefit from his or her education, such as speech and language therapy.

Failing to Implement IEP Provisions to Increase Speech and Language Services

4. Student contends that, beginning in December 2006, the District agreed in one or more IEPs to increase his speech and language therapy services to more than two weekly 30-minute sessions of direct therapy, and thereafter failed to implement the increase in services. Student asserts that the District's failure to implement the agreed-upon increase in speech therapy resulted in his loss of educational benefit and lack of educational progress, and denied him a FAPE. District contends that the parties made no such agreement, and it therefore did not fail to implement any IEP provision for increased speech therapy services.

5. A failure to implement a provision of an IEP may amount to a FAPE violation only where the failure has been determined to be material. A material deviation from an IEP occurs when the programs or services provided to the pupil fall significantly short of those required by his or her IEP. A pupil is not required to demonstrate that he or she suffered educational harm in order to prevail.

December 2006 IEP (Third Grade)

6. For the 2006-2007 school year, Student attended third grade at Northwood. In connection with an annual IEP meeting on December 5, 2006, the District offered Student an educational placement in a special day class (SDC) for the severely handicapped five days a

week and DIS speech and language therapy services twice a week for 30 minutes per session, among other services. At that time, Student was receiving the same amount of speech and language services pursuant to his prior IEP.

7. The District members of the December 2006 IEP team offered Student the speech and language therapy as two direct, one-on-one sessions and also offered related communication goals. During that IEP meeting, the District's speech and language pathologist, Lori Pastoor, reported to the team that Student had "made good progress in speech" to that point. Parent requested additional speech and language therapy to help Student progress more. The IEP meeting notes recorded: "The speech therapist will add more time with [Student] to see if he makes more progress periodically as she can get it in."⁷

8. Parent testified that she relied on the above statement by Ms. Pastoor, as memorialized in the December 2006 IEP, and believed that the District would thereafter increase the quantity of speech and language services for Student. However, Parent's testimony was not persuasive. First, the evidence establishes that Parent did not consent to the December 2006 IEP. The proposed speech services were plainly listed on the first page of the IEP, at the bottom of which was the signature section. Parent only signed to acknowledge receipt of the IEP documents, and did not consent to the offered services. Parent received written notice of her procedural safeguards and understood that she did not consent to the IEP. In addition, Parent's testimony was confusing and contradictory. For example, Parent claimed that that she "assumed" Student would be provided more speech therapy hours, but that she just signed the IEP forms without reading the amount of time provided for speech therapy in the document. However, as found above, in fact Parent did not consent to the IEP.

9. Based on the foregoing, the District was not bound by the December 2006 IEP to deliver additional speech services, absent Parent's consent. In the absence of an agreed-upon IEP, the District continued providing speech and language services twice a week pursuant to a previously agreed-upon IEP. Thus, the District did not provide additional services because it was not required to do so. Based on the foregoing, the District did not fail to implement, or materially deviate from, an agreed-upon increase in speech services.

IEPs for November 2007, June 2008, and June 2009

10. In connection with an annual IEP meeting on November 27, 2007, the District members of the IEP team offered DIS speech and language services substantially similar to those offered in the December 2006 IEP. Specifically, the District offered direct speech and language services twice a week for 30 minutes a session, with new articulation and communication goals. Parent was unable to attend the November 2007 IEP meeting, but consented to the IEP without exception on January 31, 2008. The IEP did not provide for

⁷ Parent does not contend that this conditional offer of additional services was not a clear written offer, but rather contends it should have been implemented.

increased speech therapy services. Thereafter, the District provided the agreed-upon speech services and Parent does not contend otherwise.

11. At Parent's request, an IEP meeting was held on June 6, 2008, near the end of Student's fourth grade. Ms. Pastoor conducted a speech and language assessment of Student and issued a report dated June 3, 2008, which the IEP team, including Parent, reviewed at the meeting. As recommended by Ms. Pastoor, the District continued to offer two weekly 30-minute sessions of direct speech and language services and did not offer to increase the direct sessions. Parent declined to accept the June 2008 IEP offer. By an IEP addendum on September 29, 2008, Parent agreed to permit Student to return to Northwood after his summer vacation under the terms of the June 2008 IEP, pending the outcome of due process proceedings. This document also did not involve any agreement to increase the speech and language services.

12. In connection with the next annual IEP on June 3, 2009, the IEP team, including Parent, reviewed Student's fifth grade levels of academic and functional performance. Alexis Piccione, District's speech and language pathologist, reviewed Student's prior records, assessed him, and issued a report dated May 22, 2009. Consistent with Ms. Piccione's recommendations, the District continued to offer two weekly sessions of direct speech therapy every week for 30 minutes each, and declined to agree to Parent's request to increase it. In addition to the direct speech therapy, the District offered annual goals related to communication in the areas of word recognition, expressive and receptive expression, and use of picture icons. Parent declined to consent to the June 2009 IEP.

13. Based on the foregoing, the parties did not agree to any provision to increase Student's direct speech therapy services over and above two weekly sessions of 30 minutes each, at any time from December 2006 to the present. The District provided direct therapy to Student in conformance with the services agreed upon between the parties in the IEPs. Therefore, the District did not fail to implement, or materially deviate from, provisions requiring increased speech and language services in operative IEPs from December 2006 to the present. Accordingly, the evidence did not establish that the District denied Student a FAPE on this ground.

Failing to Increase Speech and Language Services to Provide Educational Benefit

14. Student contends that, beginning in December 2006, the District should have increased his speech and language therapy services because he needed another hour of direct speech therapy each week in order to make educational progress. District contends that Student has been, and is receiving, educational benefit from the two weekly 30-minute therapy sessions, combined with other programs and services that address his communication needs throughout the school day.

15. An IEP is to be evaluated in light of the information available at the time it was developed, and is not to be evaluated in hindsight. For a school district's IEP to offer a substantive FAPE, the proposed program must be specially designed to address the pupil's

unique needs, and be reasonably calculated to provide meaningful educational benefit. A school district is not required to maximize a student's potential.

December 2006 IEP (Third Grade)

16. As found in Factual Findings 6 through 9 above, at the December 2006 IEP meeting, Parent requested additional direct speech therapy services for Student because she wanted to increase the level of his progress. Student has an enlarged or protruding tongue, symptomatic of Down syndrome, which limits his intelligibility, given the smaller size of his mouth. The evidence established that as of December 2006, Student mumbled when he spoke and needed to learn annunciation skills. Student's levels of pre-academic and functional communication in third grade included using one-word responses and three- to four-words per phrase or sentence. Student was also using the Picture Exchange Communication System (PECS), a program designed to facilitate nonverbal communication through the use of icons, pictures or photographs, and was learning sign language.

17. As found above, during that December 2006 IEP meeting, the District's speech and language pathologist, Ms. Pastoor, reported to the team that Student had "made good progress in speech" despite his severe deficits. Parent did not produce any evidence that demonstrated Student had not made progress since his last IEP.

18. At hearing, Ms. Piccione, who has provided Student with speech therapy services since November 2008, established that the District's speech and language goals, beginning in December 2006, were appropriate to meet Student's unique needs. Ms. Piccione is licensed by the State of California as a speech and language pathologist and has about five years of experience. She established that two weekly 30-minute sessions of speech and language therapy were reasonably calculated to support the communication goals and to allow him to make meaningful educational progress. For example, the articulation goal proposed working in the individual therapy sessions on Student's production of medial consonant sounds, and maintenance of syllables in three-to-four syllable words. In addition, Student's communication goals were supported in the classroom where his teacher helped him practice and interact with others. There is no evidence that the District's December 2006 offer of speech and language services was inappropriate, aside from Parent's unpersuasive testimony. Parent's desire for the District to provide additional services did not establish that the District's offer of speech and language services denied him a FAPE.

19. The District members of the December 2006 IEP team reviewed Student's levels of communication skills at that time and made the offer based on factors that were reasonably calculated to meet his unique needs for both individual speech therapy and communication experience in the classroom environment. Therefore, Parent did not sustain her burden of proof to establish that the District's December 2006 offer was not designed to address Student's needs or was not reasonably calculated to provide meaningful educational benefit.

November 2007 IEP (Fourth Grade)

20. As set forth in Factual Finding 10 above, in January 2008, Parent agreed to the District's November 2007 proposed speech and language services for the rest of the 2007-2008 school year at the same level as had been previously offered and provided, which was twice a week for 30 minutes a session. Parent did not produce any evidence, aside from her personal belief, that Student had not made progress in his communication skills since the previous IEP. Parent's personal belief was not persuasive in light of more compelling testimony from District witnesses. Ms. Piccione established that Student had made progress and the District offered new articulation and communication goals. There is no evidence that Student failed to make meaningful educational progress in the areas of language and communication between January 2008 and his next IEP meeting in June 2008. Therefore, the evidence does not support Student's contention that the November 2007 offer of speech and language services denied him a FAPE.

June 2008 IEP (Fourth Grade)

21. In connection with the June 2008 IEP meeting, as set forth in Factual Finding 11 above, Parent expressed frustration that Student had not made more progress in his ability to verbally communicate intelligibly. Ms. Pastoor reviewed her June 2008 speech and language assessment report with the IEP team. Ms. Pastoor confirmed Student's severe articulation and language deficits. Both Student's receptive and expressive language ages tested in the vicinity of a five year old. Student benefited from classroom communication aids. Ms. Pastoor recommended to the IEP team that a personal communication board system should be developed to allow him to communicate more complex ideas. In response to Parent's inquiry about Student's progress with sign language, District staff indicated that Student's motor skills were not sufficiently developed to use sign language very successfully. The District proposed to continue developing Student's verbal skills by using a picture communication board to supplement his verbal speech, and by planning to later bring in a vocal output device that would also use picture icons.

22. At the June 2008 IEP meeting, Parent stated that the District's proposed special education services at Northwood, including the speech and language services, were inappropriate and asked for another program at another school site. The District offered a special education placement at another school site, as well as at Northwood; however, the District did not offer to increase the direct speech and language services beyond two weekly 30-minute sessions of therapy. District staff explained to Parent at the June 2008 IEP meeting that Student was enthusiastic about sharing, wanted to talk more, and needed to stay in the classroom to work on those skills rather than be pulled out for more individual therapy. District's speech pathologist, Alexis Piccione, reviewed Ms. Pastoor's June 2008 assessment, and credibly testified that Ms. Pastoor's conclusions and recommendations were consistent with Ms. Piccione's 2009 assessment of Student.

23. Parent claims that on September 29, 2008, she agreed to the June 2008 IEP under duress because the District told her she had to agree to the IEP in order to return her son to school. However, there was no credible evidence establishing any duress or coercion of Parent. Parent had received written notice of her procedural safeguards in June 2008, including Student's right to "stay put" services pending a dispute. Pending the resolution of the dispute, Student would not have received increased speech services regardless whether Parent had consented to the IEP or not.

24. The evidence does not support Parent's contention that Student failed to make meaningful progress in his communication abilities during the 2008-2009 school year. Parent wanted Student to achieve more progress and was frustrated by the communication challenges related to his disability. However, the evidence established that Student benefited from the classroom communication aids provided by his teacher and his speech therapist and was making meaningful progress. Additionally, due to Student's severe oral articulation deficits, the District appropriately proposed supplemental communication methods in the June 2008 IEP to meet his communication needs. Based on the foregoing, the evidence did not establish that the District's offer of speech and language services in the June 2008 IEP denied Student a FAPE.

June 2009 IEP (Fifth Grade)

25. Ms. Piccione assessed Student's progress in May 2009, and presented her report to the annual June 2009 IEP team. She has been providing direct speech therapy services to Student since about November 2008. In the area of articulation, Ms. Piccione established that Student's severe articulation deficits continued, with some progress in producing one and two syllable words with increased accuracy, given imitation. She established that the focus of Student's articulation therapy has not moved beyond two and three syllable words due to the nature of his deficits.

26. Ms. Piccione persuasively established that, in the area of functional communication, Student has excelled in using his picture communication board, referred to as his "talker," and initiates use of the communication board on a regular basis. The device uses icons that have a picture along with the written word, and the icon contents were compiled with Student's teacher and him. Ms. Piccione found that Student is eager to use the picture communication board to enhance his access to communication with both peers and adults and has been successfully initiating the use of the picture communication board in the classroom, at lunch, and at recess. Ms. Piccione recommended to the June 2009 IEP team that the District should conduct a more thorough inventory of words related to Student's daily environments in order to develop picture icons about those environments, with Parent's input, to expand its use in the home and school. She also recommended that the board should be made into a smaller binder Student could carry around with him more easily.

27. Student's SDC teacher, Sally Ann Mandujan, also established that the picture communication board has enabled Student to have greater access to communication in his classes and on the playground. She commented on Student's 2008-2009 report card that he

“is having more conversation that is meaningful for him when he can be understood by more people” using his communication board.

28. Parent has not learned sign language to date, and rejected the District’s June 2009 offer to have a picture communication board in the home because she wants Student to learn to speak intelligibly. Parent testified that she believes that if the District provided one hour more of direct speech therapy services each week, Student’s articulation skills would improve. Parent did not consult with any public or private speech and language therapist or other specialist in order to arrive at this opinion.

29. The evidence established that as of the June 2009 IEP, Student has made meaningful progress in his abilities to communicate expressively and receptively using the picture communication board, not as a substitute for speech, but to enhance and clarify his verbal communications in order to be better understood. Parent did not establish that Student needed more direct speech and language therapy as of June 2009. Even though Student has severe language and communication deficits, he has not only progressed in the areas of articulation and oral communication, he is using the picture communication board to enhance his ability to communicate.

30. The evidence established that, from December 2006 to the present, the District offered and provided speech and language services that addressed Student’s unique needs and allowed him to make meaningful educational progress. Therefore, the District did not deny Student a FAPE based upon the speech and language services.

Failing to Provide Appropriate Transportation Services

31. Student contends that the District’s round-trip transportation services between his home and school were inappropriate and denied him a FAPE from December 2006 to the present, because the bus drivers treated Student badly, disregarded his needs for assistance and endangered his safety, and created a hostile environment for him. District contends that this issue should be dismissed since it provided all transportation services required by Student’s IEPs.

32. For a school district’s IEP to offer a substantive FAPE, the proposed program must be specially designed to address the pupil’s unique needs, and be reasonably calculated to provide meaningful educational benefit. A school district has the obligation to consider a pupil’s safety related to a qualifying disability in creating and implementing the pupil’s educational program.

33. All of Student’s IEPs from December 2006 to the present contain a provision for transportation services. The December 2006 IEP offer described the service as “door to door,” and the remaining IEPs refer to it as “curb to curb.” The IEPs do not contain any other description of the service. The evidence established that the District has consistently provided round-trip transportation services to Student. The transportation is provided in a

special bus, not the general education school bus. Indeed, Parent does not contend that the District failed to implement this service.

34. Parent testified that from December 2006 to the present, District bus drivers have not responded appropriately to Student when Parent brought him to the bus to be picked up in the mornings. According to Parent, certain bus drivers did not assist Student to get on the bus, or put his seat belt on him, endangered his safety, ignored him, and rushed too fast to drive off. Parent never notified the drivers or the District that she believed Student had not been treated well by the drivers. Parent's testimony is not corroborated by documentation of the sort reasonable people would use to complain of a problem to school officials. For example, Parent did not raise this issue during any of the IEP meetings at issue. In addition, the IEPs indicate that Student is mobile, has good self-care skills, and is able to walk about the school campus. Parent did not establish what specific help Student needs in order to board a school bus, or that the drivers' purportedly conducted prevented Student from making educational progress.

35. Parent testified that she believes some of the bus drivers treated Student badly because of his disability and/or because Parent had filed complaints with the District or OAH, and claimed Student's school transportation involves a hostile environment. "Hostile environment" is generally a legal term used to evaluate claims of discrimination, which may take the form of bullying, harassment, or other discriminatory conduct. If Parent believes that certain bus drivers have discriminated against Student, this special education proceeding is not the proper forum to litigate her dispute. Pupils are generally protected from disability discrimination in the school setting under Section 504 of the federal Rehabilitation Act of 1973,⁸ as well as other federal laws such as the Americans with Disabilities Act, over which OAH has no jurisdiction.⁹

36. Parent also testified that in the fall of 2007, a bus driver opened the bus door and hit Student's head with the door. Parent testified that she did not say anything to the bus driver, but later filed a complaint with the District's transportation supervisor. Parent did not produce any documents in support of this claim. This matter appears to be a civil personal injury claim that is also not within the jurisdiction of OAH to adjudicate.

37. Based on the foregoing, Parent did not produce any evidence that the above transportation incidents involved a special education issue. Moreover, there was no credible evidence of any harassment or threats to Student's safety. To the extent that harassment, discrimination or lack of safety could give rise to a denial of FAPE, Student did not meet his burden to establish that his educational performance suffered as a result of his treatment on the school bus. Thus, there is no evidence that any incidents resulted in a loss of educational

⁸ See title 29, United States Code (U.S.C.) section 794; 34 Code of Federal Regulations part 104; *Office of Civil Rights v. Pennsylvania School District* (April 13, 2006) No. 03-06-1017, 46 IDELR 169.

⁹ See title 42, U.S.C. section 12101 et seq.

benefit for Student, or resulted in his lack of educational progress. Consequently, the District did not deny Student a FAPE based upon lack of appropriate school transportation.

Failing to Provide a Safe Learning Environment

38. Student contends that the District denied him a FAPE for the 2007-2008 and 2008-2009 school years by failing to provide him with a safe learning environment, because he was assaulted by peers at school, and on the bus to and from school. District contends that there is no evidence that Student was assaulted, teased or bullied by other pupils in any way “out of the ordinary” for the elementary school campus or bus setting.

39. A school district must provide special education and related services to meet a pupil’s unique needs, which include the pupil’s academic, social and emotional needs. The lack of a safe learning environment due to bullying by school peers could affect a pupil’s social and emotional needs and affect his or her school performance, which could involve a denial of FAPE.

40. Parent testified that on December 21, 2007, Student was assaulted and injured on the school playground by another pupil. Parent testified that when Student came home he had an abrasion on the right side of his face and a black eye.¹⁰ She claimed that the school treated her son like “garbage” and did not even clean the wound.

41. Ms. Mandujan, Student’s teacher, was at lunch when the incident occurred and did not witness the alleged assault, but participated in the District’s investigation of the incident the same day. Ms. Mandujan notified Parent of Student’s injury, interviewed staff, including a teacher’s aide who witnessed the event, and examined his injury. When she observed him, Student was being treated by the school nurse, and an aide was applying an ice bag to his face. Ms. Mandujan found an abrasion on the side of Student’s face near the hairline. Ms. Mandujan persuasively established that the matter was an accident and that the school nurse properly attended to the wound. Ms. Mandujan’s testimony was credible and consistent with the District’s records, including the aide’s statement. Student had been riding a tricycle when a pupil who was walking backwards, talking to the teacher’s aide, bumped into the tricycle, which knocked Student off and caused him to fall.

42. Parent’s testimony that Student was assaulted was not persuasive because she did not see the incident, and her opinion is based on speculation. Although Ms. Mandujan also did not see the incident, her testimony was more persuasive because she personally interviewed the school staff and pupils who had direct knowledge about what happened. The aide who witnessed the accident described what happened to Ms. Mandujan and also submitted a written statement, describing what she saw while she was walking and talking with the pupil who was walking backwards, facing her, when Student rode by on his tricycle.

¹⁰ Mother attempted to pick Student up from school, but states that she got lost or blacked out; hence, the District sent Student home on the bus at the end of the school day.

In addition, Parent's credibility was weakened by her testimony that Student thereafter filed a complaint with OAH, implying that the complaint involved the above incident. The ALJ has taken official notice of Student's complaint filed on December 31, 2007, bearing OAH Case No. 20089010195, and finds that Student's complaint in that case did not involve this December 2007 incident.¹¹

43. Parent testified, without corroboration, that Student came home "every day" during the 2007-2008 school year saying that pupils at school had hit him, and was so traumatized that he did not want to go to school. On further examination by her own attorney, Parent could only recall one incident of an unknown date when Student came home with a scratch on his face. Parent's uncorroborated testimony was not accorded much weight. Her testimony was not credible, particularly since she would have contacted school personnel and complained or requested an IEP meeting if she believed that her son was being harassed, assaulted, or bullied. In addition, Student's annual IEPs from December 2006 to the present do not contain bullying as an issue of concern raised by any members of the IEP teams, including Parent.

44. Ms. Mandujan was Student's SDC teacher for both the 2007-2008 and 2008-2009 school years. She gave credible and persuasive testimony that she has never seen or heard anything about Student being assaulted or bullied in the school environment, aside from the isolated accident on December 21, 2007. Ms. Mandujan described Student as generally an "upbeat," happy child who was excited about learning. Ms. Mandujan has been a special education teacher for pupils with moderate to severe disabilities for four years. Student has never expressed any concerns to her about coming to school. She provided competent evidence that Student has progressed in her SDC class during both school years. In addition to the SDC class, Student spends one period a day in a general education math class for mainstreaming experiences. Ms. Mandujan has met with that teacher almost every day and is confident that Student is enjoying and benefiting from his participation with his general education peers in the class without negative incident.¹²

45. Student did not offer any persuasive evidence that he was subjected to assault or bullying from peers at school or on the bus during the 2007-2008 or 2008-2009 school years. There was no corroboration of Parent's testimony from the District or from any of the documents and IEPs received in the case. Moreover, even if Student experienced some bullying, there is no evidence that he has lost educational benefit or failed to progress in his academic and functional performance as a result. Thus, the evidence does not sustain Student's claim that the District denied him a FAPE during the 2007-2008 and 2008-2009 school years based upon an unsafe learning environment.

¹¹ OAH dismissed Case No. 2008010195 in February 2008 due to a confidential mediation settlement.

¹² Ms. Mandujan and the math teacher provided disability training to the class before Student joined it, including demonstrating Student's communication board and how he would use it in class to communicate with them combining words and pictures.

Failing to Provide Appropriate, Routine Written Reports of Educational Progress

46. Student's second amended complaint claimed that the District denied him a FAPE for the 2008-2009 school year because the District did not provide Parent with appropriate, routine written communications regarding his educational progress, such as monthly progress reports. At hearing, Student contended that, at some point in 2008, Parent and the District entered into a mediation agreement for the District to provide Parent with monthly progress reports, which the District failed to implement. Parent claims that she was thereby deprived of critical information necessary to understand and assist Student to ensure that he made educational progress. District asserts that Student's IEPs did not require monthly progress reports, enforcement of a mediation agreement is not within the jurisdiction of OAH, and that the District did provide Parent with progress reports.

47. Not every procedural violation is sufficient to support a finding that a student was denied a FAPE. To constitute a denial of FAPE, the procedural inadequacy must have impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits.

2008 Settlement Agreement

48. The limited special education jurisdiction of OAH does not include adjudicating a claim that a school district has failed to implement or comply with a settlement agreement. A claim that a school district failed to comply with the terms of a settlement agreement must be pursued through a separate compliance complaint procedure with the California Department of Education (CDE).¹³ OAH does have jurisdiction, however, to adjudicate a claim alleging a denial of FAPE as a result of violation of a settlement agreement.

49. Parent's testimony regarding monthly progress reports was confusing and difficult to follow. Parent testified that there was an agreement "with an OAH mediator" at an unknown date in 2008, in connection with a request for a due process hearing, for the District to provide her with monthly reports of Student's educational progress.

50. Ms. Mandujan testified that she understood that there was an agreement at a mediation meeting with an ALJ from OAH in a prior due process case, in which the District agreed to provide monthly reports to Parent regarding Student's progress, except for those months in which trimester report cards were issued and IEP meetings were held. No documentary evidence of the terms of the settlement agreement in that case, or any other binding, written agreement, was admitted into evidence in this case.¹⁴

¹³ 34 C.F.R. § 300.151-153 (2006); Ed. Code, § 56500.2; Cal. Code Regs., tit. 5, § 4600 et seq.

¹⁴ As set forth in Factual Finding 42, and Footnote 12, Student's due process complaint filed in December 2007, was settled and dismissed by OAH in February 2008. (OAH Case No. 2008010195.)¹⁴ That case did not involve any express problem about notice to Parent of Student's educational progress.

51. During the parties' confidential mediation meeting in the above case in January or February 2008, District and Parent had a discussion with an ALJ mediator about the District sending Parent written reports of Student's progress toward his annual goals.¹⁵ There is no evidence of a formal, binding agreement for the District to provide Parent with written monthly progress reports. District thereafter sent written progress reports to Parent in March and May 2008, and a comprehensive progress report for the June 2008 IEP meeting.¹⁶

2008 IEP Provisions for Reporting Student's Progress

52. The law requires the local educational agency (LEA), here the District, to convene an IEP team meeting at least annually to review a special education pupil's progress, his or her IEP, and the appropriateness of the placement, and to make any necessary revisions. A parent is a required and vital member of the IEP team, ensuring that the interests of the pupil and the unique perspective of the parent will be considered. The IEP must include a description of the manner in which the progress of the pupil toward meeting his or her annual goals will be measured, and when periodic reports on the progress will be provided to the parent. Aside from the above requirements, the law does not expressly address how often a school district must communicate with parents, to ensure that a parent has sufficient information regarding the child's progress to meaningfully participate in the IEP process.

53. The District's June 6, 2008 IEP offer contained a provision for reporting Student's progress to Parent, that duplicated the notice provisions in the December 2006 and November 2007 IEPs. The June 2008 IEP provided that the District would inform Parent of Student's progress every trimester by: (a) a specialized progress report; (b) District report card; and (c) parent conference.¹⁷ There was no offer to submit monthly progress reports to Parent. Thus, assuming there was a verbal understanding by February 2008 to submit monthly progress reports, the District did not offer to continue providing monthly progress reports as an IEP obligation in the June 2008 IEP. The June 2008 IEP was Student's operative IEP for the 2008-2009 school year, beginning on September 29, 2008, when Parent consented to it. (Factual Findings 11, and 21 through 24.) Regardless of the circumstances under which Parent finally consented to the IEP in September 2008, it did not contain any agreement between the parties for monthly progress reports.

54. District's June 2009 IEP also offered to provide Parent with information regarding Student's progress every trimester, but the reporting method was unspecified.

¹⁵ Mediation is voluntary and is facilitated by a qualified OAH mediator, who may also be an ALJ. Mediation may result in a settlement agreement between the parties. The mediator is not a party to the agreement. See Education Code sections 56500.3 through 56505.

¹⁶ Since the 2007-2008 school year is not at issue with respect to this problem, the missing April 2008 progress report need not be addressed.

¹⁷ Northwood operated on a trimester system, which divided the school year up into three grading periods instead of four quarters.

Parent did not consent to this IEP. (Factual Finding 12.) Based on the above, no agreed-upon IEPs from December 2006 to the present contained any provision by which the District was obligated to provide Parent with monthly written progress reports.

55. The record established that the District prepared progress reports for Parent for most, but not all school months of the 2008-2009 school year, through June 2009. There are no progress reports in evidence for the months of September, October, or November 2008, or May 2009. Regarding the progress reports in evidence, Parent could not remember whether she had seen some of them before, denied seeing some of them before, and recalled a few of them. However, Ms. Mandujan's testimony was more credible as she described how she regularly prepared the written monthly reports and directed District staff to mail them to Parent. In addition, the contents of the reports were professional and thoughtful in describing Student's accomplishments, performance, and progress on his goals as of the times the reports were prepared. However, the District offered no explanation for why written progress reports for the missing months were not placed in evidence.

56. The evidence did not establish that the District's written reports to Parent about Student's progress for the 2008-2009 school year were so deficient, in either quality or quantity, as to deprive Parent of material information that impacted her ability to play a meaningful role in Student's IEP meeting. Even if Parent did not receive written reports of Student's progress for the first three months of the school year, she received sufficient information in Student's first trimester report card in late October 2008, and in the December 2008 progress report, to enable her to take action, contact the school, or ask for an IEP meeting if she had any concerns. District complied with the law, and the operative IEP, to provide reports of progress at least every trimester. There is no evidence that Parent communicated any concerns to the District during that time. As of the annual IEP meeting in June 2009, Parent had received many written progress reports. Parent did not claim that there was any material information that she was unaware of or had missed by virtue of any missing monthly progress reports. Accordingly, the evidence did not establish that Parent needed more written progress reports from the District to meaningfully participate in the IEP process, and there was no denial of FAPE.

57. Assuming that Parent should have received a progress report every month from the District, except for those months in which report cards or IEP meetings occurred, the District's failure to deliver reports to Parent every month would still not constitute a denial of FAPE. As set forth above, a procedural violation does not amount to a denial of FAPE unless it has impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. There is no showing that Student was deprived of educational benefit or that his right to a FAPE was impeded. As found above, the evidence did not establish that Parent's opportunity to participate in the IEP process was significantly impeded. Accordingly, the District did not deny Student a FAPE based on a lack of written progress reports.

LEGAL CONCLUSIONS

1. Student, as the party requesting relief, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

Procedural and Substantive FAPE

2. A child with a disability has the right to a FAPE under the IDEA 2004. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE is defined as special education, and related services, that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o).) The term "related services" (DIS in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

3. There are two parts to the legal analysis of whether a school district offered a pupil a FAPE, whether the LEA has complied with the procedures set forth in the IDEA, and whether the IEP developed through those procedures was substantively appropriate. (*Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690], cited as *Rowley*.) Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

Issue 1(a): Did the District deny Student a FAPE from December 2006 through the present because it failed to implement an IEP provision to increase his speech and language therapy services to more than two weekly 30-minute sessions?

Failure to Implement an IEP

4. A failure to implement a student's IEP will constitute a violation of the student's right to a FAPE only if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP, and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled student fall significantly short of the services required by the student's IEP. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 481 F.3d 770.)

5. A party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial and significant provisions of the IEP. The materiality test is not a requirement that prejudice must be shown. "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Van Duyn, supra*, 481 F.3d at p. 822.)

6. As set forth in Factual Findings 4 through 13, and Legal Conclusions 2 through 5, the District was not bound by the December 2006 IEP to deliver additional speech services, because Parent did not consent to that IEP. District's offer to increase the services only as the speech and language pathologist could "fit it in" was vague and conditional, but Parent never agreed to any part of the IEP. Therefore, the District did not fail to implement, or materially deviate from, an agreed-upon increase in speech services for the 2006-2007 and 2007-2008 school years to December 2007.

7. No IEP subsequent to the December 2006 IEP contained any offer to increase Student's direct speech therapy services over and above two weekly individual sessions of 30 minutes each at any time. The District provided direct therapy to Student in conformance with the services agreed upon between the parties in the IEPs. Therefore, the District did not fail to implement, or materially deviate from, provisions requiring increased speech and language services in operative IEPs from December 2006 to the present. Accordingly, the District did not deny Student a FAPE on this ground.

Issue 1(b): Did the District deny Student a FAPE from December 2006 through the present because Student required additional weekly speech and language therapy services in order to receive educational benefit?

8. An IEP is to be evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams etc. v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the "snapshot rule," explaining that "[a]n IEP is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid*; *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.)

9. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, and be reasonably calculated to provide the student with some educational benefit. (20 U.S.C. § 1401(9).) FAPE must provide a threshold "basic floor of opportunity" in public education that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." (*Rowley*, 458 U.S. at p. 189.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams, supra*, 195 F.3d at p. 1149.) Other circuits have interpreted the standard to mean more than trivial or "de

minimis” benefit, or “at least meaningful” benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.) A child’s academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child’s potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.)

10. As set forth in Factual Findings 14 through 30, and Legal Conclusions 2, 3, 8, and 9, the weight of the evidence does not support Parent’s contention that Student needed more direct speech and language therapy every week in order to make meaningful educational progress in the area of language and communication from December 2006 through the present. Parent’s uncorroborated testimony was not persuasive. Student’s severe speech and language deficit involves a protruding tongue that makes articulation very difficult for him. District speech and language pathologists consistently recommended two weekly 30-minute sessions of one-to-one speech therapy to work on his articulation and other communication goals. In addition, those services were supplemented by practice with Student’s peers and teachers in the natural environment in the classrooms and on the playground. The fact that Parent wanted Student to achieve more progress, and that she was frustrated by the communication challenges related to his disability, did not establish that the District failed to provide a FAPE. Both Student’s speech and language pathologist, Ms. Piccione, and his SDC teacher, Ms. Mandujan, provided persuasive testimony, assessments, and reports written during the relevant time periods that documented Student’s slow but steady progress in verbal communication. Moreover, once the picture communication board was introduced during the 2008-2009 school year, Student has excelled in using it on a regular basis to enhance and clarify his verbal communications in order to be better understood. Based on the foregoing, District’s speech and language therapy services were designed to address Student’s unique needs and reasonably calculated to provide educational benefit. Student received meaningful educational benefit from the District’s speech and language services from December 2006 to the present, and there was no denial of FAPE.

Issue 2: From December 2006 to the present, did the District deny Student a FAPE because the District’s transportation services did not meet his unique needs?

11. As set forth in Legal Conclusion 9 above, for a school district’s IEP to offer a substantive FAPE, the proposed program must be specially designed to address the pupil’s unique needs, and be reasonably calculated to provide meaningful educational benefit. A school district has the obligation to consider a pupil’s safety related to his or her qualifying disability in creating and implementing the educational program. (*Lillbask v. Connecticut Dept. of Education* (2d Cir. 2005) 397 F.3d. 77, 93.)

12. As set forth in Factual Findings 31 through 37, and Legal Conclusions 2, 8, 9, and 11, Parent did not establish that any transportation incidents she described involved a special education issue related to Student’s IEPs. Parent’s evidence consisted solely of her vague and general testimony that failed to provide much information regarding any specific incidents. Moreover, Parent’s testimony was not corroborated by any documentation or requests for meetings to complain of such a problem to school officials or the IEP team.

There was no evidence of harassment or threats to Student's safety. To the extent that harassment, discrimination, or lack of safety precautions by school bus drivers could give rise to a denial of FAPE, there was no evidence that any incidents resulted in a loss of educational benefit or lack of educational progress. Consequently, the District did not deny Student a FAPE on this basis.

Issue 3: Did the District deny Student a FAPE for the 2007-2008 and 2008-2009 school years by failing to provide him with a safe learning environment because Student was assaulted at school and on the school bus?

13. As set forth in Factual Findings 38 through 45, and Legal Conclusions 2, 8, 9, and 11, Parent produced evidence that Student was injured on the school playground on December 21, 2007. However, the evidence did not sustain Parent's claim that Student was assaulted by another student, and the clear weight of the evidence established that it was an accident. Parent did not provide any specific information about any other incidents at school or on the school bus during her testimony. There is no persuasive evidence that Student was subjected to assault or bullying from peers at school or on the bus during the 2007-2008 or 2008-2009 school year. There was no corroboration of Parent's testimony from the District or from any of the documents and IEPs received in the case. Moreover, even if Student experienced some bullying, there is no evidence that he lost educational benefit or failed to progress in his academic and functional performance. Thus, the evidence does not sustain Student's claim that the District denied him a FAPE during the 2007-2008 and 2008-2009 school years on this basis.

Issue 4: Did the District significantly impede Parent's right to participate in the IEP decision making process, and thereby deny Student a FAPE, by failing to provide Parent with written monthly progress reports?

Parental Participation

14. The LEA shall convene an IEP team meeting at least annually to review the student's progress, the IEP, including whether the annual goals are being achieved, the appropriateness of the placement, and to make any necessary revisions. (Ed. Code § 56343, subd. (d).) A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §56341, subd. (b)(1).) The IEP team must consider the concerns of the parents for enhancing the child's education. (Ed. Code, § 56341.1, subd. (a)(2).) The IDEA's requirement that parents participate in the IEP process ensures that the interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J. v. Clark County School Dist.*, (9th Cir. 2001) 267 F.3d 877, 891.) A parent has meaningfully participated in the development of an IEP when the parent is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.)

15. The IEP shall include “a description of the manner in which the progress of the pupil toward meeting the annual goals . . . will be measured and when periodic reports on the progress the pupil is making toward meeting the annual goals, such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards, will be provided.” (Ed. Code § 56345, subd. (a)(3).) The law does not otherwise expressly address how often a school district must communicate with parents, or in what manner, to ensure that a parent has sufficient information regarding the child’s progress in order to meaningfully participate in the IEP process.

Settlement Agreements

16. The jurisdiction of OAH to hear due process claims under the IDEA is limited. There must be a claim regarding a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child, or the provision of a FAPE to a child, or the refusal of a parent or guardian to consent to an assessment of a child, or a disagreement between a parent or guardian and the district as to the availability of a program appropriate for a child. (Ed. Code § 56501, subd. (a).)

17. This limited jurisdiction does not include jurisdiction over claims alleging that a school district has failed to comply with a settlement agreement, which must be pursued through a separate compliance complaint procedure with CDE. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.) However, OAH has jurisdiction to adjudicate claims alleging a denial of FAPE as a result of a violation of a settlement agreement, as opposed to “merely a breach” of the agreement that should be addressed by CDE’s compliance complaint procedure. (*Pedraza v. Alameda Unified Sch. Dist.* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 26541.)

18. Based on Factual Findings 46 through 57, and Legal Conclusions 2, 3, 8, 9, and 14 through 17, effective September 29, 2008, the June 2008 IEP was Student’s operative IEP for the 2008-2009 school year, and it did not contain any offer or agreement to provide Parent monthly progress reports. In addition, the evidence did not establish that the District and Parent entered into any binding settlement agreement in connection with a prior special education due process matter that obligated the District to provide monthly progress reports. Thus, the District was not required, by the terms of either an IEP or a settlement agreement, to deliver written monthly progress reports to Parent, and any failure to do so did not result in a denial of FAPE.

19. The evidence showed that the District provided written monthly progress reports for most of the 2008-2009 school year, with the possible exceptions of September, October, and November 2008, and May 2009. The evidence was equivocal whether those reports had been given to Parent. Assuming that Parent should have received a progress report almost every month from the District due to an informal understanding, the District’s failure to do so would still not constitute a procedural violation, because an informal verbal understanding is not generally enforceable under the IDEA. District complied with the law

and the IEP provisions to provide reports of Student's progress at least every trimester and with his report cards, and also provided additional reports.

20. Even if the District did commit a procedural violation, it does not amount to a denial of FAPE unless it has impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. The evidence did not support Parent's claim that the District should have provided monthly progress reports in order for her to meaningfully participate in the IEP process for the 2008-2009 school year. Parent received sufficient progress information in the first trimester report card, and in the December 2008 progress report, to enable her to take appropriate action if she had any concerns. There is no evidence that she communicated any concerns to the District at that time. There is no evidence that Parent missed material information that impeded her ability to understand and participate in the June 2009 IEP meeting. Thus, the evidence did not establish that Parent needed more progress reports to meaningfully participate in the IEP process. Therefore, even if a violation were to be found, Parent's opportunity for meaningful participation was not significantly impeded, and there was no denial of FAPE.

Relief and Compensatory Education

21. When an LEA fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Educ.* (1996) 471 U.S. 359, 369-371; 20 U.S.C. § 1415(i)(2)(C)(3); Ed. Code, § 56505, subd. (g).)

22. As determined above, the District did not deny Student a FAPE on the basis of any of his four problems. Student is therefore not entitled to relief.

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on all issues decided in this case.

