

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

MENLO PARK CITY SCHOOL  
DISTRICT.

OAH CASE NO. 2009050599

**DECISION**

Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH), State of California, heard this matter in Menlo Park, California, on September 23 and 24, 2009.

Father represented Student.<sup>1</sup> Student's mother was present during the hearing. Student was not present.

John Nibbelin, Deputy County Counsel, represented the Menlo Park City School District (District). Olivia Mandilk, the District's Director of Student Services, also appeared on behalf of the District.

Student filed his due process request (complaint) on May 13, 2009. On June 29, 2009, OAH issued an order permitting Student to file an amended due process hearing request. That amended due process request was deemed filed on July 14, 2009. On September 2, 2009, the parties requested and received a continuance of the hearing dates. At the close of the hearing, the matter was continued to October 8, 2009, for the submission of closing briefs. The District's submitted its closing brief on October 8, 2009.<sup>2</sup> Student submitted his closing brief on October 15, 2009, and the record was closed.<sup>3</sup>

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<sup>1</sup> Student's father is also a licensed California attorney.

<sup>2</sup> To maintain a clear record, the closing briefs have been marked as exhibits. The District's brief has been marked as Exhibit D-19.

<sup>3</sup> Student's brief has been marked as Exhibit S-6. Although Student submitted an untimely closing brief, without explanation, it was considered for this Decision.

## ISSUES<sup>4</sup>

(1) Did the District deny Student a free appropriate public education (FAPE) by predetermining its placement offer for the 2009-2010 school year at the March 9, March 25, and April 22, 2009 individualized education program (IEP) meetings, thereby denying Parents' meaningful participation in the IEP process?

(2) Did the number of students in the District's special day class (SDC), the ages of the students and their disabilities deny Student a FAPE because the District could not address Student's unique needs in the SDC?

## CONTENTIONS OF PARTIES

Student asserts that the District denied him a FAPE by refusing to consider other placements than its SDC at Encinal Elementary School (Encinal) at the March 9, March 25, and April 22, 2009 IEP meetings after the District completed its triennial assessment and Student had been in the classroom for almost two months. Student contends that the District cannot meet his unique needs in the SDC because the classroom has too many students, whose age range and disabilities are too varied.

The District asserts that Student's claims regarding his placement are barred by the parties' January 23, 2009 Settlement Agreement, in which the parties agreed that Student would attend the Encinal SDC for one year. Additionally, the District asserts that the Encinal SDC provides Student with a FAPE. Student contends that the parties did not agree in the Settlement Agreement that Student would remain in the Encinal SDC for a year, and that the District violated the Settlement Agreement and denied Student a FAPE by changing the student composition in the classroom. Student also argues that Parents could not waive his future FAPE claims in the Settlement Agreement.

## FACTUAL FINDINGS

### *Jurisdiction and Background*

1. Student is a nine year-old boy who resides with Parents within the geographical boundaries of the District, and is in the third grade for the 2009-2010 school year (SY). Student is eligible for special education services under the category of autistic-like behaviors, and has received special education services since his entry into the District during SY 2007-2008. Student also has type-1 diabetes, and requires blood glucose testing, two times each school day.

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<sup>4</sup> The issues for hearing were clarified at the commencement of the hearing.

2. For SY 2007-2008, Student attended Oak Knoll Elementary School (Oak Knoll). Student was in the District's inclusion program and attended a regular education first grade classroom with a one-to-one aide, and received speech and language and occupational therapy services. At the start of SY 2008-2009, a dispute arose between Parents and District staff at Oak Knoll regarding the appropriateness of Student's continued attendance at Oak Knoll in its inclusion program. In late September 2009, Parents agreed to a diagnostic placement of Student in the SDC of teacher Alex Ruth at Encinal.

3. For the three weeks that Student attended Mr. Ruth's class, there were nine students in the classroom. The age range of the students was from six years old to 13 years old, with three of the other students around the same age of Student. About a third of the students received special education services under the criteria of autistic-like behaviors, one third of students had significant cognitive disabilities and the other third had multiple disabilities, including physical disabilities. Besides Mr. Ruth, there were four aides, which included Student with his own one-to-one aide, and a nurse in the classroom.

4. On October 9, 2008, District representatives and Parents met at an IEP meeting to discuss Student's future placement. The District offered Mr. Ruth's SDC. Parents eventually declined the District's placement offer at Encinal and Student returned to his prior inclusion program at Oak Knoll.

5. On October 30, 2008, Student filed a request for a due process hearing against the District. The District filed a cross-complaint on November 12, 2009. OAH consolidated both actions for hearing, and the administrative hearing commenced on January 22, 2009. On January 23, 2009, the parties entered into a Settlement Agreement on the record, and agreed to reduce the Settlement Agreement to writing. ALJ Rebecca Freie dismissed both matters after the parties completed reciting the agreement into the record.

6. Student began attending Mr. Ruth's SDC at the beginning of February 2009, and he is currently in that classroom.

7. Due to a clerical error, the parties' cases remained opened and OAH scheduled a trial setting conference on June 29, 2009, regarding the status of the cases. OAH subsequently issued an order to show cause why the cases should not be dismissed due to the January 23, 2009 Settlement Agreement on the record.

8. Judge Freie heard oral arguments from Father and Mr. Nibbelin. Father requested that OAH not dismiss the cases because there was no settlement agreement as the parties could not reach agreement concerning the wording of a formal written settlement agreement. Further, he argued that the District had not fully complied with the terms of the settlement as read into the record, and further proceedings were required. The District argued that the cases had been settled, and therefore both cases should be dismissed.

9. After reviewing the transcript of the January 23, 2009 hearing, Judge Freie issued an order on June 30, 2009, which held that the parties reached an agreement that resolved all issues in the consolidated matter. Judge Freie dismissed both cases because the transcript of the hearing was sufficiently clear to constitute the agreement between the parties, and OAH did not have jurisdiction to conduct further proceedings in those matters concerning implementation of the Settlement Agreement.

*District's Placement Offer*<sup>5</sup>

10. Under the Individuals with Disabilities in Education Act (IDEA), parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A district must fairly and honestly consider the views of parents expressed in an IEP meeting. School officials may not arrive at an IEP meeting with a "take it or leave it" attitude, having already decided on the program to be offered. School officials do not predetermine an IEP offer simply by discussing a child's programming in advance of an IEP meeting, but a district that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process. Student argues that the District members of his IEP team arrived at the March 9, March 25, and April 22, 2009 IEPs meeting having already decided that the only placement they would consider was Mr. Ruth's SDC. An initial question is whether the Settlement Agreement required Student's continued placement in Mr. Ruth's SDC.

11. On January 23, 2009, the parties agreed on the record that Student would attend Mr. Ruth's SDC for one year and that the District would obtain autism training from the Pacific Autism Center for Education (PACE) for Mr. Ruth and Student's one-to-one aide, Caitlin Laycock. Parents agreed to a District assessment plan, and the District agreed to convene an IEP meeting for the parties to discuss the assessment results, and to draft new goals for Student. Mr. Ruth and Ms. Laycock completed the five day training and Student began attending Mr. Ruth's SDC at the beginning of February 2009. Parents, Student's private providers and District representatives met before the March 9, 2009 IEP meeting to discuss the assessments and proposed goals. Placement was not discussed at that meeting, nor at the March 9 and 25, 2009 IEP meetings.

12. Parents first raised their concern about Student's continued placement in Mr. Ruth's SDC at the April 22, 2009 IEP meeting, and requested that the District consider other placements for Student, either in or outside of the District. Parents raised concerns that Mr. Ruth's classroom was not appropriate for Student because the age range of the other students in the classroom and their range of disabilities would not allow Mr. Ruth to address Student's unique needs. The District refused to consider other placements because of the Settlement Agreement.

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<sup>5</sup> Student's complaint only involves an alleged predetermination of the District's offer of placement, and does not involve the proposed goals or related services in the March 9, March 25, and April 22, 2009 IEPs.

13. Student's contention that the parties did not agree on January 23, 2009, to Student's continued placement in Mr. Ruth's classroom for one year is not supported by the record in the prior matter. The transcript of January 23, 2009, shows that the parties agreed that Student would attend Mr. Ruth's SDC for one year. Parents soon thereafter allowed Student to attend Mr. Ruth's SDC. Although represented by counsel, Parents were involved, on the record, in establishing the terms of the Settlement Agreement. The January 23, 2009 transcript contains no discussion that parties reserved the right to change Student's placement after the completion of the assessments.

14. Student further contends that the District needed to discuss at the IEP meetings Student's continued placement in Mr. Ruth's SDC because there was a material change in the student composition in his classroom. Parents' contention that they did not know of the student composition in Mr. Ruth's SDC before the January 23, 2009 Settlement Agreement is not credible. Both Parents are actively involved in Student's education, and extremely knowledgeable of Student's educational program. Mother observed Student in Mr. Ruth's classroom during September and October 2008. The classroom composition was discussed at the October 9, 2008 IEP meeting, attended by both Parents, and they expressed concerns in this IEP meeting whether the Encinal SDC could meet Student's academic needs. The parties' discussion on January 23, 2009, establishes that Parents requested that Student be placed in Mr. Ruth's classroom, with specified training requirements and modifications to the SDC program. On the record on January 23, 2009, Parents knew of Mr. Ruth's class program because they did not want Student to participate in particular class activities, such as returning library books and participating in the class café, so Student could focus on more academic instruction through his aide, and the District agreed to Parents' requested program change.

#### *Denial of FAPE Due to Class Composition*

15. Student asserts that there has been a material change in the class composition of Mr. Ruth's SDC, and this change constitutes a breach of the Settlement Agreement and a denial of FAPE because the District could not meet Student's unique needs.<sup>6</sup> However, when Student started in Mr. Ruth's SDC in the beginning of February 2009, the same eight students from fall 2008 were in the classroom, with same adult to student ratio. Mr. Ruth had not changed the instructional program in his classroom, and the District provided Student with the trained one-on-one aide as required by the Settlement Agreement. The District was under no obligation to consider any other placement for Student than Mr. Ruth's SDC at the March 9, March 25, and April 22, 2009 IEP meetings because the parties were bound by the provisions in the Settlement Agreement that governed Student's placement. Therefore, the District did not violate Parents' procedural rights in not considering their request for another placement because the District was complying with the Settlement Agreement.

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<sup>6</sup> The complaint only contains allegations regarding Student's classroom for the regular school year in Mr. Ruth's SDC, and no claims regarding the 2009 Extended School Year.

16. For SY 2009-2010, Mr. Ruth's SDC has 10 students, and the only new student in his SDC is a six year old kindergarten student, who is in a wheelchair. This student only attends Mr. Ruth's SDC for one hour a day, during the mid-morning group session, and has a one-to-one aide. Neither Mother, Father, or Student's private speech and language provider, Donna Dagenais, who all have spent some time in Student's classroom this year, could provide any concrete examples how this new student's presence in the classroom materially changed Student's program. Additionally, neither Parents, Ms. Dagenais, or Marcia Goldman, Education Director of PACE,<sup>7</sup> established that Student's academic, speech and language, occupational therapy or behavioral needs had significantly changed, or that the information in the District's triennial assessment did not accurately document Student's unique needs.

17. Mr. Ruth and Ms. Laycock established that the presence of the one new student did not materially change the instruction that Student received in the classroom. Mr. Ruth and Ms. Laycock have worked with Student daily and have not observed a significant change in Student's unique needs. Mr. Ruth and Ms. Laycock established that they can meet Student's unique needs in Mr. Ruth's SDC. Therefore, the addition of the one student into Mr. Ruth's classroom did not constitute a material change to the classroom that breached the Settlement Agreement and there was not a denial of FAPE.

18. Student contends that even if the parties agreed that Student would attend Mr. Ruth's SDC and the addition of the one student did not materially change Mr. Ruth's SDC, his Parents could not waive his future right to FAPE. However, pursuant to Legal Conclusions 10 through 13, the January 23, 2009 Settlement Agreement constitutes a waiver of claims for one year because his Parents can waive future claims.

19. Therefore, Student waived his right to raise any claim against the District that it denied him a FAPE because there has not been a material change in Mr. Ruth's SDC, nor Student's unique needs.

## LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof in this matter. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### *Elements of a FAPE*

2. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and

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<sup>7</sup> PACE has provided and is currently providing Student with applied behavioral analysis services and classroom consultation.

related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690](*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2009) 575 F.2d 1025, 1035-1038.) The Ninth Circuit 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 v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149. (hereafter *Adams*).)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d 1141, 1149.)

5. 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 v. Baker Sch. Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 815.)

#### *Parents' Right to Participate in the Educational Decisional Process*

6. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

7. A parent has meaningfully participated in the development of an IEP when the parents is informed of the child’s problems, attends the IEP meeting, expresses any disagreement with the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (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 Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

8. Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345.) A district may not arrive at an IEP meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist., supra*, 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*N.L. v. Knox County Schs., supra*, 315 F.3d at p. 693, fn. 3.) Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized. (Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).)

#### *OAH Jurisdiction to Hear Student’s Claims*

9. Parents have the right to present a complaint “with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a).) OAH has jurisdiction to hear due process claims arising under IDEA. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029 [hereafter *Wyner*].)

10. This limited jurisdiction does not include jurisdiction over claims alleging a school district’s failure to comply with a settlement agreement. (*Id.* at p. 1030.) In *Wyner*, during the course of a due process hearing the parties reached a settlement agreement in which the district agreed to provide certain services. The hearing officer ordered the parties to abide by the terms of the agreement. Two years later, the student initiated another due process hearing, and raised, inter alia, six issues as to the school district’s alleged failure to comply with the earlier settlement agreement. The California Special Education Hearing Office (SEHO), OAH’s predecessor in hearing IDEA due process cases, found that the issues pertaining to compliance with the earlier order were beyond its jurisdiction. That ruling was upheld on appeal. The *Wyner* court held that “the proper avenue to enforce SEHO orders” was the California Department of Education’s compliance complaint procedure (Cal. Code Regs., tit. 5, § 4600 et seq.), and that “a subsequent due process hearing was not available to address . . . alleged noncompliance with the settlement agreement and SEHO order in a prior due process hearing.” (*Wyner, supra*, 223 F.3d at p. 1030.)

11. More recently, in *Pedraza v. Alameda Unified Sch. Dist.*, 2007 U.S. Dist. LEXIS 26541 (N.D. Cal. 2007), the United States District Court for the Northern District of California held that OAH has jurisdiction to adjudicate claims alleging denial of FAPE as a result of a violation of a mediated settlement agreement, as opposed to “merely a breach” of the mediated settlement agreement that should be addressed by the California Department of Education’s compliance complaint procedure.

12. A special education settlement agreement is considered a contract. (See, e.g., *D.R. v. East Brunswick Board of Education* (3d Cir. 1997) 109 F.3d 896, 898.) Settlement agreements are interpreted using the same rules that apply to interpretation of contracts. (*Vaillette v. Fireman’s Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 686, citing *Adams v. Johns-Manville Corp.* (9th Cir. 1989) 876 F.2d 702, 704.) “Ordinarily, the words of the document are to be given their plain meaning and understood in their common sense; the parties’ expressed objective intent, not their unexpressed subjective intent, governs.” (*Id.* at p. 686.) If a contract is ambiguous, i.e., susceptible to more than one interpretation, then extrinsic evidence may be used to interpret it. (*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37-40.) Even if a contract appears to be unambiguous on its face, a party may offer relevant extrinsic evidence to demonstrate that the contract contains a latent ambiguity; however, to demonstrate an ambiguity, the contract must be “reasonably susceptible” to the interpretation offered by the party introducing extrinsic evidence. (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391, 393.)

13. In *D.R. v. East Brunswick Board of Education*, *supra*, 109 F.3d 896, the parties resolved by settlement agreement student’s prior claims against the school district. The parties also resolved in the settlement agreement future claims for the upcoming school year as the school district agreed to reimburse parents for 90 percent of the private school cost. A dispute arose between the parties when student’s private school tuition doubled because of student’s purported need for a personal aide. The school district refused to pay for the additional cost because the aide was not a related service covered by the parties’ settlement agreement. The Circuit Court agreed with the school district’s interpretation of the settlement agreement, and rejected the parents’ attempt to void the settlement agreement for the upcoming school. The Court held that nothing in the IDEA prevents the parties from waiving future FAPE claims, or prevents enforcement of such a provision, unless there has been a change of circumstances.

A party enters a settlement agreement, at least in part, to avoid unpredictable costs of litigation in favor of agreeing to known costs. Government entities have additional interests in settling disputes in order to increase the predictability of costs for budgetary purposes. We are concerned that a decision that would allow parents to void settlement agreements when they become unpalatable would work a significant deterrence contrary to the federal policy of encouraging settlement agreements.

(*D.R. v. East Brunswick Board of Education*, *supra*, 109 F.3d 896, 901.)

*Issue One: Did the District deny Student a free appropriate public education (FAPE) by predetermining its placement offer for the 2009-2010 school year at the March 9, March 5, and April 22, 2009 individualized education program (IEP) meetings, thereby denying Parents' meaningful participation in the IEP process?*

14. Pursuant to Factual Findings 11, 13, and 14, and Legal Conclusions 10 through 13, the Settlement Agreement explicitly stated that Student would attend Mr. Ruth's SDC with a one-to-one aide for one year, provided that Mr. Ruth and the aide received the required autism training from PACE. Parents knew of the student composition and classroom program of Mr. Ruth's SDC when they entered into the Settlement Agreement. The District complied with the training requirement and has not materially changed the class composition. Therefore, the District did not violate Parents' procedural rights because the Settlement Agreement requires that Student's placement through January 22, 2009, is Mr. Ruth's class. The District did not have to discuss other placement options at the IEP meetings.

*Issue Two: Did the number of students in the District's special day class (SDC), the ages of the student and their disabilities deny Student a FAPE because the District could not address Student's unique needs in the SDC?*

15. Pursuant to Factual Findings 15 through 19, and Legal Conclusions 10 through 13, there has not been a change of circumstances that voids the Settlement Agreement. The classroom composition and program of Mr. Ruth's SDC did not significantly change from Student's diagnostic placement in the fall 2008, as the addition of one kindergarten student for SY 2009-2010 was for only one hour a day during group instruction and did not significantly affect the nature of the class. Student still received the same level of one-on-one instruction from Ms. Laycock, and Mr. Ruth provided the same level of instruction to Student. Additionally, Student's unique needs did not significantly change from the date of the Settlement Agreement to the present. Therefore, Student did not establish that the District denied him a FAPE because there has been a significant change in circumstances in Mr. Ruth's SDC or Student's unique needs.

## 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.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by 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: October 28, 2009

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PETER PAUL CASTILLO  
Administrative Law Judge  
Office of Administrative Hearings