

*P/SEND*UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**CIVIL MINUTES - GENERAL**

Case No. CV 10-1065-GHK (RCx)

Date March 15, 2011

Title *Bellflower Unified School District v. Sandra Velez, individually and on behalf of minor E.V., et al.***Presiding: The Honorable****GEORGE H. KING, U. S. DISTRICT JUDGE**

Beatrice Herrera

N/A

N/A

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

None

None

**Proceedings: (In Chambers) Order re: Parties' Joint Trial Brief**

This matter is before the Court on the Parties' Joint Trial Brief. We have read and considered the Joint Trial Brief, as well as the lengthy administrative record in this case, and deem this matter appropriate for resolution without oral argument. L.R. 7-15. As the Parties are familiar with the facts, we will repeat them only as necessary. Accordingly, we rule as follows.

**I. Background**

Plaintiff and Counter-Defendant Bellflower Unified School District (the "District") commenced this action to reverse the decision of the California Office of Administrative Hearings, OAH Case No. 2009080509 (the "Decision"). Administrative Law Judge Peter Paul Castillo (the "ALJ") received exhibits, heard testimony, and conducted a six-day hearing in November 2009. He issued the fifty-two page Decision on January 26, 2010. The District appeals the ALJ's adverse ruling on seventeen issues,<sup>1</sup> including the related findings of fact, conclusions of law, remedies, order, and determination of the prevailing party. (Compl. ¶ 8). Defendants and Counter-Claimants Sandra and Erwin Velez (the "Parents"), individually and on behalf of minor E.V. ("Student"), seek partial reversal of the ALJ's relief order.

At all relevant times, Student was considered eligible for special education services, and an Individual Education Plan ("IEP") was in place. Pursuant to Student's May 2007 IEP ("2007 IEP"), the District found him eligible for special education services under the category of speech and language ("S/L") impairment. For the remainder of the 2006-07 school year, all of the 2007-08 and 2008-09 school years, Student attended Whitewood Early Intervention Preschool's Special Day Class ("SDC"). Pursuant to Student's February 2008 IEP ("February 2008 IEP") and February/March 2009 IEP ("March

<sup>1</sup> For purposes of this appeal, we have not adopted the ALJ's method for grouping and labeling issues. As explained *infra*, we do not find it necessary to reach each issue appealed. For clarity of the record, we will also identify the issue(s) implicated by our holdings according to their designation by the ALJ.

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2009 IEP”), Student remained eligible for special education services based on S/L impairment. The March 2009 IEP also offered Student Occupational Therapy (“OT”) services. In May 2009, Student’s primary eligibility for special education was changed to autism. At the conclusion of the 2008-09 school year, the Parents unilaterally removed Student from the District and placed him in a home applied behavior analysis (“ABA”) program and private preschool.

The Parents brought the OAH action, arguing that Student had been denied a Free Appropriate Public Education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”). The ALJ ruled that the District denied Student a FAPE by, *inter alia*, failing to assess Student in all areas of suspected disability—specifically, autism and OT impairment—and failing to offer services appropriate to meet Student’s unique needs. The ALJ ordered the District to reimburse the Parents for the cost of private S/L, OT, ABA, and one-to-one aide services. The ALJ also awarded Student compensatory education in the form of home ABA and OT services. The ALJ further ordered the District to provide Student with one-to-one aide services while he attended a general education kindergarten and certain OT services through the end of the 2010 calendar year.

## II. Level of Review

The IDEA provides that a party aggrieved by the findings and decision made in a state administrative due process hearing has the right to bring an original civil action in federal district court in order to secure review of the disputed findings and decision. *See* 20 U.S.C. § 1415(i)(2). In an action challenging an administrative decision, “the court[] (i) shall receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” 20 U.S.C. § 1415(i)(2)(C)(i)-(iii).

In IDEA cases, we do not employ a highly deferential standard of review. *J.G. v. Douglas County Sch. Dist.*, 552 F.3d 786, 793 (9th Cir. 2008) (citations omitted). Nevertheless, complete de novo review “is inappropriate.” *Id.* (citations omitted). We are required to give “due weight to the decisions of the states’ administrative bodies.” *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 888 (9th Cir. 2001) (citation and quotation marks omitted). “Due weight” means that we are “to consider the findings carefully and endeavor to respond to the hearing officer’s resolution of each material issue.” *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995) (citation and quotation marks omitted). We consider the thoroughness and care of the findings. *Id.* How much deference we afford to those findings is a matter of our discretion. *Id.* We give them substantial weight where the decision “evinces [the ALJ’s] careful, impartial consideration of all the evidence and demonstrates [the ALJ’s] sensitivity to the complexity of the issues presented.” *County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir. 1996) (citation and quotation marks omitted). The party challenging the administrative decision bears the burden of persuasion on its claim. *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1399 (9th Cir. 1994), superseded by statute on other grounds.

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**III. Requirements for FAPE**

The term “free appropriate public education” is defined as “special education and related services that . . . are provided in conformity with the individualized education program required under section 1414(d) of this title.” 20 U.S.C. § 1401(9). The term “individualized education program” is defined in the IDEA as “a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.” *Id.* § 1401(14); *see also N.B. v. Hellgate Elementary Sch. Dist., ex rel. Bd. of Dirs., Missoula County, Mont.*, 541 F.3d 1202, 1207 (9th Cir. 2008).

An IEP must meet both procedural and substantive requirements. The IDEA inquiry begins by determining whether “the State complied with the procedures set forth in the Act, and, second, whether the individualized educational program developed through the Act’s procedures was reasonably calculated to enable the child to receive educational benefits.” *Amanda J.*, 267 F.3d at 890 (citation, quotation marks, and alteration omitted). We consider the IEP at the time of its implementation, not in hindsight. *Douglas County*, 552 F.3d at 801.

“Not all procedural violations deny the child a FAPE.” *R.B., ex rel. F.B.v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932, 938 (9th Cir. 2007) (citations omitted). Ninth Circuit precedent requires that we apply “harmless error” analysis. *Id.* Procedural error is not harmless where it either “results in the loss of educational opportunity or seriously infringes the parents’ opportunity to participate in the IEP formation process.” *Id.* (citation, quotation marks, and alterations omitted).

An IEP is reasonably calculated to enable a student to receive educational benefits if it is appropriately designed and implemented so as to convey a meaningful benefit on the student. *See Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *see also J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 951 n.10 (9th Cir. 2010) (although “[s]ome confusion exists in this circuit regarding whether the Individuals with Disabilities Education Act requires school districts to provide disabled students with ‘educational benefit,’ ‘some educational benefit’ or a ‘meaningful’ educational benefit . . . all three phrases refer to the same standard”). A FAPE must only provide a student with a “basic floor of opportunity” and need not provide a “potential-maximizing education.” *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d 811, 821 (9th Cir. 2007). However, “Congress did not intend that a school system could discharge its duty under the IDEA by providing a program that produces some minimal academic advancement, no matter how trivial.” *Amanda J.*, 267 F.3d at 890 (citations, quotation marks, and alteration omitted).

**IV. Discussion**

We find that the ALJ’s Decision is thorough and careful. His findings reflect an appreciation for factual nuances. Rather than undifferentiated all-or-nothing conclusions, there were issues on which

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each party prevailed.<sup>2</sup> The ALJ carefully scrutinized each form of relief requested, granting some while denying others. We therefore give the Decision due weight, and believe that the ALJ's Decision is entitled to substantial deference. We now consider the following material findings and conclusions of the ALJ.

**A. Failure to Assess for Eligibility for Special Education Services Related to Autism<sup>3</sup>**

The IDEA requires that “[e]ach local educational agency shall ensure that . . . (B) the child is assessed in all areas of suspected disability.” 20 U.S.C. § 1414(b)(3). “In conducting the evaluation, the local educational agency shall . . . (B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child[.]” *Id.* § 1414(b)(2). This requirement is mirrored in the Code of Federal Regulations: “[e]ach public agency must ensure that . . . (4) [t]he child is assessed in all areas related to the suspected disability.” 34 C.F.R. § 300.304(c). And “the public agency must . . . (1) [u]se a variety of assessment tools . . . [and] (2) [n]ot use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability and for determining an appropriate educational program for the child.” *Id.* § 300.304(b).

We agree with the ALJ's finding that the District should have suspected autism as an area of disability, and therefore, it had a duty to assess Student for autism. By the time of the February 2008 IEP, the District had been told by Student's father that Student's pediatrician had diagnosed him with autism, yet Student was not assessed for autism by the District until March and April of 2009. Moreover, District psychologist Nina Rezvani had recorded behavioral observations of Student that were consistent with autism. (*See* ALJ Decision ¶ 11 (“Student's behaviors during the [Initial Psychoeducational Evaluation and Supplemental S/L Assessment], such as his noncompliant and aggressive behaviors, including kicking and hitting during [the] testing, lack of peer interaction, significant inability to communicate orally and his inability to participate with his class during group instructions without prompting, are indications of autistic-like behavior.”)). Although Rezvani explained that the results of her assessment and observations did not lead her to believe that Student was autistic because she viewed such deficits as commensurate with Student's cognitive abilities, we agree with the ALJ that this explanation is unpersuasive in light of the District's knowledge that Student had been diagnosed with autism and because Student's observed behavior could also be indicative of autism. When Student was eventually assessed by the District for autism, the LA County Office of Education made observations that “were consistent with past observations by District staff regarding attention,

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<sup>2</sup> The Parents have not appealed the ALJ's adverse decision on any issue, other than the aforementioned aspect of his relief order.

<sup>3</sup> The ALJ designated this as Issue 1(a) and Issue 2(a). Issue 1 and all of its sub-issues relate to the February 2008 IEP and Issue 2 and its sub-issues relate to the March 2009 IEP. Since Student was not finally assessed for autism until after the March 2009 IEP, the analysis as to both Issues is the same, except where otherwise noted.

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language, social-emotional, behavior and cognitive deficits.” (ALJ Decision ¶ 26 (emphasis added)). Contrary to the District’s argument, the ALJ did not inappropriately apply hindsight judgment; rather, his conclusion was based on the information that the District had available at the time of the February 2008 IEP. Therefore, the District’s statutory obligation to assess student in all areas of suspected disability was triggered by the time of the February 2008 IEP.<sup>4</sup> *See Hellgate*, 541 F.3d at 1209 (school district’s duty to assess a student for autism was triggered after it received a report from the student’s physician that indicated there was an autistic component to the student’s poor performance).

The District next argues that Student was in fact, albeit unknowingly, assessed for autism. Rezvani administered the Vineland Adaptive Behavior Scales, 2nd Edition (“VABS-II”) assessment to Student in February 2008. Although the VABS-II assessment can be used to identify a student with autism, we agree with the ALJ’s finding that there is no evidence that the results were actually analyzed in a way that would permit such a determination. Rezvani’s report does not mention autism in the section of the report discussing the VABS-II assessment results. (*See Initial Psychoeducational Evaluation and Supplemental Speech and Language Assessment, Administrative Record 30:391-403*). Additionally, even if the VABS-II did constitute *an* assessment for autism, the IDEA and its implementing regulations require that no single metric be used, and the ALJ found that “Rezvani did not explain why she did not administer any test instruments that specifically examined deficits related to autistic children.” (ALJ Decision ¶ 32). Accordingly, we reject the District’s argument that its use of VABS-II, without more, is sufficient to discharge its statutory duty to assess for all areas of suspected disability.

Having determined that the District violated the procedural requirements of the IDEA, we must determine whether this procedural error “resulted in a loss of educational opportunity or significantly restricted parental participation.” *Napa Valley*, 496 F.3d at 938. Although the ALJ did not explicitly conduct this harmless error analysis for purposes of determining whether the failure to assess denied Student a FAPE, his subsequent conclusions that Student’s February 2008 and March 2009 IEPs substantively denied him a FAPE are tantamount to a finding that the failure to assess was not harmless.<sup>5</sup>

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<sup>4</sup> The District argues that the Parents restricted access to Student prior to his 2007 IEP. However, this is not relevant to any duty to assess pursuant to the February 2008 IEP. Additionally, the District argues that the Parents disagreed with Student’s pediatrician’s diagnosis of autism. However, parental disagreement does not discharge the District’s statutory duty. *See Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994) (“[A] school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child’s parents expressed unwillingness to accept that placement.”); *Hellgate*, 541 F.3d at 1209 (“[A] failure of the parents to turn over portions of a specialist’s report cannot excuse the District’s failure to procure the same information for itself. A school district cannot abdicate its affirmative duties under the IDEA.” (citations, internal quotation marks, and alterations omitted)).

<sup>5</sup> The ALJ concluded that the February 2008 and March 2009 IEPs failed to offer Student a FAPE because the proposed placement in the District’s SDC was not appropriate to meet his unique

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We agree with these factual findings, and we conclude that the District's failure to assess resulted in the loss of educational opportunity.

We reject the District's contention that the services it was providing to Student pursuant to his IEPs—albeit not based on an eligibility determination for autism—were sufficient to render any failure to assess harmless. In the context of autism, the Ninth Circuit has squarely rejected this argument. *See Hellgate*, 541 F.3d at 1210 (“[W]ithout evaluative information that [the student] has autism spectrum disorder, it was not possible for the IEP team to develop a plan reasonably calculated to provide [the student] with a meaningful educational benefit . . .”); *Amanda J.*, 267 F.3d at 894 (“The IEP team could not create an IEP that addressed [the student]’s special needs as an autistic child without knowing that [the student] was autistic.”).

Moreover, we reject the District's argument given the particular facts of this case. The District argues that Student's placement in Lori Alvarado's and later Erendida Contreras's SDC allowed Student to make meaningful educational progress because these teachers had received training in educating children with autism, and they had incorporated discrete trial training (DTT) techniques into the SDC instruction, which is commonly used to teach autistic children. However, the ALJ found that Alvarado's classroom was designed for pupils with S/L impairments and average cognitive abilities, and that her classroom was not designed to meet the needs of children with autism. (ALJ Decision ¶¶ 60-61). Additionally, the use of DTT was informal, no tracking data was collected, and DTT instruction was not directed at all of Student's autism-related deficits. Student was moved from Alvarado's to Contreras's SDC at the start of the 2008-09 school year, and the March 2009 IEP offered the same placement in Contreras's SDC. The ALJ did note that Contreras's class included other children whose areas of need included autistic-like behaviors. However, by the time of the March 2009 IEP, Student had made minimal progress in Contreras's class and, in fact, had begun to exhibit aggressive behavior. In light of this, we agree with the ALJ that the March 2009 IEP was merely a continuation of the same program that was not reasonably calculated to address Student's unique needs. (*See* ALJ Decision ¶ 97).

Finally, the District's existing policies undercut its argument that the non-recognition of Student's autism was without consequence. While the District does not have a preschool program specifically for autistic students, its policy is to consult with a non-public agency for assistance in developing programs for autistic students—which it did not do prior to formulating Student's February 2008 and March 2009 IEPs. The existence of this policy implicitly acknowledges that knowing of a student's autism is a logical prerequisite to directing meaningful educational services to that student. *See also Amanda J.*, 267 F. 3d at 883 (autism is a disorder where “early diagnosis is crucial” and where “intensive early intervention ‘makes a clinically significant difference for many children’” (citations omitted)).

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needs (Issues 1(c) and 2(d)).

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Having concluded that Student's February 2008 and March 2009 IEPs were infected by procedural error, which was non-harmless, we **AFFIRM** the ALJ's conclusion that Student was denied a FAPE.<sup>6</sup>

In light of this conclusion, and because we consider this to be independently sufficient to affirm the corresponding relief ordered by the ALJ, we do not consider it essential to reach many of the separate issues on appeal that concern whether the IEPs substantively denied Student a FAPE. *See id.* at 895 ("Because we hold that the District failed to develop the IEP in accordance with the procedures mandated by the IDEA and that this failure in and of itself denied [the student] a FAPE, we do not address the question of whether the proposed IEPs were reasonably calculated to enable [the student] to receive educational benefits."); *Hellgate*, 541 F.3d at 1210 (same); *W.G. v. Board of Trustees of Target Range School Dist. No. 23, Missoula, Mont.*, 960 F.2d 1479, 1485 (9th Cir. 1992), superceded by statute on other grounds (same). However, the ALJ's conclusion that the District's proposed placement substantively denied Student a FAPE provides an independent and alternative ground for affirming some of the relief ordered. Therefore, in light of our factual analysis, *supra*, and after applying the appropriate standard, we also **AFFIRM** the ALJ's conclusion that Student's February 2008 and March 2009 IEPs substantively denied him a FAPE by offering a placement that was not reasonably calculated to provide Student with an educational benefit.<sup>7</sup>

**B. Failure to Assess Student for Fine Motor Deficits<sup>8</sup>**

The District provided Student with an Occupational Therapy ("OT") assessment for fine motor skills in November 2008. The February 2008 IEP was formulated without the benefit of this assessment. We agree with the conclusion of the ALJ that Student was denied a FAPE based on this failure to assess him in all areas of suspected disability.

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<sup>6</sup> Our conclusion as to the District's failure to assess Student for autism logically resolves another issue on appeal—specifically, the February 2008 and March 2009 IEPs' failure to contain appropriate behavioral and social goals (Issues 1(e) and 2(f)). Both Parties seem to agree that Student's behavioral and social deficits were a subset of his autistic-like behavior, and this is how the ALJ analyzed this issue. (*See* ALJ Decision ¶ 66). The District does not dispute that the IEPs failed to contain behavioral goals. Such procedural error was not harmless in light of our discussion herein. Although the District points to some interventions undertaken by Alvarado and Contreras, the absence of an express goal in the IEPs resulted in no comprehensive or systematic approach to address Student's behavioral deficits. Although we do not consider it essential that we reach this issue, inasmuch as it provides additional support for the relief ordered by the ALJ, we **AFFIRM** the ALJ's conclusion that Student was denied a FAPE.

<sup>7</sup> For clarity of the record, this refers to Issue 1(c) and 2(d).

<sup>8</sup> This issue falls under Issue 1(a) and concerns the February 2008 IEP only.

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The District argues that it properly assessed Student's fine motor deficits. Rezvani did perform the Battelle Developmental Inventory, 2nd Edition (BDI-2) to assess Student's fine motor abilities. It indicated that his ability was in the fifth percentile. Notwithstanding this result, Rezvani explained that she did not conduct a complete OT assessment because she believed that Student's fine motor skills were commensurate with his cognitive abilities and that attempts to address Student's fine motor deficits should first be attempted in the classroom rather than through special OT services. The ALJ rejected this testimony because it would have been necessary to identify the extent of Student's deficits before determining the best method for addressing them. (*See* ALJ Decision ¶ 35). We accept the ALJ's evaluation of Rezvani's testimony. Also, the District did not assess Student's fine motor skills during its adaptive physical education assessment of Student prior to the February 2008 IEP, which further restricted the District's understanding of Student's unique needs. We agree with the ALJ that Student should have received a complete OT assessment prior to the February 2008 IEP. Accordingly, the 2008 IEP was procedurally deficient.

As to the issue of harmlessness,<sup>9</sup> the District argues that it was providing services to Student designed to address his fine motor deficits. Student's 2007 IEP contained two fine motor goals and Alvarado used DTT instruction to work on Student's fine motor skills. However, we agree with the ALJ's findings that Student had demonstrated a lack of meaningful progress on his May 2007 fine motor goals. Yet, the same goals were continued in the February 2008 IEP. After Student received a full OT assessment, the District offered him direct OT services, initially for fifty minutes per week in individual sessions. This implicitly concedes that Student was denied educational opportunity as a result of the failure to provide a complete OT assessment at an earlier time.

Accordingly, we **AFFIRM** the ALJ's conclusion that Student was denied a FAPE because of the failure to adequately assess his fine motor deficits.<sup>10</sup>

**C. Failure to Offer Student a Placement in the Least Restrictive Environment<sup>11</sup>**

The IDEA requires that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled." 20 U.S.C. § 1412(a)(5)(A). The process of exposing the

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<sup>9</sup> The ALJ made no explicit determination that the failure to assess Student's fine motor deficits was not harmless. However, under Issue 1(g), he concluded that Student had been substantively denied a FAPE because the 2008 IEP failed to offer sufficient OT services. The factual findings supporting the ALJ's substantive conclusion also demonstrate the non-harmless nature of the District's procedural violation of the IDEA.

<sup>10</sup> We also **AFFIRM** the ALJ's conclusion that Student's OT offer substantively denied him a FAPE (Issue 1(g)). In light of the relevant standard, our factual analysis in this section supports this conclusion.

<sup>11</sup> The ALJ designated this as Issues 1(d) and 2(e).

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disabled student to his nondisabled peers is referred to as ‘mainstreaming.’ The Ninth Circuit has adopted the following four-factor balancing test to determine the appropriateness of a placement: “(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student] had on the teacher and children in the regular class; and (4) the costs of mainstreaming [the student].” *Sacramento City Unified Sch. Dist., Bd. Of Dirs. v. Rachel H.*, 14 F.3d 1398, 1404 (9th Cir. 1994).

Student’s February 2008 IEP offered mainstreaming opportunities primarily during recess. The time spent in the general education environment comprised 16% of Student’s day, and the rest of the day was spent in the SDC. However, because of Student’s social deficits, he did not engage with other children during recess; he played alone. In effect, Student’s only mainstreaming opportunity did not actually result in any meaningful interaction with his typically-developing peers. The ALJ found that at the February 2008 IEP meeting, the District did not discuss how to ensure that Student interacted with general education students, and the March 2008 IEP was a continuation of the previous approach. (ALJ Decision ¶¶ 64, 97).

The District has not provided analysis in terms of the four-factor balancing test. It conclusorily asserts that permitting Student to play alone at recess does not amount to a denial of a FAPE. This argument misconstrues the ALJ’s ruling. The District’s placement functionally provided no mainstreaming. Given Student’s deficits, recess time was inadequate, and the District failed to consider alternative placements.

We **AFFIRM** the ALJ’s conclusion that Student was denied a FAPE because his proposed placement was not in the Least Restrictive Environment.

***D. Failure to Offer Student Sufficient S/L Services***<sup>12</sup>

Student’s 2007 IEP offered S/L services in the form of sixty minutes of group therapy per week. The February 2008 IEP reduced that offer to fifty minutes of group therapy per week. In November 2008, Student was offered seventy-five minutes of S/L therapy, consisting of two twenty-five minute individual sessions and one twenty-five minute group session. The ALJ concluded that the February 2008 IEP denied Student a FAPE by reducing Student’s S/L services by ten minutes and by failing to offer Student any individual S/L therapy.

We note initially that the District has not objected to the ALJ’s conclusion that Student needed to have some of his S/L therapy provided in individual sessions in light of his attention deficits and need to be redirected. Rather, the District’s briefing focuses on the ALJ’s conclusions as to the ten-minute reduction in services in the February 2008 IEP from the 2007 IEP. This is significant because the ALJ’s relief order provides reimbursement only for the number of thirty-minute *individual* S/L sessions that

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<sup>12</sup> The ALJ designated this as Issue 1(f). It only applies to the time period from the February 2008 IEP to November 21, 2008.

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the District failed to provide, and the District has not adequately discussed this in its brief. In any event, we agree with the ALJ that in light of Student's deficits, he required individual S/L sessions to make meaningful educational progress.

The District baldly asserts that the ALJ erred because there was no showing how the ten-minute reduction in services denied Student a FAPE. However, the ALJ fully acknowledged Student's progress, albeit limited, and the S/L services that the District did in fact provide under the February 2008 IEP. Significantly however, the District offered no explanation at the IEP meeting, nor could it explain at the administrative hearing, why it had reduced Student's S/L services. The District has not offered any additional evidence to the Court which might cast light on this decision. Since the 2007 IEP contained the same goals as the February 2008 IEP, the District's offer of services pursuant to the 2007 IEP implicitly confirmed that Student needed sixty minutes to receive educational benefit. Given that the District could not articulate any change of circumstances or rationale for its changed view of Student's needs, the February 2008 IEP offer of reduced services was insufficient. Having provided no showing otherwise, the District has not carried its burden of demonstrating that the ALJ erred.

In light of Student's assessed progress at the time of the February 2008 IEP—his significantly delayed receptive language skills and limited progress in expressive language abilities since the 2007 IEP, and his difficulty functioning in a group therapy environment—the ten-minute reduction in S/L services and the failure to provide Student with individual S/L sessions were not reasonably calculated to confer educational benefit. We **AFFIRM** the ALJ's conclusion on this issue.

***E. Remaining Non-Relief Issues***

The ALJ concluded that the May 1, 2009 and May 15, 2009 IEPs ("May 2009 IEPs") failed to offer Student appropriate OT services.<sup>13</sup> The District merely incorporates its briefing on Issue 1(g), which addressed the District's OT services offer in the February 2008 IEP. We note that by May 2009, unlike in February 2008, the District was providing Student with some direct OT services. The sufficiency of the services offered in May 2009 turns on different facts than those that animated our earlier analysis and the District's briefing on Issue 1(g). Resolution of this issue would have required separate and particularized argument and analysis. Accordingly, the District has failed to carry its burden as the appealing party, and the ALJ's conclusion that the May 2009 IEPs denied Student a FAPE by not offering adequate OT services is **AFFIRMED**.

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<sup>13</sup> This is part of the issue designated as Issue 4 by the ALJ.

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We find it unnecessary to reach the remaining issues.<sup>14</sup> The ALJ does not cite them, or the factual findings underlying them, as the basis for any of the relief that he ordered.<sup>15</sup> Accordingly, any error was harmless.

## V. Relief Ordered

When parents unilaterally seek appropriate replacement services that the District has not provided because of a procedural violation of the IDEA which denies the student a FAPE, the parents have an equitable right to reimbursement. *See Target Range*, 960 F.2d at 1485. Factors to consider in determining whether such equitable relief is appropriate include “the existence of other, perhaps more appropriate, substitute placements, the effort expended by [the] parents in securing alternative placements and the general cooperative or uncooperative position[s] of [the Parties].” *Adams*, 195 F.3d at 1151.

“Compensatory educational services can be awarded as appropriate equitable relief.” *Park, ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9th Cir. 2006). “Compensatory education is an equitable remedy that seeks to make up for educational services the child should have received in the first place, and aims to place disabled children in the same position they would have occupied but for the school district’s violations of IDEA.” *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1125 (9th Cir. 2011) (citation, quotation marks, and alteration omitted). We reject the District’s argument, based on out-of-circuit authority, that compensatory education is only available where the district has flagrantly failed to comply with the IDEA or where egregious circumstances are present. *See Carlisle Area Sch. v. Scott P. By and Through Bess P.*, 62 F.3d 520 (3rd Cir. 1995). The Ninth Circuit has noted that compensatory education is an equitable remedy, and courts have been “creative in fashioning the amount and type of compensatory education services to award.” *Prescott*, 631 F.3d at 1126; *see also Parents of Student W. v. Puyallup School Dist., No. 3*, 31 F.3d 1489, 1497

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<sup>14</sup> For clarity of the record, this includes: Issues 1(b) and 2(b) concerning the District’s failure to designate Student as autistic; Issues 1(h) and 2(g) concerning whether Student’s offer was based on peer reviewed research (we note that the ALJ’s Decision at page 44 contains a typographical error by mislabeling Issue 1(h) as Issue 1(g)); Issue 2(h) concerning the District staff’s training and supervision; Issue 3, which addresses the use of a ‘restraint chair’; and the remaining component of Issue 4, regarding the District’s delay in providing Student with a behavioral support plan.

<sup>15</sup> We note the exception that the factual findings underlying the ALJ’s conclusions as to Issues 1(h) and 2(g) are cited as support for part of the relief order. However, these same factual findings also support the conclusion that Student’s placement was inappropriate (Issues 1(c) and 2(d)). In our analysis of the appropriateness of placement issue, we fully considered all the facts relevant to Student’s placement, including the extent to which peer reviewed methods (such as DTT) were used.

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

## CIVIL MINUTES - GENERAL

Case No.	CV 10-1065-GHK (RCx)	Date	March 15, 2011
Title	<i>Bellflower Unified School District v. Sandra Velez, individually and on behalf of minor E.V., et al.</i>		

(9th Cir. 1994) (“It may be a rare case when compensatory education is not appropriate” and the matter is one of the district court’s discretion).

**A. *District’s Appeal***

We note that the contours of the District’s objection are difficult to understand. It is clear that the District is arguing that because it did not deny Student a FAPE, the relief order must be reversed. However, as to some of the ordered relief, the District may be arguing that the services that it was willing to offer made the alternative services unilaterally secured by the Parents inappropriate. Inasmuch as this is the District’s position, its factual analysis is largely undeveloped, and thus insufficient to carry its burden on appeal.

The District argues that the ALJ committed error when he awarded reimbursement for S/L services because there was no showing of a denial of a FAPE due to the lack of S/L services. We have affirmed the ALJ’s conclusion that Student was denied a FAPE as a result of the District’s violation of the IDEA’s substantive requirements concerning the provision of S/L services. The ordered relief, for reimbursement for those thirty-minute individualized S/L sessions that the District failed to provide from the February 2008 IEP to November 21, 2008, is properly tailored to the IEP’s substantive deficiencies.

Next, the District objects to the ALJ’s award of reimbursement for privately obtained OT services because there was no showing of a denial of a FAPE. We have affirmed the ALJ’s conclusion that the February 2008 IEP and May 2009 IEPs denied Student a FAPE, and the District has not challenged the amount of reimbursement ordered or otherwise analyzed the appropriateness of the services secured by the Parents. We affirm the ALJ’s conclusion that this reimbursement is appropriate to address the FAPE denial.

The District also seeks reversal of the ALJ’s order of reimbursement for ABA and one-to-one aide services. The ABA services were appropriate in light of our conclusion that Student was denied a FAPE based on the non-harmless procedural violation resulting from the failure to assess him for autism. Additionally, our conclusion that Student was denied a FAPE because the IEPs were substantively defective in failing to appropriately place Student also constitutes independent grounds to order reimbursement of the ABA services. The appropriateness of the ABA services is also supported by our conclusion regarding the IEPs’ failure to contain behavioral and social goals, which also denied Student a FAPE. The one-to-one aide services were necessary to allow Student to attend a general education kindergarten, which provided him with mainstreaming opportunities that the District had failed to offer. As we have concluded that Student was denied a FAPE because his offered placement did not constitute the LRE, this relief is also appropriate.

The District objects to the compensatory educational relief ordered by the ALJ, which included an ABA home program through the end of the 2010 calendar year with corresponding supervision and consultation services, and additional individual OT sessions through the end of the 2010 extended

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school year. Given the considerable period of time during which the District was on notice of Student's autism and fine motor deficits, yet failed to properly assess Student for such potential disabilities, this compensatory award is well within the equitable discretion of the ALJ, and is supported by the evidence. The contours of the ABA home program are based on an evaluation by a private organization and Student's demonstrated progress in the same ABA program during the time after the Parents pulled Student out of the District. The program is reasonable and appropriate. Additionally, the OT relief addresses Student's need to receive OT services in individual sessions.

Finally, the ALJ has ordered a placement for Student through the end of calendar year 2010 consisting of one-to-one aide services and OT services. The District asserts that this order was error and it should not be required to provide these services. The ALJ found that the July 2009 IEP offer of placement in a kindergarten SDC with opportunities for mainstreaming was "a substantially similar educational program for kindergarten that had not previously permitted Student to make meaningful educational progress." (ALJ Decision ¶ 141). The ALJ also ordered the District to provide fifty minutes of OT services, with half in a group setting and half in individual sessions. This relief was informed by an independent assessment conducted by Gallagher Pediatric Therapy, Student's demonstrated progress during various permutations of OT service offerings, and expert testimony. The District has not carried its burden of showing that these findings were in error.

Accordingly, the ALJ's relief order is **AFFIRMED** as to each of the issues appealed by the District.

**B. Student's Appeal**

The ALJ awarded the Parents reimbursement for ABA & one-to-one aide services through September 2009, and ordered the District to provide such services going forward from the date of the Decision, issued January 26, 2010, until the end of 2010. There is no explanation for the omission of reimbursement of these services during the period from October 1, 2009 to January 26, 2010. The Administrative Record does not contain any documentary evidence of the Parents' expenses during this period. The Parents have explained that on the date that they were required to exchange evidence with the District, they had only been billed through September 2009. As we see no reason why Student's entitlement to these services during this four-month period was any different from the period directly before or after, we **REVERSE** the ALJ's relief order to the extent that it does not reimburse the Parents for the cost of ABA and one-to-one aide services from October 1, 2009 to January 26, 2010. We **REMAND** to the OAH to allow the ALJ to calculate the Parents' additional entitlement to reimbursement.

**VI. Conclusion**

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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

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Except as to those issues which we did not need to reach, we **AFFIRM** the ALJ's conclusions that Student was denied a FAPE on procedural and substantive grounds. We **REVERSE** the relief order only to the extent that the ALJ did not award reimbursement to the Parents for ABA and one-to-one aide services from October 1, 2009 to January 26, 2010, and in all other respects we **AFFIRM** the ALJ's relief order. We **REMAND** to allow the ALJ to determine the amount of additional reimbursement that the Parents are entitled to receive.

**IT IS SO ORDERED.**

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