

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CUPERTINO UNION SCHOOL
DISTRICT,

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2009120761

DECISION

Administrative Law Judge Peter Paul Castillo, Office of Administrative Hearings, State of California, heard this matter in Cupertino, California, on March 2, 3, 4, and 30, 2010 and April 1, 2010.

Cupertino Union School District (District) was represented by attorney Eliza McArthur. Patti Vidmar, District Director of Pupil Services, and Michael Martinez, Santa Clara County Special Education Local Plan Area, Program Specialist, were present at the hearing.

Student was represented by her father (Father), and mother (Mother), referred to as Parents, who were present on all hearing days. Student was present for a portion of the hearing on April 1, 2010.

The District filed its due process request (complaint) on December 16, 2009. On January 7, 2010, the parties requested and received a continuance of the hearing dates. At the close of the hearing, the matter was continued to April 19, 2010, for the submission of closing briefs. The parties submitted their closing briefs on April 19, 2010, the record was closed, and the matter was submitted for decision.¹

¹ To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Exhibit S-18, and District's brief has been marked as Exhibit D-64.

ISSUES²

1. Did District's November 9, 2009 individualized education program (IEP) provide Student with a free appropriate public education (FAPE) because:
 - a) The proposed goals met Student's unique needs and were based on accurate present levels of performance?
 - b) The offer of placement in a SDC was reasonably calculated to provide Student with meaningful educational progress in the least restrictive environment (LRE)?³

PROPOSED REMEDY

The District requests an order that its November 9, 2009 IEP offer, which includes the goals developed on May 11, 2009, was reasonably calculated to provide Student with meaningful educational progress in the LRE.

CONTENTIONS OF PARTIES

The District's November 9, 2009 IEP proposed that Student spend four hours a day in a second grade regular education class and two hours a day in a special day class (SDC) for mathematics, reading and language arts. The November 2009 IEP also incorporated goals from Student's May 11, 2009 IEP, which the District contends are appropriate to meet her unique needs. The District asserts that the November 11, 2009 offer would provide Student with a FAPE in the LRE based on her present levels of performance from her classroom performance before and during diagnostic placement of the first trimester of the 2009-2010 school year (SY) pursuant to the parties' August 20, 2009 Settlement Agreement (Settlement Agreement), and the May 2009 psychoeducational assessment. The District contends that the information gathered during the diagnostic placement is accurate because the District substantially complied with the diagnostic placement requirements.

Student asserts that the District denied Student a FAPE because it did not comply with the diagnostic placement requirements because it did not implement appropriate goals and resource services. Student asserts that the two May 11, 2009 academic goals were not appropriate because Student had already met these goals by the November 9, 2009 IEP

² These issues are those framed in the February 23, 2010 Order Following Prehearing Conference and as further clarified at hearing. The ALJ has reorganized the issues for this Decision.

³ At hearing, Parents stated that their objection to the District's IEP offer was limited to the District's proposed placement and adequacy of the proposed goals in the areas of academics, social skills and behavior.

meeting. Further, Student contends that the District should have developed additional goals to address her behavior and social skills deficits that interfered with her ability to access the curriculum in a general education classroom. Finally, Student asserts that two hours a day of instruction for mathematics, reading and language arts instruction should occur in a resource specialist program (RSP) classroom because the District's proposed SDC has inappropriate peer models and will not permit Student to make meaningful educational progress.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is a nine-year-old girl who resides with Parents within the geographical boundaries of the District, and attended second grade for SY 2009-2010. Student is eligible for special education services under the category of other health impairment due to her seizure disorder, with a secondary eligibility of speech and language impairment. Student entered the District at the start of SY 2006-2007, and received special education services. Student has not attended a District school since November 10, 2009, when Parents unilaterally removed her from school.

2. Student has a seizure disorder and began to suffer significant seizures during kindergarten, in SY 2006-2007. Student began kindergarten in a regular education class at her home school, but moved to a moderate-to-severe SDC, with a one-to-one aide, at West Valley Elementary School (West Valley), midway through the school year due to an increase in seizure activity and intensity. The SDC was a non-categorical class with approximately eight students with a variety of disabilities. The District provided Student with a one-to-one aide because of the risk to her safety if she suffered a seizure. Student had numerous absences during SY 2007-2008 and SY 2008-2009 due to her seizures. Midway through SY 2008-2009, Student underwent a medical procedure to control her seizure activity. Student's seizure activity and absences decreased after the procedure.

Validity of District's Proposed Goals

3. A district is required to identify a student's unique educational needs and to provide special education and related services designed to meet those needs. An IEP must include a statement of measurable annual goals that are designed to meet the student's needs resulting from his or her disability, and a statement of how the student's progress toward the annual goals will be measured.

4. The District asserts the goals it offered at the November 9, 2009 IEP meeting, which were developed at the May 11, 2009 IEP meeting, and proposed placement in an SDC, were adequate to meet Student's unique needs. The District also argues that it complied with the diagnostic placement requirements, and the information obtained during the assessments accurately reflected Student's present levels of performance. Student asserts that the District did not comply with the Settlement Agreement. Further, Student contends she had met the

District's academic goals at the time of the November 2009 IEP meeting, and that the District did not offer sufficient social skills and behavior goals.

May 11, 2009 IEP Meeting

5. On May 11, 2009, the parties convened for an IEP meeting. Student's second grade teacher, Ivy Rances, discussed Student's progress and present levels of performance. Student's reading, writing and mathematics were at the kindergarten-to-first-grade level. Student could read simple books that had repetitive sentence patterns and illustrations that provided clues about the text. Student could answer basic "wh" questions (who, what, when, where, why) about a story, but needed prompting to remain focused on the story. Student could count to 20 with prompting and perform basic addition and subtraction up to 10 with moderate prompting.

6. In the SDC during the first and second grades, Student interacted appropriately with her classmates and was very social. Student participated in small-group instruction and completed familiar tasks independently. She responded well to social praise. However, Student gave up easily on novel or difficult tasks, and asked for help and needed affirmation before completing them. Student had difficulty working independently as she sought immediate attention instead of waiting for directions, and required prompting or adult attention to remain on task.

7. The District's speech and language pathologist, Nanette Baltazar, conducted a formal speech and language assessment. Ms. Baltazar's assessment corroborated Ms. Rances' classroom observations regarding Student's ability to follow directions and stay on task. Student displayed significant deficits in expressive and receptive language, which made it hard for Student to follow directions and respond properly. Student needed information to be presented in simplified chunks and needed to repeat back what she heard to ensure that she understood the information. Student displayed significant auditory memory deficits and difficulty in answering correctly 15 "wh" questions. In speech and language therapy sessions, Student required moderate to maximum prompting to stay on task, and performed better when information was presented in both auditory and visual ways.

8. Student had met all her goals from the May 2, 2008 IEP. Therefore, the District proposed new academic, classroom, behavior, social skills and speech and language goals in the May 11, 2009 IEP. At the time, Student could answer basic "wh" questions from three-to-four-word sentences with assistance from picture cues. The District proposed a reading goal for Student to read simple six-to-seven-word sentences that contained "consonant-vowel-consonant" (CVC) or "consonant-consonant-vowel-consonant" (CCVC) words, and answer basic "wh" questions with 60 percent accuracy in five consecutive trials.

9. For math, the District proposed that Student answer oral or pictorial math questions with 70 percent accuracy over five consecutive trials. The goal did not state at what grade level the District expected Student to answer.

10. Regarding classroom and behavioral skills, the District proposed that when performing an academic task Student would stay on task for seven minutes, with no more than two prompts, in four out of five trials. Another goal was for Student to follow directions with one prompt when given directions for a non-preferred activity in four out of five trials.

11. The District designed its proposed receptive and expressive language goals to assist Student to follow classroom instructions, categorize items, and improve her auditory memory. In the receptive language goal, Student had to comprehend basic spatial, quantitative, and temporal concepts with 70 percent accuracy in four out of five trials with limited prompting. As of May 2009, Student required moderate to maximum prompting to perform these tasks with 50 percent accuracy. For expressive language, Student needed to group two to three items by similar name or attribute, such as seeing a red truck, red apple and red hat and stating that these items are all red. At this time, Student required moderate to maximum prompting to answer these questions at a four-year-old level.

12. Finally, the District proposed a social skills goal for Student to explain how a procedure is accomplished for a simple three-to-four-step daily task, with visual cues. To meet this goal, Student needed to accurately explain the procedure 60 percent in three out of five trials. The purpose of this goal was for Student to follow classroom instructions.

13. In the May 11, 2009 IEP, the District offered to continue Student's placement in Ms. Rances' SDC for third grade, with 19 percent of the school day in regular education class and extracurricular and non-academic activities.

14. Parents did not consent to any portion of the proposed IEP. Based on Student's decreased seizure activity, Parents believed that the proposed SDC was no longer the LRE for Student. Parents also believed that the District's proposed academic goals underestimated Student's actual abilities, and that Student could attend to classroom tasks for longer periods than the District reported at the IEP meeting.

May 2009 Psychoeducational Assessment

15. Based on Parents' concerns that the District underestimated Student's abilities in developing the proposed goals and offer of placement, the District offered to obtain a psychoeducational assessment from Edward Emling, Ph.D., and Parents consented.

16. Dr. Emling has extensive experience in special education and conducting psychoeducational assessments. He was employed as a school counselor, psychologist and special education coordinator from 1985 through 2006, when he retired. He was employed by the District from 1985 through 1999. After retirement, he has been a private consultant for various school districts, including the District, as a school psychologist to conduct psychoeducational assessments.

17. Before conducting his formal assessment in May 2009, Dr. Emling met with Ms. Rances and observed Student in her classroom. Dr. Emling reviewed Student's educational records, but not the May 11, 2009 IEP. He was aware of Student's medical history and that her seizure disorder affected her school performance.

18. Dr. Emling observed Student three more times in her SDC on the days he conducted formal testing. Student's one-to-one aide assisted Dr. Emling during each testing session. Student cooperated during all three testing sessions and attempted to complete the tasks presented. Dr. Emling tested Student in a separate room on campus with just himself, Student and her aide present. Student required redirection from her aide to remain on task during the testing sessions, and prompting from her aide and Dr. Emling to complete the required tasks.

19. Dr. Emling could not obtain valid standard scores for Student on the Matrix Analogies Test (Matrix) or the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) because Student required prompting that exceeded the level of assistance the testing manuals permitted. On the Matrix, Dr. Emling had to prompt Student and discuss each flip card with her. On the WISC-IV, Dr. Emling practiced the various tasks with Student and provided prompting not permitted by the testing manual. Without these modifications, Student would not be able to perform many of the tasks on the WISC-IV. Although the test scores are not valid due to the testing modifications, the test results do indicate Student's areas of weakness and cognitive ability with significant redirections and prompting.

20. The Matrix is designed to test non-verbal reasoning. Student displayed significant weakness on the Matrix in completing patterns, perceiving pattern changes, ordering items and imagining how two items would appear when combined.

21. On the WISC-IV, Student displayed significant weakness in verbal comprehension in the areas of logical and abstract thinking, vocabulary and answering questions. In the visual subtest, Student required extensive prompting to perform the required tasks of visual sequencing, block design and picture concepts, and even then performed well below her chronological age.

22. In tests of working memory, Student could not understand the concept of listening to a sequence of letters and numbers and repeating back the sequence, even with extensive prompting. With a sequence of just numbers, Student could repeat a two-digit sequence. Finally, regarding Student's processing speed, she displayed weakness in copying designs presented to her and looking at two designs and then scanning a series of designs to see if the designs are in a series.

23. Dr. Emling also administered the Basic Assessment System for Children, 2nd Edition (BASC-II). Dr. Emling only had the questionnaire results from Ms. Rances as Parents did not return the form sent to them. The results of the BASC-II showed that Student

had significant problems maintaining attention, and staying on task, and with functional communication and study skills.

24. Dr. Emling's May 2009 psychoeducational assessment results were consistent with the District's January 2007 and January 2008 psychoeducational assessments regarding Student's need for significant redirections and prompting, cognitive abilities, and deficits in working memory, attention and social skills, and were consistent with Ms. Rances' view of Student's present levels of performance. While Student demonstrated some improvement after the medical intervention, which reduced her seizure activity, her progress was slow.

The Diagnostic Placement

25. On August 20, 2009, the day before the start of SY 2009-2010, the parties agreed to the diagnostic placement for the first trimester. The parties agreed that Student would attend a regular education second grade classroom, and receive RSP services for reading, language arts and math. The District agreed to provide Student with a one-to-one instructional assistant, and occupational therapy (OT) and speech and language services as agreed to in the May 2008 IEP. The parties agreed to hold an IEP meeting before the end of the first trimester to discuss Student's progress during the diagnostic placement and any changes to the District's May 2009 IEP offer of services, goals and placement.

26. Angela Keller has been a RSP teacher at West Valley for seven years, and her RSP classroom is adjacent to Terry Wight's, Student's second grade teacher for the diagnostic placement. After being informed of the diagnostic placement, Ms. Keller reviewed Student's records and started to plan for Student's program during the diagnostic period. During the first two weeks of SY 2009-2010, Ms. Keller assisted Ms. Wight in administering classroom assessments given to all students in Ms. Wight's class and observed Student in the classroom. Ms. Keller provided about one hour a day of RSP support to Student, with her aide, in the RSP classroom. Ms. Keller also worked with the aide on assisting Student with academic instruction.

27. Ms. Keller knew that Parents did not consent to the May 11, 2009 proposed goals, and that Student had met all her May 2, 2008 IEP academic goals. Ms. Keller modified the May 2, 2008 academic goals by increasing the difficulty of sight and CVC words and math problems from kindergarten- to first-grade level. Ms. Keller also worked with Ms. Wight to modify the general education curriculum because Student could not independently complete grade-level work.

28. The parties met on September 11, 2009, at an IEP meeting to discuss Student's progress, and to review her health protocol, OT and speech and language services. Ms. Keller discussed her observations and recommended increasing the RSP services because the one hour a day Student was receiving was not sufficient to meet her unique needs. She recommended that Student receive two hours a day of RSP services in the RSP classroom for reading, language arts and math. Ms. Keller, along with Student's aide, would work with Student from 8:30 a.m. to 9:30 a.m. on math, and 10:20 a.m. to 11:20 a.m. on

reading and language arts. These were times that Ms. Wight's class would be working on those subjects. Parents agreed to the two hours a day of RSP services.

29. At the September 11, 2009 IEP meeting, Student's speech and language therapist, Kristi Iwama, discovered that she was implementing the incorrect IEP as she was providing services pursuant to the May 11, 2009 IEP, to which Parents had not consented. Ms. Iwama had been providing two weekly, 30-minute individual sessions, instead of one half-hour individual session and a half-hour small-group session, as agreed to by the parties. After this IEP meeting, Ms. Iwama provided the agreed-upon speech and language services.

30. None of the parties realized during the diagnostic placement that the OT provider, Denise Seimas, was incorrectly using the May 11, 2009 IEP OT service levels, and not the May 2008 IEP service levels, as agreed to by the parties for the diagnostic placement, which provided for a 30-minute small-group session, once a week. Instead, Ms. Seimas provided 30 minutes a month of consultation services to Student's one-to-one aide, Ms. Wight and Ms. Keller, and direct services to Student during the consultation. While the District did not provide Student with the level of speech and language and OT services agreed to by the parties, Student does not contend that the District's failure to comply invalidated the diagnostic placement.

31. Parents asserted that the District did not comply with the diagnostic placement requirement that the District would provide Student with a one-to-one instructional aide, as the District continued to provide Student with a one-to-one health aide. However, the District demonstrated that there is no difference between a health aide and an instructional aide because both have the same employment qualifications within the District. Additionally, Student's one-to-one aides during the diagnostic placement provided the required academic support to Student under the direction of Ms. Keller and Ms. Wight.

32. During the two hours of daily RSP services, Student sat with her aide, at a desk about three feet away from Ms. Keller's desk. Ms. Keller designed the academic program for Student during the RSP class, which the aide implemented. The aide worked with Student during the two hours, and Ms. Keller worked closely with the aide to ensure that the aide provided adequate academic support. Additionally, Ms. Keller worked directly with Student during the two hours. The District demonstrated that the aides provided Student with adequate academic assistance during the diagnostic placement.

33. The District provided Student with a qualified one-to-one instructional aide, properly supervised by Ms. Keller. Additionally, the District provided Student with appropriate academic instruction during the diagnostic placement. While the District did not provide the agreed-upon speech and language and OT services, the District established that this failure did not impact Student's progress during the diagnostic period, nor impacted Student's present levels of performance at the November 2009 IEP meeting. Therefore, the District substantially complied with the provisions of the diagnostic placement.

November 2, 2009 Demonstration

34. The parties met again on September 30, 2009, to discuss Student's progress. Parents disagreed with Ms. Wight's and Ms. Keller's statements that Student's academic abilities were below grade level, and that she could only complete classwork with significant modifications or individual support. Parents asserted that Student performed grade-level work at home with limited assistance, which supported their contention that the District's academic goals were not adequate, and Student should not be in an SDC. The parties agreed that Parents would set up a demonstration at school to show how they worked with Student when she completed grade-level work.

35. The demonstration took place on November 2, 2009. The night before the demonstration, Student had a mild seizure. As a result, Student was fatigued for a day or two. Parents decided to continue with the demonstration, which they videotaped. The demonstration was delayed to give Student more time to recover from the seizure. Lisa Taormina, school principal, Ms. Keller and Ms. Wight attended the demonstration, which lasted almost an hour.

36. During the demonstration, Student appeared tired and was distracted as she was aware that she was being watched and videotaped. Student performed the math, reading and computer tasks to the best of her abilities during the demonstration. Parents asserted that the demonstration established that Student's math, reading and language arts were at grade level and Student only required minimal prompting and redirection to complete the tasks presented to her.

37. However, a review of the videotape of the demonstration shows that Parents provided extensive prompting to Student and redirection when she was off-task. While Student could write numbers 1 to 100 with minimal assistance, Parents had to constantly prompt her to complete the addition and subtraction problems. When reading sight words, Student had to phonetically sound out the words, such as 'back,' 'frog' and 'flag,' instead of just saying the word. Additionally, Student had to phonetically sound out these words when writing them. Parents had to provide constant praise to Student for her to complete a task.⁴

The Demonstration at Hearing

38. During the hearing, Student demonstrated her ability to complete math problems and read aloud. Student's math and reading ability during the hearing corresponded to that of the November 2009 demonstration. Parents prepared Student for the demonstration by pre-teaching the math problems she would complete. Even with the pre-teaching, Student required extensive prompting from Parents to complete the math problems.

⁴ Student also introduced a more recent video of her reading aloud at home Green Eggs and Ham. The longest words had five letters. Student needed repeated prompting from Father to read the book as Student lost her place. Additionally, Student had to sound out most of the words in the book.

For the reading demonstration, Student sounded out the sight words in the same fashion as in November 2009. Student would stop work until she received praise from Parents.

39. The demonstrations corroborate Ms. Keller's observations of Student's present levels of performance in November 2009, in her and Ms. Wight's classrooms, that Student required extensive prompting to complete academic tasks. Additionally, Student needed constant praise and redirection to stay on-task. While Student had a seizure the night before the November 2009 demonstration, which may have limited her ability to perform the tasks presented, the seizure's impact was not so significant to invalidate the performance as to her ability. Student's performance during the hearing was comparable to her performance levels in class during the diagnostic placement and as demonstrated in the videotape. Therefore, the demonstrations established that Student required extensive prompting and redirection to complete tasks and that her ability was more at a first-grade level than a second-grade level.

November 9, 2009 IEP Offer of Goals

40. The parties met on November 9, 2009, to discuss Student's performance during the diagnostic placement, and Student's future goals and placement. The District proposed the same goals.

41. The District argued that the May 2009 IEP goals were adequate to meet Student's unique needs as of the November 2009 IEP meeting. Parents asserted that the proposed academic goals were set for a too-low level because as of November 2009, Student had met the District's two proposed academic goals. Parents also contended that the District failed to include sufficient social skills and behavioral goals to reduce Student's social skills deficits and off-task and distraction behaviors.

42. Regarding Student's academic levels of performance, Ms. Keller and Ms. Wight persuasively established that Student's math, reading and language arts abilities were in the beginning first-grade level, and that Student required extensive prompting to complete her classwork. Student's performance at the November 2, 2009 demonstration confirmed the District's contention regarding Student's abilities. As of the November 9, 2009 IEP meeting, Student had not met the May 2009 IEP academic goals, and the goals were still appropriate based on Student's unique needs and her present levels of performance.

43. Ms. Iwama, based on her work with Student, supported Student's contention that she required additional goals to address her behavioral deficits and to allow her integration into a general education classroom. According to Ms. Iwama and Student's teachers, Student did not understand the concept of personal space, as she would get too close to her classmates, touch them when they did not want to be touched, and got too close to her classmates when speaking, which bothered her classmates. Based on Ms. Iwama's and the other teachers' observations, Student needed a goal to address this pragmatic language and social skill deficit.

44. The evidence showed that Student needed a social skill goal relating to respecting the personal space of others and a pragmatic language goal of not getting too close to others when in conversation. Therefore, the District's goals failed to adequately address Student's social skills and behavioral deficits that interfered with her ability to attend a general educational classroom.

November 9, 2009 IEP Offer of Ms. Rances' SDC

45. A school district provides a FAPE to a student if its program or placement is designed to address the student's unique educational needs and reasonably calculated to provide meaningful educational benefit in the LRE.

46. The District offered at the November 9, 2009 IEP the same level of OT and speech and language services as in the May 11, 2009 IEP,⁵ and placement in Ms. Rances' SDC for reading, language arts and math instruction. The District proposed placing Student in Ms. Rances' SDC for the reading, language arts and math services that Student had received in the RSP classroom during the diagnostic placement. Student would remain in Ms. Wight's class for the rest of the school day. The District asserted that the November 9, 2009 IEP offer was reasonably calculated to provide Student with meaningful educational progress because she was isolated in the RSP class with the one-to-one instruction and could learn at her ability level in the SDC in a group setting and obtain independence skills.

47. Parents disagreed with the District's offer of Ms. Rances' SDC as they believed that the District did not comply with the diagnostic placement requirements, and that the diagnostic placement was too short to get accurate information regarding Student's progress. Finally, Parents disagreed with the District's present levels of performance presented by Ms. Keller and Ms. Wight because they believed, based on working with Student at home, that she demonstrated grade-level academic abilities and that she required minimal prompting and redirection to complete her work.

48. At the November 9, 2009 IEP meeting, the parties discussed Student's progress in the diagnostic placement. Ms. Keller presented her view of Student's present levels of performance. While Student made progress with the RSP services in reading, language arts and math, her abilities in these areas were still at an early first-grade level. Additionally, Student required one-to-one attention for all activities in the RSP room. Student needed prompting from either her aide or Ms. Keller to stay on-task and complete the assignment, especially when working on non-preferred tasks, and had trouble remembering directions. Student's performance in the RSP classroom was extremely variable from day to day.

⁵ Student stipulated that the District's offer of OT and speech and language services in the IEP is adequate to meet her unique needs.

49. In the general education class, Student required one-to-one assistance to complete academic tasks. Ms. Wight corroborated Ms. Keller's observation that Student's math, reading and writing were at an early first-grade level. Student required extensive prompting and verbal praise from Ms. Wight when she had Student read aloud to her and answer questions. Student's ability to complete first-grade-level math worksheets depended on whether Student was having a good or bad day regarding her memory. Student was spelling and writing at an early first-grade level and she needed prompting to complete these tasks. She had trouble picking the correct answer unless there was a list of possible answers. For science and social studies, Student had trouble completing the lessons, which Ms. Wight modified to Student's comprehension level, and required step-by-step verbal cues to complete in-class assignments.

51. Socially, Student had trouble remembering her regular education classmates' names. Student had trouble understanding that she could not violate the personal space of other students or touch them after being told not to by her classmates. Student understood playground game rules, but would boss around her classmates instead of playing cooperatively. Student was impulsive in that she had trouble waiting for help and continued to ask for help until the teacher came over. Student also liked to sing when working on assignments, which disturbed the RSP and regular education students. Because of Student's inability to remain on-task, Ms. Keller needed to develop a sticker reward system for both the RSP and regular education classes as motivation to keep her on-task.

52. Ms. Keller's observations of Student's performance during the diagnostic period were consistent with Student's performance in Ms. Rances' class in May 2009 and Dr. Emling's psychoeducational assessment. Student's academic abilities were at the first-grade level and she required constant redirection and prompting to stay on-task. While Student made progress, she still required an SDC placement to meet her unique needs as of November 2009.

53. Dr. Emling's assessment supported the District's SDC based on Student's cognitive delays and inability to stay on-task. Dr. Emling is knowledgeable of the District's special education programs through his work with the District. Based on his assessment and observations, Dr. Emling persuasively established that Student needed to attend an SDC with a one-to-one aide, and with mainstreaming with typical peers. Dr. Emling recommended an SDC because, based on her skill level and learning capacity, she required small-group instruction to make adequate educational progress and needed classroom instruction to be presented at her ability level.

54. Student's performance in Ms. Keller's RSP and Ms. Wight's class established that Student's academic abilities were at the first-grade level, and that Student needed group instruction, and not to be isolated in the RSP classroom. Therefore, the District's offer of Ms. Rances' SDC for two hours a day for reading, language arts and math instruction, was reasonably calculated to permit Student to make meaningful educational progress.

Least Restrictive Environment

54. A special education student must be educated with nondisabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. A placement must foster maximum interaction between students with disabilities and their nondisabled peers. The law favors mainstreaming, although it recognizes that a less restrictive setting may not always meet a child's unique needs. For some students, a more restrictive setting may be necessary to provide a student with a FAPE.

55. The test of whether a particular placement is the LRE for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a less restrictive class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the less restrictive class; and (4) the costs of educating the child in a less restrictive classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting.

56. The parties agree that the four hours a day Student would spend in general education is appropriate. However, the District contends that its November 9, 2009 offer of placement in an SDC for two hours a day for mathematics, reading and language arts is appropriate and is the LRE for those subjects. Student contends that the District's proposed placement for those hours does not meet her unique needs, and that placement in an RSP classroom for those two hours a day would be in the LRE for those subjects.

Educational Benefits

57. The District's offer does not reduce Student's time in Ms. Wight's class, just that Student spend two hours a day in an SDC and not an RSP class. While Student received an educational benefit in the RSP classroom, it was a more restrictive setting than an SDC because Student was educated away from other students, instead of being included in group instruction. Based on Student's classroom performance before and during the diagnostic placement and Dr. Emling's assessment, the District established that Student would receive educational benefit in the SDC with its small class size and curriculum modified to meet Student's unique needs. The District demonstrated that the manner of instruction in Ms. Rances' class with small-group tabletop instruction and class group instruction had previously allowed Student to receive educational benefit. Student's present levels of performance in math, reading and language arts were at the early first-grade level, and she needed constant prompting to complete her classwork and redirection to stay on-task. Receiving instruction by herself in the RSP class only reinforced Student's dependence. Learning the same material in a group setting would teach Student independence skills and better prepare Student for group instruction in the general education classroom. Therefore, the District's offer of an SDC would provide Student with academic progress.

Non-academic Benefits

58. Student was isolated from her peers in the RSP classroom for two hours a day. Although there were five or six students in the RSP class, Student did not interact with the students, who were older, because their academic level was closer to their grade level than Student's. Being in an SDC to receive the same level of academic instruction would allow Student to interact with her peers and to learn classroom skills that she could not obtain being isolated in the RSP classroom. Parents asserted that the SDC would be a negative influence on Student because the other SDC students exhibited maladaptive behaviors that Student had and would learn. However, Ms. Keller, who visited Ms. Rances' SDC, established that the students' behavior was not so severe to disrupt Student's ability to learn or that Student would learn behaviors that would impede her ability to remain in a general education classroom. Parents' concern about the students' behavior in Ms. Rances' SDC was not based on accurate information, but rather conjecture.

Classroom Disruption and Cost

59. The other students in Student's RSP classroom had more independence skills than she did and could study quietly with little or no redirection from Ms. Keller. Those students were in the RSP class for additional instructional support, and because they needed a quieter place than their classroom for this support. Student disturbed the other students with her singing and constant verbal requests for assistance when left alone to complete a task. The other students in the RSP class would ask that Student be quiet. In contrast, as Ms. Rances and Ms. Keller credibly testified, Student would not be as disruptive in the SDC because the SDC involves more group interaction for learning. Finally, cost is not an issue regarding whether Student is in either the SDC or RSP.

60. A balancing of the four factors establishes that the SDC is the LRE for Student for instruction in math, reading, and language arts. In either the SDC or the RSP class, Student will achieve educational benefit through specialized instruction. However, the RSP class isolates Student and does not permit her to interact with her peers, especially since the RSP students require a quieter learning environment and Student disrupted the learning of those students. Additionally, the students in Ms. Rances' SDC did not have behavior problems so significant that they would impede Student's academic progress or teach her maladaptive behaviors. Therefore, the SDC for two hours a day for math, reading and language arts instruction is the LRE for Student.

Procedural Requirement

61. A procedural violation of the Individuals with Disabilities in Education Act (IDEA) results in a denial of a FAPE if it impedes the student's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to her child, or causes a deprivation of educational benefits. The parties dispute whether the District's offer for time spent in Ms. Rances' and Ms. Wight's class was sufficiently clear for Parents to make a decision.

62. The District's written IEP offer did not state the percentage of time that Student would spend in Ms. Wight's class or the time spent in Ms. Rances' SDC, which are procedural violations. The District intended that Student's time in Ms. Wight's class would remain the same, approximately four hours a day, and that the remainder, two hours, would be in Ms. Rances' SDC, but did not write the time on the IEP.

63. The conversation in the IEP meeting established that the District merely wanted to move the two hours a day that Student spent in the RSP classroom during the trial period to Ms. Rances' class. Additionally, the District's written offer stated that Student would receive reading, language arts and math instruction in Ms. Rances' class, which was the same instruction she received in the RSP class during the diagnostic placement. Therefore, the District's offer was sufficiently clear that it intended to move Student's instruction for two hours a day in reading, language arts and math from the RSP class to Ms. Rances' SDC. Although the District did not clearly explain on the IEP the percentage of time Student would spend in general education and special education in the written IEP, the District's failure to include this information did not interfere with Parents' ability to participate in the IEP process because Parents were aware of those times.

LEGAL CONCLUSIONS

1. As the petitioning party, the District 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 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. 2010) 592 F.3d. 938, 950-953.) 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. (*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. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in the denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

6. A school district violates the IDEA if it is shown to have materially failed to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815.) "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Id.* at p. 822.) This standard does not require that the child suffer demonstrable educational harm for there to be a finding of a material failure. (*Ibid.*) However, the child's educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided. (*Ibid.*)

7. The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1526.)

Issue 1(a): Did District's November 9, 2009 IEP provide Student with a FAPE because the proposed goals met Student's unique needs and were based on accurate present levels of performance?

8. Pursuant to Factual Findings 5 through 12, 16 through 24, 27, 28, 30 through 33, 35 through 39, 42, 43 and 44 and Legal Conclusions 2 through 6, the District's proposed goals were based on accurate present levels of performance from Student's classroom

performance in the SDC, general education and RSP classrooms and Dr. Emling's assessment. The District obtained accurate information regarding Student's present levels of performance during the diagnostic placement as the District's failure to provide speech and language and OT services, pursuant to the May 2008 IEP, was not a material failure and did not contribute to any lack of academic or behavioral progress. Based on Student's present levels of performance, the District's academic goals were appropriate to meet Student's unique needs as she had not met the May 2009 proposed academic goals at the time of the November 9, 2009 IEP meeting. However, The District's social skills and behavior goals were not adequate to meet Student's unique needs because the District needed to have an added goal to address Student's problem in understanding the concept of personal space.

Least Restrictive Environment

9. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii)(2006).) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a less restrictive class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the less restrictive class; and (4) the costs of placing the student in a less restrictive class.

Issue 1(b): Did District's November 9, 2009 IEP provide Student with a FAPE because the offer of placement in a SDC was reasonably calculated to provide Student with meaningful educational progress in the LRE?

10. Pursuant to Factual Findings 48 through 53, 56 through 60, 62 and 63 and Legal Conclusions 2 through 10, the District's offer of Ms. Rances' SDC for reading, language arts and math instruction, for two hours a day, provided Student with a FAPE in the LRE. The District's offer of Ms. Rances' SDC at the November 9, 2009 IEP was a sufficiently clear offer because Parents knew that the District intended to move the reading, language arts and math instruction time that Student received in Ms. Keller's RSP to Ms. Rances' SDC. Finally, the District's proposed placement in Ms. Rances' classroom was the LRE because Student would receive the same educational benefit as in the RSP classroom, and have more interaction with her peers. The RSP was a more restrictive placement because Student did not have social interaction with other students. Additionally, the District established that the students in Ms. Rances' SDC do not have significant behavior problems that Student would learn. Therefore, the District's offer of placement in Ms. Rances' SDC was reasonably calculated to provide Student with meaning educational progress in the LRE.

