

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SAN MATEO-FOSTER CITY SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2014020951

DECISION

The San Mateo-Foster City School District filed this due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on February 27, 2014, naming Student. The matter was continued for good cause on March 13, 2014.

Administrative Law Judge Adeniyi A. Ayoade heard this matter in Foster City, California, on April 8 and 9, 2014.

Melanie D. Seymour, Attorney at Law, represented San Mateo. John Bartfield, San Mateo's Director of Special Education, attended the hearing as San Mateo's representative. Student's father represented Student at the hearing.

On April 9, 2014, the last day of the hearing, a continuance was granted for the parties to file their respective written closing arguments and the record remained open until April 23, 2014, at 5:00 p.m. Upon timely receipt of San Mateo's written closing argument,¹ the record was closed and the matter was submitted for decision.

¹ Student did not submit a written closing brief, but Parent made an oral statement at the conclusion of the due process hearing on April, 9, 2014.

ISSUE²

Does San Mateo's offer of placement and services described in the April 30 and June 18, 2013 annual individualized education program, as amended on August 30, September 17, and December 13, 2013 (the "disputed annual IEP offer") provide Student a free appropriate public education?

SUMMARY OF DECISION

This decision holds that San Mateo violated Parents' right to meaningfully participate in the development of Student's IEP due to its failure to have all required IEP team members present at the IEP team meetings where San Mateo made the disputed annual IEP offer to student. In this hearing, San Mateo failed to establish that it complied with the procedures set forth in the law, particularly relating to the opportunity of the Parents to fully and meaningfully participate in the development of Student's annual IEP. Because Parents' ability to meaningfully participate in the development of Student's IEP was significantly impeded and a denial of FAPE has resulted, no analysis of the substantive adequacy of San Mateo's IEP offer to Student is required or provided in this decision. Accordingly, this decision does not determine whether San Mateo's substantive IEP offer was reasonably calculated to provide Student with educational benefit, or whether the disputed annual IEP offer provided Student a FAPE in the least restrictive environment.

FACTUAL FINDINGS

Background

1. Student was a 13-year-old girl who resided within San Mateo's geographical boundaries at all relevant times. Student was eligible for special education primarily under the category of autistic-like behaviors, and secondarily under the category of emotional disturbance.

2. Student demonstrated autistic-like characteristics due to her social communication and pragmatic skills deficits, her withdrawal from social situations, and difficulties establishing social relationships in school-based settings. In addition, based on a Kaiser assessment of Student that was obtained by Parents in August 2010, Student's patterns of behaviors qualified her for a diagnosis of oppositional defiant disorder. Her classroom behaviors were often hostile and disruptive, and her ability to progress academically and socially was significantly compromised due to her anxiety about school, her

² The issues have been rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

noncompliance, and impulsivity. Student often became rigid, reactive, irritable, demanding, and difficult.

3. Due to her disability, Student had significant behavioral and social/emotional needs, and had deficits in the areas of socialization and peer interaction. She often made inappropriate comments to peers and adults, and would become aggressive and dangerous to herself and others. Student had received specialized academic instruction, speech and language services (to address her social and pragmatic skills deficits), and academic supports in order to assist her produce to adequate school work. Since at least the 2010-2011 school year, each of Student's IEP's included behavioral services and/or a behavior support plan.

4. During the 2011-2012 school year, Student's IEP placed her in a San Mateo special day classroom for the mild-to-moderately disabled students at Bowditch Elementary School. During that school year, Student had eight behavior incidents for which she was disciplined and/or suspended from school. As a result of one of those behavior incidents that occurred on February 22, 2012 during the 2011-2-12 school year, San Mateo referred Student to law enforcement authorities and Student was involuntarily taken to County Mental Health for involuntary psychiatric evaluation. Shortly after the February 22, 2012 incident, Parents withdrew Student from school and Student was not returned to school until the 2013-2014 school year.³

5. During the 2013-2014 school year, Student was in the seventh grade but, except for the morning of August 27, 2013, Student has not attended school since the 2011-2012 school year. August 27, 2013 was the first day of school for the 2013-2014 school year and Student attended school that day. However, after spending about two hours at school, Student was suspended from school and parents have not returned Student to school since. Parents were concerned that Student's behavioral issues would lead to her arrest or her detention at a juvenile hall.

Disputed Annual IEP Offer

6. Based on the testimony of several witnesses,⁴ the evidence established that Student's annual IEP review meetings were timely noticed, scheduled and held on April 30 and June 18, 2013. The meetings were held prior to the beginning of the 2013-2014 school

³ Student was home-schooled for the entire 2012-2013 school year pursuant to a settlement agreement between the parties.

⁴ At the hearing, San Mateo called seven witnesses to testify regarding the disputed annual IEP offer and its appropriateness for Student. The witnesses included: 1) Student's father; 2) Judith Tichy; 3) Cherie Motobu; 4) Jason Carney; 5) Mr. Bartfield; 6) Karen Stogstram; and 7) Linda Young. Student did not call any witness, but Student's father questioned some of the witnesses regarding the implementation of Student's behavior support plan by County.

year, and San Mateo worked cooperatively with parents to schedule the meetings on mutually agreeable dates.

THE APRIL 30, 2013 IEP TEAM MEETING

7. At the April 30, 2013 IEP team meeting, both parents, San Mateo staff including Cherie Motobu⁵ (San Mateo's school psychologist), Judith Tichy⁶ (San Mateo's Program Specialist) and Jason Carney⁷ (County's school psychologist/program specialist) were present. No general or special education teacher was present at the meeting.⁸

⁵ Ms. Motobu was San Mateo's school psychologist and a member of Student's IEP team. She has a master's degree in school psychology, and a bachelor's degree in psychology with urban education as a minor. Ms. Motobu holds a pupil personnel services school psychology and a pupil personnel services school counseling credentials. As a school psychologist, she has conducted psychoeducational evaluations, attended IEP team meetings, consulted with teachers, parents, and staff regarding students' educational programs. She has developed behavioral interventions and support plans for students, and has provided direct therapy, behavioral supports, and services to students. Ms. Motobu had observed Student in school at least five times, discussed with Student and her teachers, and reviewed her assessments' information, educational records, and IEP's. She was familiar with Student and her needs as a member of Student's IEP team.

⁶ Ms. Tichy has master's degrees in education administration and learning disabilities, respectively. Her bachelor's degree was in social science and special education - emotionally impaired (combined). Ms. Tichy holds California credentials in: 1) administrative services; 2) multiple subjects (general education classes); and 3) special instruction is special education, and has taught students in general and special education environments. Prior to joining San Mateo, Ms. Tichy worked with special needs students since 1974, and has conducted psychoeducational assessments, developed curriculum for handicapped students, and created positive behavior systems and strategies for special needs students and classrooms. Through her work with other IEP team members in developing Student's IEP and her years of work and experience working with special need students, Ms. Tichy was familiar with Student and her unique needs.

⁷ Mr. Carney has been County school psychologist for eight years. He has a bachelor degree in psychology, a master's degree in school psychology, and holds a pupil personnel services school psychology credential. As a school psychologist and program specialist for County, he conducts psychoeducational evaluations, consults with teachers and staff in County's special education classrooms, and works with IEP teams, districts' special education directors, and program specialists when placing their students in County programs. He is the contact person for districts wanting to place students in County schools and programs. He attended Student's April 30, 2013 IEP team meeting because San Mateo wanted to explore placement options for Student in County's programs.

⁸ See further discussion below regarding this issue.

8. At the April 30, 2013 IEP team meeting, the team discussed Student's present levels of performance and unique needs. In order to determine Student's present levels of performance and unique needs, Parents presented an account of how Student was doing in her home-school program during the 2012-2013 school year, and shared information about Student's overall present levels of performance and functioning. Parents shared academic and behavioral information about Student, and reported that Student had a "pretty good" year during the 2012-2013 school year, and was doing well academically. Parents shared that Student continued to have needs in the areas of behavior, pragmatic skills and socialization, and that Kaiser was reevaluating Student. The team reviewed Student's educational records, prior IEP's, existing assessment data, including Student triennial speech and language assessment conducted in February 2012, and her triennial psychoeducational assessment conducted in January 2012, and determined Student's levels of performance and unique needs in all areas.

9. The team determined that in order to receive a FAPE Student required: 1) a structured small instructional setting with a small student-to-teacher ratio; 2) specialized academic instruction by a special educational credential teacher; 3) behavioral supports and social skills training; 4) mainstreaming opportunity for socialization; and 5) training on how to relate with authority figures and accept direction.

10. The team discussed goals, services, supports and placement for Student. Regarding the goals, they determined that Student's 2011-2012 school year goals would be implemented until new goals could be developed for Student during the 2013-2014 school year. Student would continue to receive behavioral services and her IEP would include a behavior support plan. Regarding placement, the team determined that San Mateo's general or special day classes, even with services and supports, had not been adequate to meet Student's behavioral needs and that Student required a different placement. The team considered various placement options for Student, and determined that Student could benefit from a County placement. San Mateo proposed Burlingame as a likely and appropriate placement for Student.

11. Mr. Carney described the Burlingame, the class size, class curriculum, teaching strategies, class structure and supports, as well as the school schedule to the team members. Burlingame was as a middle school classroom designed to serve emotionally disturbed students and those with emotional and behavioral issues. The team determined that intake assessment should begin in order to determine whether Burlingame could meet Student's needs and provide her with a FAPE. As part of the intake process, San Mateo would provide County with Student's educational records including prior years IEP's, assessment reports, and behavior support plan for review, and Parents would visit Burlingame to observe the proposed placement.

12. Parents agreed to visit Burlingame as part of the intake process and the team agreed to continue the IEP team meeting in order to give parents time to visit Burlingame, and for County to complete their review of Student's records and determine whether Burlingame could in fact meet Student's needs. Accordingly, the development of Student's

IEP was not completed on April 30, 2013. The evidence established that the continuation of the April 30, 2013 IEP team meeting did not impact, and would not have impacted Student's ability to receive a FAPE during the 2013-2014 school year, as the school year did not begin until August 2013. After the April 30, 2013 IEP team meeting, parents visited Burlingame, and Mr. Carney visited Student⁹ as part of the intake and evaluation process.

JUNE 18, 2013 IEP TEAM MEETING

13. The continued IEP team meeting took place on June 18, 2013 in order to complete Student's IEP for the 2013-2014 school year. Student's father, Ms. Motobu, Ms. Tichy, and Mr. Carney attended the meeting. At this meeting also, no general or special education teacher attended the IEP team meeting.

14. At the June 18, 2013 meeting, Mr. Carney again described Burlingame, and the team discussed how to prepare for Student's transition back to school. The team agreed that Burlingame could meet Student's unique needs and provide her with a FAPE. San Mateo formally offered Burlingame to Student as her placement for the 2013-2014 school year. Parents consented to Student's placement at Burlingame, and to the full implementation of San Mateo's April 30 IEP, and June 18, 2013 IEP offer.¹⁰ The team agreed that Burlingame's special day class teacher, Karen Stogstram should meet with Student prior to the first day of school as part of the transition plan.

PROCEDURAL REQUIREMENTS FOR IEP TEAM MEETINGS

REQUIRED MEMBERS OF IEP TEAM¹¹

15. However, at the April 30 or June 18, 2013 IEP team meetings, there was no special or general education teacher "*of the child*" as Student had not been in school since around March 2012.¹² The evidence failed to show that the teachers were excused by Parents

⁹ Mr. Carney met Student at her mother's café, and not at Burlingame, in order to ensure that Student was comfortable and due to Student's anxiety about school.

¹⁰ At the hearing, Student's father testified that Parents agreed with the proposed placement because they wanted to see if it would work for Student.

¹¹ See Education Code section 56341 for the list of required individuals at an IEP team meeting.

¹² The law does not just require that a special education teacher, and/or a general education teacher be present at the IEP team meeting, but that the special education teacher and/or the general education teacher of "*the*" (Student) must be present. The general education teacher is a required member of the IEP team if Student would or may be participating in the regular education environment. It is unclear from the record whether

from attending the meetings, or that any was invited by San Mateo. While Student did not have a general education or special education teacher as of April 30, 2013, San Mateo failed to explain why other general education and special education teachers were not invited to attend Student's annual IEP team meeting, especially since Student's IEP included a 20 percent mainstreaming time, and it was clear that Student would be participating in the general education environment/curriculum.

16. Because of this failure, there was no teacher present at the April 30 or June 18, 2013 IEP team meetings that could explain how Student could meaningfully engage with, and benefit from County or San Mateo's curricular instructions and program, and how she could benefit from both the general education and special education learning environments. In this hearing, while the evidence showed that Mr. Carney and Ms. Tichy were knowledgeable and familiar with County's and San Mateo's special and general education curriculum, respectively, San Mateo failed to establish that either of them, or any other person, took on the role of a special education or general education teacher at the meetings in order to adequately explain the proposed placement and educational programs to Parents.

17. The failure to have the teachers present at the IEP team meetings was a significant procedural violation, which resulted in a substantive denial of FAPE to Student. Because there was no teacher present at the IEP team meetings to explain the instructional implications of San Mateo's offer to Parents, and to address any question that Parents might have had about San Mateo or County's programs being considered for Student, Parents were deprived of the opportunity to meaningfully participate in the decision making process relating to the development of Student's annual IEP. Certainly, any discussion regarding the goals, behavior support plan, placement and services, or whether any changes could have been made to Student's IEP at the April 30 or June 18, 2013 IEP team meeting would also have been impacted by the failure to have the teachers present. Accordingly, the ability of Parents to meaningfully participate in the development of Student's IEP was compromised at the April 30 and June 18, 2013 IEP team meetings.

18. The evidence showed that all required individuals did not attend the April 30 or June 18, 2013 IEP team meeting, as no teacher was present at either meeting. The failure to have a general education or special education teacher present at the April 30 and June 18, 2013 IEP team meetings was a significant procedural violation under the law, and is found to have significantly interfered with Parents' right to meaningfully participate in the IEP development process. This failure was a fatal blow to San Mateo's attempt to develop an appropriate IEP offer for Student, and the failure has led to denial of FAPE to Student.

19. Therefore, because Parents right to meaningfully participate in the IEP

Student's home-school teacher was a credentialed general or special education teacher, or whether the teacher was invited to the April 30, 2013 IEP team meeting.

decision-making process was significantly impeded, and FAPE was denied to Student on this procedural ground, no substantive analysis of San Mateo's April 30 and June 18, 2013 IEP offer could be made at this time. San Mateo first had to cure the above failure before such evaluation of its substantive IEP offer could be warranted.

AUGUST 27, 2013 INCIDENT AND STUDENT'S REMOVAL FROM SCHOOL

20. On August 27, 2013, Student returned to school and attended Burlingame. Student was only in school between 90 and 150 minutes, as she was suspended that day for engaging in "aggressive and unsafe behaviors."¹³

AUGUST 30, SEPTEMBER 17, AND DECEMBER 13, 2013 IEP AMENDMENTS

21. After Student's suspension and removal from school, San Mateo convened IEP team meetings on August 30, September 17, and December 19, 2013 in order to review and/or revise Student's IEP and the team's plan for transitioning Student back to school, and to determine whether Burlingame continued to be an appropriate placement for Student.

22. The August 30, 2013 meeting was attended by Father, Mr. Carney, Ms. Stogstram, Linda Young, Ms. Tichy, and Tracy Bonaduce, school psychologist. While Ms. Stogstram, Student's special education teacher, attended this meeting, there was still no general education teacher at this meeting even though Student's IEP continued to state that Student would participate in the general education setting for 20 percent of her school day.

23. The record from the August 30, 2013 IEP team meeting showed that Student's father agreed to excuse the participation of the general education teacher at the August 30, 2013 IEP team meeting "because area of curriculum or related services" that would have required the participation of a general education teacher "was not being discussed or modified" at the meeting. The evidence showed that because Student's general education participation or mainstreaming opportunities was not discussed at the August 30, 2013 meeting, the viewpoint of a general education teacher regarding Student's educational program, placement and services, and her participation in the general education setting was still not obtained. Accordingly, the fatal violation relating to San Mateo's failure to have a general education teacher participate in the development of Student's IEP continued. In addition, other than discussing the August 27, 2013 incident at Burlingame, and offering to reduce Student's school day, there was no evidence showing that the IEP team reviewed Student's IEP goals with Ms. Stogstram on August 30, 2013, or that Ms. Stogstram provided any input regarding the goals, or as to whether or how those goals could be implemented in her classroom. Based on the forgoing therefore, the fatal flaw relating to

¹³ A detailed analysis of the events of August 27, 2013, Student's behavior support plan, as contained in Student's IEP, and as implemented on August 27, 2013, is unnecessary and not discussed herein due to the denial of FAPE found above regarding San Mateo's April 30 and June 18, 2013 IEP offer.

San Mateo's April 30 and June 18, IEP offer continued even after the August 30, 2013 IEP team meeting.

24. The team met again on September 17, 2013 in order to discuss Student's placement as Parents had not returned to school since August 27, 2013. The September 17, 2013 meeting was attended by Parents, Mr. Carney, Ms. Tichy, and Ms. Motobu. There were no general or special education teacher present at the meeting, and the evidence failed to show that they were excused by Parents from attending the meeting. Accordingly, the violation regarding San Mateo's failure have Student's teachers present at Student's IEP team meeting continued.¹⁴

25. Student's IEP team met for a final time on December 13, 2013. Student's father, Mr. Carney, Ms. Motobu and Ms. Young attended the meeting. There were no general or special education teacher present at the meeting. Just like the August 30, 2013 IEP team meeting, Student's father agreed to excuse the attendance of the general education teacher from the December 13, 2013 meeting. The reason for the excusal was the same as was given for the excusal of a general education teacher from the August 30, 2013 IEP team meeting.¹⁵ Thus, at the December 13, 2013 IEP meeting also, Student's mainstreaming time or participation in general education setting was not discussed, and the opinions or recommendations of a general education teacher regarding Student's educational program, placement and services, and her participation in the general education setting were still not obtained. Therefore, the fatal violation relating to San Mateo's failure have a general education teacher participate in the development of Student's IEP was not cured at the December 13, 2013.

26. At the December 13, 2013 meeting, Father requested that Student be provided home-hospital instruction for the remainder of the 2013-2014 school year as "home schooling was working for Student", and Student was not ready to return to school. San Mateo disagreed with Parents' request because it believed that home-hospital instruction was not appropriate for Student due to her social skills and pragmatic skills needs, and the concern that home-hospital instruction was not the least restrictive environment for Student. San Mateo thus restated its FAPE offer for Student as contained in the disputed IEP. Because the April 30 and June 18, 2013 IEP offer denied Student a FAPE due to the significant procedural violation that impeded Parents' right to meaningfully participate in the IEP development process, merely restating the IEP offer did not cure the procedural violation that denied Student a FAPE.

¹⁴ On October 15, 2013, Mr. Bartfield sent to parents a prior written notice explaining San Mateo' IEP offer, and expressing concern about Student's continuing absence from school. Parents responded on November 1, 2012 requesting home-hospital instruction for Student.

¹⁵ That is, area of curriculum or related services that would require the participation of a general education teacher would not be discussed or modified at the meeting.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*¹⁶

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. §§ 1400 et. seq.; 34 C.F.R. §§ 300.1 (2006) et seq.; Ed. Code, §§ 56000, et seq.; Cal. Code Regs., tit. 5, §§ 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible 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(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.] (*Mercer Island.*) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Mercer Island, supra*, 592 F.3d at p. 950, fn. 10.)

¹⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, San Mateo has the burden of persuasion.

Does San Mateo's offer of placement and services described in the April 30 and June 18, 2013 IEP, as amended on August 30, September 17, and December 13, 2013, offer Student a FAPE?

5. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, there must be a determination whether a district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. 176, 206-207.) Second, there must be a determination of 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.*) If the school district's program addresses a student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if student's parent preferred another program that would result in greater educational benefit to the student. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

ANNUAL REVIEW OF IEP

6. A school district must hold an IEP team meeting for a special education student at least annually to review the IEP to determine whether the annual goals are being achieved, to make any necessary revisions to address any lack of expected progress, and to consider new information about the student. (20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b)(1); Ed. Code, §§ 56380, subd. (a)(1) & 56343, subd. (d); *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055-56.)

REQUIRED MEMBERS OF AN IEP TEAM

7. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent; and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)

8. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification,

assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. §1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Accordingly, at the meeting, parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1.)

9. The Ninth Circuit has held that regular education teachers often play a central role in the education of children with disabilities. (*M.L. v. Federal Way School District* (9th Cir. 2005) 394 F.3d 634, 643 (*M.L.*) The *M.L.* court found that the "plain meaning of the terms used in section 1414(d)(1)(B) compels the conclusion that the requirement that at least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory - not discretionary." (*M.L.*, *supra*, 394 F.3d at p. 643.) In the case of *R.B. v. Napa Valley Unified School Dist.* (9th Cir, 2007) 496 F.3d 932), the Ninth Circuit determined that it is only necessary for a general education teacher who has instructed the child in the past or who may instruct the child in the future to be present. (*Id.* at pp. 938-940.)

PARENTAL PARTICIPATION IN THE DECISION-MAKING PROCESS

10. A parent has meaningfully participated in the development of an IEP when he or she is informed of their child's problems, attends the IEP meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

CONSEQUENCES OF PROCEDURAL ERROR

11. The Supreme Court has recognized the importance of adherence to the procedural requirements of the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 205-206 [73 L.Ed.2d 690] (*Rowley*).) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a 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); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

12. San Mateo has a burden in this case to prove that it complied with the procedural requirements of the IDEA. The IDEA clearly requires the presence of a special education teacher at the IEP team meeting. If a special education teacher who has not

recently worked with the pupil is not available, the school district must try to have a special education teacher who has at some time worked with or is familiar with the pupil present. If that is still not possible, the school district must have available a special education teacher that is at least familiar with the possible special education placements that may be offered to the pupil. Here, San Mateo failed to have any special education teacher present.

13. A school district must also have a regular education teacher present at the IEP team meeting if the pupil is likely to have some part of their school day in the general education setting. Here, Student's placement called for 20 percent of her school day to be within the general education setting. San Mateo failed to have any regular education teacher present at any of the IEP team meetings subject to this hearing.

14. Because there were no teachers present at any of the team meetings (except that a special education teacher attended the August 30, 2013 IEP team meeting), there was no teacher at the IEP team meeting to explain to Parents the instructional implications of San Mateo IEP offer of program and services to Student. No teacher was available at the meetings to answer any question that Parents might have about San Mateo or County's placements being considered for Student, and to evaluate the adequacy or appropriateness of Student's goals, behavior support plan, placement and services, or whether any changes to Student's IEP were warranted at the time. Accordingly, the ability of Parents to meaningfully participate in the development of Student's IEP was significantly impeded at each of the IEP team meetings for the failure to have a general education teacher at the meetings, and for the failure to have a special education teacher present at all, but one, IEP team meetings.

15. While Parents initially accepted the April and June 2013 IEP offer, there is no indication that Parents were either requested to or, knowingly waived the participation of the requisite teachers and critical members of the IEP team at either the April or June 2013 IEP team meeting. As the evidence established, within hours of the implementation of the IEP developed at the April and June 2013 IEP team meetings, Student was suspended and Parents no longer agreed with the placement offer.

16. Overall, the evidence established that Parent's opportunity to meaningfully participate in the decision-making process regarding the development of San Mateo's IEP offer at issue in this case, and the provision of a FAPE to the Student, was significantly impeded. These procedural violations significantly impeded Student's right to a FAPE, and a denial of a FAPE to Student is found on procedural grounds. For these reasons, San Mateo failed to meet its burden of demonstrating by a preponderance of the evidence that it offered Student a FAPE pursuant to its April 30 and June 18, 2013 IEP, as amended on August 30, September 17, and December 13, 2013.

17. Based on the preponderance of all evidence in this case, the evidence failed to show that the disputed annual IEP offer was reasonably calculated to allow Student to obtain educational benefit, or that it offered Student a FAPE in the least restrictive setting.

ORDER

San Mateo's April 30 and June 18, 2013 IEP offer, as amended on August 30, September 17, and December 13, 2013, cannot be found to constitute an offer of FAPE in the least restrictive environment for Student, and as such, San Mateo may not implement it without parental consent.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on the sole issue presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: May 22, 2014

/s/

ADENIYI A. AYOADE
Administrative Law Judge
Office of Administrative Hearings