

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

STANISLAUS UNION SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2015040932

DECISION

Stanislaus Union School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on April 22, 2015, naming Parents on behalf of Student. On May 11, 2015, OAH granted a continuance.

Administrative Law Judge Ted Mann heard this matter in Modesto, California, on May 26, 2015, and May 27, 2015.

Diane Beall, Attorney at Law, represented District. Regina Hedin, Director of the Stanislaus Special Education Local Plan Area, attended the hearing on behalf of District.

Neither Student nor any representative on his behalf appeared at the hearing.¹

OAH granted a continuance for District to file written closing arguments. The record remained open until Monday, June 15, 2015. Upon timely receipt of the written closing arguments, the record closed and the matter was submitted for decision.

¹ Father represented Student at the prehearing conference, stated that Parents would attend the hearing, obtained a one week continuance of the hearing, and confirmed an interpreter for Mother. During a telephone call with OAH staff on the morning of May 26, 2015, Father stated that Parents would not attend the hearing. Neither Parents nor Student attended either day of the hearing.

ISSUES²

1. Did District comply with the procedural requirements of the Individuals with Disabilities Education Act and related laws in holding Student's annual individualized education program meeting in the absence of Student's parents?
2. Is Student no longer eligible for special education and related services, and may District exit Student from, and cease providing him, special education and related services?

District seeks answers in the affirmative for both of the above issues.

SUMMARY OF DECISION

District met its burden of proof in establishing that District complied with the procedural requirements of IDEA when it held an IEP meeting on February 24, 2015, in Parents' absence. District made reasonable, repeated efforts to secure Parental attendance, but Parents actually and constructively refused to attend, and their refusal amounted to a waiver of a claim of a procedural FAPE violation arising out of their non-attendance. District also met its burden of proof that Student was no longer eligible for special education and should be exited from the District's special education program.

FACTUAL FINDINGS

Jurisdiction

1. At the time of the hearing, Student was a six-year and eight-month-old boy who resided in the District at all relevant times, and had been made eligible for special education under the category of Autism Spectrum Disorder. Student did not have a secondary eligibility category. He originally entered District's special education program on September 25, 2011, at the time of his third birthday.

Background and Educational History

2. Student was first diagnosed with Autism Spectrum Disorder in August of 2010, thereafter qualifying for special education upon his third birthday, as noted above. Student received Early Intervention Behavior Therapy service through Behavioral and

² The issues have been rephrased and reorganized 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.)

Educational Strategies, a nonpublic agency. He also briefly received early intervention services through another nonpublic agency named Therapeutic Pathways. During the 2013-2014 school year, Student attended a District general education transitional kindergarten class with the assistance of a one-to-one paraprofessional aide, along with other services and accommodations. During the 2014-2015 school year, Student attended a District general education kindergarten class with a one-to-one paraprofessional aide and other services and accommodations as per his February 18, 2014 and May 14, 2014 IEP's, which contained goals in the areas of language, reading, mathematics, social skills, and emotional management.

District's August 2014 Assessment Plan

3. Student's triennial assessment and his annual IEP were due on or before September 21, 2014. Michele Wolf, Assistant Director of Student Services for District, sent Father an assessment plan by email on August 20, 2014. The assessment plan proposed District assessments by a school psychologist, resource specialist, speech and language pathologist, and an autism inclusion specialist. Father objected to the assessment plan as he wanted to attend each assessment to make sure that there were no problems with the assessors.

4. Ms. Wolf attempted to allay Father's concerns by holding a meeting on September 11, 2014, with the Father and each of the proposed assessors. Attendees at the meeting were Ms. Wolf, Father, school psychologist Sue Montgomery, resource specialist/special education teacher Kathi Ellis, speech and language pathologist Brittany Top, and autism inclusion specialist Ronda Howser. The meeting lasted approximately two hours. Father questioned each of the proposed assessors aggressively about their qualifications and credentials.

5. At the conclusion of the meeting, Father continued to insist that he needed to attend the assessments, and requested a different psychologist than Ms. Montgomery. Ms. Wolf offered to have District school psychologist Chad Andreoni assess student instead of Ms. Montgomery, but declined to allow Father to observe the assessments out of concern that his presence would invalidate the assessment results. Ms. Wolf did offer that the one-to-one paraprofessional that worked with Student could be used as a neutral observer, but Father rejected this idea. Father signed the assessment plan, but noted on the plan that "a parent must be present during assessment but not visible to child."

6. District filed a request for due process seeking an order from the Office of Administrative Hearings that the assessments could be undertaken without parental consent. The parties subsequently reached a settlement wherein Parents would not attend the assessments, but the paraprofessional could attend and stay in the background. As part of the settlement, the parties agreed that the assessments would be audio recorded, and District would provide Parents with the audio recordings and the assessment reports 10 days in advance of Student's IEP meeting. Mr. Andreoni was substituted for Ms. Montgomery in the revised assessment plan. Father signed the revised assessment plan on October 22, 2014.

Assessments Pursuant to Revised Assessment Plan

7. Following the agreement to the revised assessment plan, the assessments were conducted by the various assessors. The assessments were audio taped and the tapes turned over to District by the individual assessors.

Resource Services and Academic Achievement Testing

8. Kathi Ellis provided Student with resource specialist services beginning in August 2014. She provided resource services to Student using both push-in and pull-out models. She also conducted academic achievement testing of Student in Fall 2014. Ms. Ellis has been a special education teacher with District for 10 years, and has been a District resource specialist for five years. She holds both mild/moderate and moderate/severe special education teaching credentials. Prior to working as a resource specialist, she taught a severely handicapped class for three years for the Turlock Unified School District that included students with autism. She has significant training and experience working with autistic students and is very familiar with behaviors displayed by children with autism including resistance to change, repetitive behaviors, obsession with particular objects, sensory issues, and language delays. She did not observe such behaviors being displayed by Student during her work with him during the 2014-2015 academic year.

9. Ms. Ellis conducted academic achievement testing of Student over four sessions on October 31, 2014, November 7, 2014, November 14, 2014, and November 17, 2014. Four sessions is a typical time period for conducting the assessments for a child of Student's age. She recorded the testing session and Student's one-to-one aide was present for each testing session. Her report was issued on December 1, 2014.

10. Ms. Ellis administered three tests to Student, including the Test of Early Reading Ability-Third Edition; the Test of Early Mathematics Ability; and the Test of Written Language-Second Edition. She compared his academic achievement scores with his performance on tests of his intellectual ability and concluded that Student did not have a severe discrepancy between these two areas. In order to have a severe discrepancy, and based upon his test scores, Student had to have more than an approximately 20 point variance between his cognitive testing scores and his academic achievement scores. As a result, she concluded that Student did not qualify for special education under the category of specific learning disability.

Psychoeducational Assessment

11. Chad Andreoni, M.A., conducted a psychoeducational assessment of Student in Fall 2014, when Student was approximately six years old and in kindergarten. He issued a report of his findings and conclusions on November 25, 2014. Mr. Andreoni received his bachelor's degree from the University of California at Irvine in psychology, and held a master's degree in school psychology. He obtained a Pupil Personnel Services credential in 2004. He has been employed by District for nine years in the capacity of school

psychologist. Prior to working for District, he worked for the Pomona Unified School District for two years. Mr. Andreoni has conducted approximately 50 assessments of students with autism, and is knowledgeable in the most current educational criteria in California for eligibility under autism.

12. In conducting the assessment, Mr. Andreoni utilized materials and procedures for assessment that were selected and administered so as not to be racially, culturally, or sexually discriminatory and were considered valid and reliable for his evaluation. In preparing his findings and making his conclusions, he conducted a comprehensive review of Student's cumulative file records including prior assessments and other educational records, including academic performance records. Student's history noted standardized testing and a parent questionnaire that found Student within classification range of an Autism Spectrum Disorder in November 2013. Student was also diagnosed with Attention Deficit Hyperactivity Disorder-Mixed Type in 2013. Mr. Andreoni also conducted observations of Student in different school settings, interviewed his general education teacher, reviewed questionnaires completed by Student, Father, and the teacher, reviewed Student's performance on tests of academic functioning administered by Ms. Ellis, and administered a battery of standardized tests.

13. Mr. Andreoni observed Student in different school-based settings a total of four and one-half hours over five days: October 31, 2014, November 4, 2014, November 7, 2014, November 17, 2014, and November 20, 2014.

14. On October 31, 2014, Mr. Andreoni observed Student for a total of one hour during recess and a classroom Halloween party. On the playground, Student was observed engaging in reciprocal play activities with peers and classmates. Student demonstrated a wide range of gestures, facial expressions, and imitative play with peers while maintaining appropriate social interactions and personal space. At the conclusion of recess, Student transitioned easily from play activities to a classroom setting as he lined up appropriately with his classmates and walked back to class as directed.

15. Back in the classroom, Student and his classmates held a Halloween party. During the social activity, Student appeared at ease while conversing with classmates and enjoying cupcakes and candy. After the party, Student participated in a peer share activity with his classmates, discussing likes and dislikes about Halloween costumes and candy. Student had no difficulty both sharing his thoughts and listening to those of his classmates.

16. During the October 31, 2014 observations, Student did not require any assistance or prompting from his one-to-one aide to either participate in play and social interactions or to engage in classroom activities. Similarly, Student did not require the assistance of the one-to-one aide in making transitions from one activity to the next.

17. On November 4, 2014, Mr. Andreoni observed Student for a total of one hour of classroom activities, lunch, lunch recess, and additional classroom activities. The observer entered the classroom and was greeted by Student who smiled, waved, and gave a

“thumbs up” gesture. During a calendar activity, Student paid proper attention to the substitute teacher and responded appropriately to questions. Student then easily transitioned to lining up for lunch.

18. At lunch, Student had no difficulty following established rules and procedures, nor did he exhibit any sensory issues related to food, lighting, or noise level in the cafeteria. During lunch recess, Student engaged in social play with peers on the yard and on the slides. He then transitioned back to the classroom without difficulty. Following recess, the class engaged in a circle time activity in which Student was attentive, cooperative, and participatory.

19. During the November 1, 2014 observations, Student did not require any assistance or prompting from his one-to-one aide to either participate in play and social interactions or to engage in classroom activities. Similarly, Student did not require the assistance of the one-to-one aide in making transitions from one activity to the next.

20. On November 7, 2014, Mr. Andreoni observed Student for a total of one hour of independent classroom activities and physical education. Initially, Student was observed while he did independent seat work at his desk completing a worksheet. He worked diligently, followed directions, and remained focused on his work throughout the activity. At one point, he raised his hand to ask a question about the assignment. Following the conclusion of the independent work, Student cleaned up his work area and placed his work in the proper place for it and then transitioned to his physical education activity.

21. During the physical education activity, Student stood in line, listened to directions, and waited appropriately for his turn at the activity. It was a team activity and Student was observed giving praise and expressing happiness at his teammate’s success, and exhibiting good sportsmanship during personal or teammates’ mistakes or team losses. Student demonstrated a wide range of socially appropriate facial and emotional expressions during the social activity.

22. During the November 7, 2014 observations, Student did not require any assistance or prompting from his one-to-one aide to either participate in play and social interactions or to engage in classroom activities. Similarly, Student did not require the assistance of the one-to-one aide in making transitions from one activity to the next.

23. On November 17, 2014, Mr. Andreoni observed Student for a total of 45 minutes of independent seat work on a Thanksgiving art project followed by a group art activity in the classroom. During the independent work, Student demonstrated appropriate fine-motor coordination while following directions, working attentively, and cleaning up after finishing his work. He then easily transitioned to the group activity at one of the classroom centers that involved painting.

24. During the group activity, Student worked cooperatively with his neighbors, including sharing watercolors and cleaning paintbrushes. Student followed directions, demonstrated creativity in his artwork, and raised his hand appropriately when needing assistance completing the task.

25. During the November 17, 2014 observations, Student did not require any assistance or prompting from his one-to-one aide to engage in various classroom activities. Similarly, Student did not require the assistance of the one-to-one aide in making transitions from one activity to the next.

26. On November 20, 2014, Mr. Andreoni observed Student for a total of 45 minutes of classroom instructional activity. During the activity, Student briefly lost focus and picked at his fingernails, but was able to redirect himself, and respond correctly when called upon by the teacher. He did not require assistance or prompting from his one-to-one aide to engage in the classroom activity, nor did he require the one-to-one aide to redirect himself when his attention wavered.

27. During the five observations, Student exhibited the ability to perform all school-related tasks and activities independently. He did not need the one-to-one aide at any point to follow directions, complete assignments, follow classroom rules and routines, interact with others in a socially appropriate manner, and transition between activities. Student did not exhibit any significant impairment in verbal or nonverbal communication with either peers or adults. Likewise, he exhibited a wide range of socially appropriate behaviors with both peers and adults. Student did not exhibit any unusual responses to sensory experiences, nor did he appear to engage in any repetitive activities or stereotyped movements.

28. Mr. Andreoni interviewed Student's general education teacher, Amy Rank. She reported that Student is very bright and quite capable academically. He is somewhat resistant to change, and becomes upset if he misses a classroom activity. When he gets in trouble, he tends to shut down or act out. He also can lack awareness or understanding of others' emotions, ask questions that are off topic, and miss some social cues. However, these weaknesses are consistent with those typically found in his age/peer group, and are therefore unremarkable.

29. Mr. Andreoni assessed Student's cognitive functioning using the Kaufman Assessment Battery for Children, Second Edition in two testing sessions on November 6, 2014 and November 12, 2014. The Kaufmann Battery was culturally appropriate for Student and was administered in accordance with the publisher's directions. Student's one-to-one aide was present during the administration of the assessment, but did not amount to a distraction to Student that would affect the validity of his scores. Student's scores were on the average range in the different ability clusters and subtests of the Kaufmann Battery, ranging from the 25th percentile (Word Order) to the 75th percentile (Conceptual Thinking). Student's scaled score, assessing overall cognitive functioning, was 100 on the Mental Processing Index, placing it in the 50th percentile.

30. Mr. Andreoni assessed Student's visual motor skills using the Beery Developmental Test of Visual-Motor Integration, Sixth Edition on November 6, 2014. The test assesses the ability of the eyes and hands to work together in smooth, efficient patterns, and requires the ability to translate visual perception into motor functioning. The Beery assessment was culturally appropriate for Student and was administered in accordance with the publisher's directions. Student's one-to-one aide was present during the administration of the assessment, but the aide's presence did not affect the validity of Student's score. Student's standard score was 98 which equates to an average score and a percentile rank of 45th.

31. Mr. Andreoni assessed Student's adaptive behavior using the Vineland Adaptive Behavior Scales, Second Edition to measure the personal and social skills of Student. The Vineland Scales are designed for individuals from birth to adulthood and assesses the relative adaptive behavior of students to typical peers in four domains: Communication, Daily Living Skills, Socialization, and Motor Skills. Student's scores were derived by scoring assessment forms filled out by both Father and Ms. Rank. The scores from the teacher showed that Student was functioning within range of average or typical peers in a classroom setting. The scores from Father showed that Student was performing below average when compared with peers in a home setting.

32. Mr. Andreoni used the Autism Spectrum Rating Scale to obtain a norm-referenced assessment based upon a national sample that is designed to identify symptoms, behaviors, and associated features of the full range of Autism Spectrum Disorders. Mr. Andreoni scored the rating forms filled out by Ms. Rank and Father in accordance with the publisher's instructions. Ms. Rank rated Student between "slightly elevated" and "average." Father rated Student "slightly elevated."

33. Based upon his review of testing, scales, interviews, observations, and records, Mr. Andreoni concluded that Student was not eligible for special education under any of the categories of autism, other health impairment, or specific learning disability. In concluding that Student did not qualify for special education under the category of autism, Mr. Andreoni found that Student did not exhibit significant autistic-like behaviors in the educational environment such as inappropriate use of verbal and non-verbal language, impairments in socialization with peers and adults, and engagement in repetitive activities and stereotyped movements. Although both Parents' and teacher's Rating Scales found some autistic behaviors, those behaviors did not adversely affect Student's educational performance based upon observations of Student, Student's first trimester kindergarten grades, and Student's performance on tests of ability in reading, math, and written language.

34. In concluding that Student did not qualify for special education under the category of other health impairment, Mr. Andreoni found that Student's medical condition of ADHD-mixed type did not appear to impair or limit Student's mental alertness, within the educational environment, to a degree that adversely affected his educational performance.

Mr. Andreoni based his opinion upon his observations of Student, his review of Student's first trimester kindergarten grades, and Student's performance on the three tests of early ability in reading, math, and written language.

35. In concluding that Student did not qualify for special education under the category of specific learning disability, Mr. Andreoni found that Student did not have a severe discrepancy between his cognitive ability and his academic performance. Mr. Andreoni based his opinion upon Student's performance on the Kaufmann assessment, his review of Student's first trimester kindergarten grades, and Student's performance on the three tests of early ability in reading, math, and written language.

Speech and Language Assessment

36. Brittany Top conducted a speech and language assessment of Student in November 2014, when Student was approximately six years and one month old. Additionally, she provided Student with speech and language services for 20 minutes twice per week during the 2014-2015 school year.

37. Ms. Top holds a bachelor's degree in liberal studies with a concentration in language acquisition. She was licensed as a speech and language pathologist in 2013. Ms. Top also earned a Certificate of Clinical Competency issued by the American Speech Hearing Language Association in 2013. She has worked for the District for three years.

38. During the school year, Ms. Top worked with Student on his speech and language goals. He met or exceeded all the goals that had been developed for him. Prior to meeting Student, Ms. Top observed Student's class for 10 minutes without being able to pick Student out by his behavior. She did not have any behavioral issues with Student while working with him during the 2014-2015 school year. His participation was good, and she did not observe any characteristics of autism during her time working with him.

39. Ms. Top administered the Expressive One Word Picture Vocabulary Test; Receptive One Word Picture Vocabulary Test; the Test of Language Development-Primary, Fourth Edition; the Pragmatic Language Skills Inventory; and the Test for Examining Expressive Morphology. She also observed and evaluated Student's speech mechanism, fluency, and voice, finding all to be within the normal range. Student's one-to-one aide was present for all testing and evaluations, and the aide's presence did not affect Student's performance or the reliability of the assessments.

40. The assessments she undertook were all valid and reliable for assessing speech and language in Student's age range. She administered the standardized assessments in accordance with the publisher's instructions, scored the assessment results in accordance with the publisher's instructions, and accurately recorded Student's scores and her observations and conclusions in her Speech and Language Assessment Report, dated December 3, 2014.

41. Student obtained a standard score of 96 on the test of expressive language, in the 39th percentile or average range. In receptive language, Student obtained a standard score of 110, in the 75th percentile on the higher side of average. In the test of language development and spoken language, Student scored an 87, in the 19th percentile, below average. On the test of pragmatic language, Student obtained average sub-scores and an average overall index score of 102 in the 55th percentile.

42. Student received his lowest score in the area of expressive morphology, the correct use of such language forms as plurals, verbs, possessives and third-person singular. Ms. Top explained that English language learners such as Student typically have difficulties with this subsection, even in the absence of a speech or language impairment, and that Student's low score was not alone indicative of a speech and language disorder.

43. Ms. Top concluded that based upon the California legal criteria for a speech and language impairment, Student was not eligible for speech and language services. The criteria require two scores that fall at least 1.5 standard deviations below the mean; i.e. below the 7th percentile. Student had one very low score, but the remainder of his scores were average or close to average. In Ms. Top's opinion, Student does not require speech and language services.

Autism Inclusion Assessment

44. Ronda Howser is an inclusion teacher with the Stanislaus County Office of Education. She was assigned to work with Student at the beginning of the 2014-2015 school year. Ms. Howser has a bachelor's degree in child development and a master's degree in special education. She holds three teaching credentials: multiple subject; mild/moderate special education; and moderate/severe special education. As an inclusion specialist, her duties included assisting general education teachers in teaching children with disabilities, including autism. She is very experienced with autistic children and most of the children she serves as an inclusion specialist are autistic.

45. In preparing to work with Student, Ms. Howser did not review his file as she preferred to observe a child and form her own first impressions rather than having preconceived notions about a child. In keeping with her practice, she observed Student in his kindergarten class during the first week of school. As she observed the class, she noted five students who exhibited broadly autistic behaviors. None of the five she noticed were Student. She had observed Student to be attentive, focused, and able to follow directions, and was surprised that he was autistic based upon her initial classroom observation of him.

46. Ms. Howser observed Student on an on-going basis from the beginning of the school year through the Fall. During that time period, she observed Student to be a very active student who displayed enthusiasm to learn and do his best. He responded chorally in group, raised his hand to participate in class, initiated peer interactions and completed work

independently. Overall, Student displayed developmentally appropriate and typical behaviors for learning, peer socialization, social/emotional reciprocity, and self-management behaviors.

47. Ms. Howser subsequently reviewed Student's records and provided services to Student four times a month for 30 minutes per session in keeping with Student's February 18, 2014 and May 14, 2014 IEPs. She provided her services primarily using a push-in model, but she did provide some services on a pull-out basis. She worked with Student on three autism inclusion goals from his February 18, 2014 and May 14, 2014 IEP's, and he had met all of the goals by December 2014.

48. During her work with Student she formed the opinion that he presented as a normally developing child who did not appear to exhibit autistic characteristics or behaviors. He was independent in the classroom and did not require the assistance of his one-to-one aide. Similarly, he engaged in socially appropriate behaviors in educational settings, rarely required redirection, and was able to transition without difficulty.

49. Ms. Howser conducted a formal inclusion assessment of Student as part of his triennial assessment in the Fall of 2014.

50. She observed Student for approximately 45 to 60 minutes in his physical education class on November 7, 2014, while the students played a bean bag toss game. Student displayed age appropriate behaviors, participation, and social interactions that were developmentally appropriate.

51. She observed Student a second time for approximately 45 to 60 minutes in his general education classroom on November 14, 2014. During the observation, Student maintained on-task behaviors, followed directions, participated, and maintained appropriate social interactions and behaviors. Student's behavior was typical.

52. Ms. Howser administered a Social Skill survey in which Father, classroom teacher, one-to-one aide, and inclusion team completed scoring surveys of Student. Student's overall score on the survey placed him within the range of his typically functioning peers with strengths in all six domains and only three areas of need. The six domains were conversational skills, cooperative play skills, friendship management, self-regulation, empathy, and conflict management. The three areas of need were within the domains of friendship management, self-regulation, and conflict management, but all three areas of need were within typical peer behavior and developmentally appropriate.

53. Ms. Howser also administered an Intraverbal Assessment of Student. The assessment consisted of 80 questions of which Student scored 68 of 80 for an 85 percent score. She considered him to have performed well on the assessment.

District's Attempts to Schedule Student's 2014 IEP Meeting

54. Once the assessments were well underway, Ms. Wolf attempted to arrange Student's annual IEP meeting by e-mail on November 18, 2014. Father had previously established himself as the primary point of contact between District and Parents, and had previously requested that Ms. Wolf not try to contact him by telephone as he was frequently out of the country and unreachable by phone. He assured her that he could always retrieve his e-mail and that it was the best way to contact him.

55. At the time of that e-mail, the IEP meeting to review the triennial assessments was due by December 21, 2014, pursuant to statutory timeline. Ms. Wolf proposed four meeting dates: December 15, 2014, at 8:00 a.m.; December 16, 2014, at 8:00 a.m.; December 17, 2014, at 8:00 a.m.; and December 19, 2014, at 8:00 a.m. In her e-mail, Ms. Wolf advised Father that the triennial assessment reports were being finished, and that they would be provided to him 10 days prior to the IEP meeting date he chose. She did not hear back in response to the November 18, 2014 e-mail.

56. On November 21, 2014, Ms. Wolf e-mailed again that she was holding the four proposed dates open. Parents did not respond.

57. The following week was District's Thanksgiving break and Ms. Wolf did not e-mail Parents until the week after that. On December 3, 2014, Ms. Wolf e-mailed a third time, once again inquiring as to whether any of the four dates would work. Father responded on December 4, 2014, informing her that he would not schedule the IEP meeting date until such time as he had received all of the assessment reports and the audio tapes and he had confirmed them to be complete 10 days in advance of the meeting. This was a change of terms from the settlement regarding the assessment plan and IEP meeting which only required that Parents be provided with the recordings and reports 10 days before the meeting.

58. On December 8, 2014, Ms. Wolf nevertheless placed all the assessment reports and the audio recordings of each assessment into a manila envelope to be delivered to Parents. That same day, Ms. Wolf e-mailed Parents advising them that the assessment reports and recordings were available to be picked up. In the same e-mail, she offered an additional day, December 18, 2014, for the IEP. Parents did not respond to the December 8, 2014 e-mail. On December 9, 2014, Mother picked up the packet of assessment reports and tapes.

59. On December 12, 2014, Ms. Wolf e-mailed Parents to confirm that they had received the reports and audio tapes and to inquire whether any of the proposed IEP meeting dates would work.

60. Parents did not respond until December 18, 2014. In his December 18, 2014 e-mail, Father indicated that he was out of town for work and would "review the material for their completeness" when he returned home. He did not otherwise indicate when he was due

to return home. Father also stated: “Once all material are (*sic*) reviewed for completeness, I will inform you to schedule a meeting.” This again constituted a change in the terms of the settlement agreement that had been reached regarding the assessment plan and the IEP meeting.

61. Ms. Wolf e-mailed Parents back on December 18, 2014, and requested that they let her know if they had any questions about the reports or audio recordings. She also asked Parents to provide her with dates in January 2015 when they would be available for the IEP meeting, and further advised them that she would check her school e-mail over the winter break. Parents did not respond to Ms. Wolf’s December 18, 2014 e-mail.

62. After the winter break, when she had not heard from Parents, Ms. Wolf e-mailed them on January 13, 2015, and proposed IEP meeting dates on January 28, 29, or 30 from 8:00 a.m. to 10:00 a.m. or on February 3, 4, or 6 from 8:00 a.m. to 10:00 a.m. Once again, Parents did not respond to her e-mail.

63. Not having heard from Parents, on January 26, 2015, Ms. Wolf sent a prior written notice letter to Parents proposing to hold the IEP meeting no later than March 1, 2015, and also reviewing her numerous prior attempts to schedule the meeting. Along with the letter, Ms. Wolf included two notice of meeting forms for February 6, 2015, and February 26, 2015, both running from 8:00 a.m. to 10:00 a.m. She instructed Parents to sign and return the notice of meeting form for the date that worked best for them. Ms. Wolf decided to use a process server to both deliver the letter and confirm its delivery to Parents. Process server Cherlyn Smoke hand-delivered the January 26, 2015 letter to Father on January 29, 2015.

64. Parents did not sign and return either notice of meeting form, nor did they contact Ms. Wolf in response to her January 26, 2015 letter to them. Nonetheless, in case Parents decided to attend the February 6, 2015 meeting, Ms. Wolf assembled the District members of the IEP team at 8:00 a.m. on that date. She and the District members of the team waited at least 30 minutes for Parents to arrive, but they did not appear for the meeting. Without Parents’ attendance, Ms. Wolf did not hold the meeting.

65. On February 19, 2015, Ms. Wolf prepared a second prior written notice letter to Parents informing them that due to their continuing lack of response or cooperation in scheduling the IEP meeting, that the meeting would be held with or without them on February 26, 2015, at 8:00 a.m. at the Chrysler School. Ms. Wolf instructed Karen Convers, a District administrative assistant, to hand deliver the February 19, 2015 letter to Parents at their home address. Ms. Convers delivered the letter to Mother on February 20, 2015, but Mother refused to sign for the letter.

66. On February 25, 2015, at 4:44 p.m., Parents sent Ms. Wolf an e-mail indicating that they would not attend the IEP meeting on February 26, 2015. The e-mail was argumentative and hostile towards District. The e-mail stated: “We been (*sic*) advised not to participate in the game that you guys play. You can send people to our home and give us all

what you like (*sic*), but the matter is that Stanislaus Union School District again have (*sic*) not provided all documents that were requested of district.” The e-mail went on to state: “Check and double check if you have provided us all the things that you are required to provide . . . without all the documents and audio recording we will not participate in a staged act of an IEP.” It also stated: “We are not going to play the game of (ooh what you did not provide to us.)”

67. Ms. Wolf received and read Parents’ e-mail at the end of the work day on February 25, 2015. Ms. Wolf believed that based upon the totality of Parents’ conduct that they were refusing to participate in the IEP meeting process. In light of this, Ms. Wolf assembled the District members of the IEP team on February 26, 2015, and after waiting a reasonable time for Parents to arrive, conducted the IEP meeting in their absence.

February 26, 2015 IEP Meeting

68. At the February 26, 2015 IEP meeting, the District members of the team reviewed the triennial assessment reports, and other relevant materials, and concluded that Student was no longer eligible for special education under the category of autism, nor was he eligible for special education under alternative categories of other health impairment, speech and language impairment, or a specific language disability. At the meeting, the District team members held a lengthy discussion of the eligibility criteria for autism, and whether Student was eligible for special education under those criteria. All of the District members of the team agreed that Student no longer qualified under the category of autism based upon their review of Student’s present levels of performance, observations of the team members, and the results of the triennial assessments. District prepared an IEP for Student at the meeting that found Student no longer eligible for special education and exited him from special education on that basis.

Further Contact Between District and Father Post-IEP Meeting

69. Following the February 26, 2015 IEP meeting, Ms. Wolf prepared another prior written notice letter to Parents on March 2, 2015. The letter included a copy of the draft February 26, 2015 IEP. Ms. Wolf requested Parents to contact her to schedule an appointment with her if they wished to inspect District’s copies of the IEP. She also requested Parents to provide her with proposed dates to reconvene the IEP meeting and revisit Student’s assessments and progress. The letter of March 2, 2015 was hand-delivered to Mother on March 4, 2015 by the process server. There was no response from Parents to the March 2, 2015 letter.

70. On March 24, 2015, Ms. Wolf sent another prior written notice letter to Parents requesting that they sign the February 26, 2015 IEP by a date no later than April 3, 2015, or District intended to initiate a due process proceeding to implement it. The March 24, 2015 letter was hand-delivered to Mother that same day by the process server. There was no response to the March 24, 2015 letter. District subsequently filed for due process.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*³

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.⁴; 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; 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].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁴ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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].) 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. (*Id.* at p. 950, fn. 10.)

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) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, 56505, subd. (l).) 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]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, because District filed the complaint and requested the hearing, District has the burden of proof.

Issue 1 –IEP Team Meeting Without Parental Attendance

5. District contends that it had the right and obligation to proceed with the February 26, 2015, IEP meeting without Parents in attendance. District further contends that Parents actually or constructively refused to attend the IEP meeting, relieving District of any obligation to include them, and therefore the non-inclusion of Parents did not constitute a procedural FAPE violation.

6. Under the IDEA, in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child’s right to a FAPE; significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to the parents’ child; or caused a deprivation of educational benefits. (20 U.S.C. 1415(f)(3)(E)(ii); see also Ed. Code, § 56505 subd. (j); *Shapiro v Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078. See also *Amanda J. v. Clark Cnty. Sch. Dist.*, (9th Cir. 2001) 267 F.3d 877, 892.)

7. When confronted with the situation of complying with one procedural requirement of the IDEA or another, a local educational agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE. In reviewing an agency's action in such a scenario, the agency is allowed reasonable latitude in making that determination. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038 (*Doug C.*))

8. The necessity of Parents' attendance at and participation in a Student's individualized education program meeting is mandated by the IDEA and strongly supported by precedent; however, the importance of their attendance is not unlimited, as Parents' refusal to attend can waive any procedural FAPE claim associated with their non-attendance. (Shapiro, *supra*, 317 F.3d 1072, at p. 1077-1078.)

9. Here, District, principally by and through its Assistant Director of Student Services, Ms. Wolf, made every reasonable attempt and tried essentially everything it could think of to convince Parents to attend the IEP meeting. Despite District's efforts, Parents effectively refused to attend. Their refusal relieved District of any responsibility to ensure their attendance.

10. District offered many different proposed dates for the IEP, over a stretch of almost three months of District trying to schedule the meeting without success. Parents repeatedly failed to respond. Ultimately, Parents did not respond meaningfully until the eve of the February 26, 2015 meeting, when they e-mailed Ms. Wolf at 4:44 p.m. on February 25, 2015, and effectively told her that they would not attend the meeting the next day, and disparaged the District, its intentions, and its efforts to schedule the meeting.

11. The Court in *Doug C.* recognized an exception to the parental attendance requirement when the parents refuse to attend an IEP meeting. Such was the case here. Parents' repeated delaying tactics and effective refusal to attend the February 26, 2015 IEP meeting or any other meeting date proposed by District, were sufficient for District to proceed with the meeting in Parents' absence without a procedural FAPE violation. The District acted reasonably and properly in proceeding with the meeting in Parents' absence, and in fact undertook great, if ultimately unsuccessful, efforts to attempt to secure their participation.

12. The District has met its burden with regard to this issue.

Issue 2 – Student's Eligibility for Special Education and District's Right to Exit Student from Special Education

13. District contends that Student is no longer eligible for special education under the category of autism, nor is Student eligible for special education under the alternative eligibility categories of speech-language impairment, specific learning disability, or other health impairment. Further, District contends that in the absence of any eligibility for special education, that Student should be exited from the special education program.

14. For purposes of special education eligibility, the term “child with a disability” means a child with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, requires instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. § 1402(3)(A)(ii); 34 C.F.R. § 300.8(a).) Similarly, California law defines an “individual with exceptional needs” as a pupil who is identified by an IEP team as “a child with a disability” pursuant to 20 U.S.C. section 1402(3)(A)(ii), and who requires special education because of his or her disability. (Ed. Code, § 56026, subs. (a), (b).)

15. Not every student who is impaired by a disability is eligible for special education. Some disabled students can be adequately educated in a regular education classroom. Federal law requires special education for a "child with a disability," who is defined in part as a child with an impairment "who, by reason thereof, needs special education and related services." (20 U.S.C. § 1401(a)(3)(A)(ii); 34 C.F.R. § 300.8(a)(i).)

16. State law requires special education for "individuals with exceptional needs," who are defined in part as individuals whose "impairment ... requires instruction, services, or both, which cannot be provided with modification of the regular school program." (Ed. Code, § 56026, subd. (b).) In deciding whether a student needs special education, courts apply the *Rowley* standard and consider whether the pupil can receive some educational benefit from the general education classroom. (*Hood v. Encinitas Union School Dist.* (9th Cir. 2007) 486 F.3d 1099, 1106-1107 [decided under former Ed. Code, § 56337].)

17. The pertinent eligibility categories in this case are autism, speech-language impairment, specific learning disability and other health impairment.

18. California Code of Regulations, title 5, section 3030, subdivision (b)(1), defines “autism” as a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, and adversely affecting a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. A student is eligible for special education and related services under the category of speech-language impairment if he demonstrates difficulty understanding or using spoken language under specified criteria and to such an extent that it adversely affects her educational performance and cannot be corrected without special education. The criteria are : articulation disorders, such that the pupil's production of speech significantly interferes with communication and attracts adverse attention; abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness; fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect

communication between the pupil and listener; inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the pupil's language performance level is found to be significantly below the language performance level of his or her peers; or hearing loss which results in a language or speech disorder and significantly affects educational performance. (Ed. Code, § 56333.)

19. The pupil has an expressive or receptive language disorder when he or she scores at least 1.5 standard deviations below the mean, or below the 7th percentile, for his or her chronological age or developmental level on two or more standardized tests in one or more of the following areas of language development: morphology, syntax, semantics, or pragmatics, or scores at least 1.5 standard deviations below the mean or the score is below the 7th percentile for his or her chronological age or developmental level on one or more standardized tests in areas of speech and language, and displays inappropriate or inadequate usage of expressive or receptive language as measured by a representative spontaneous or elicited language sample of a minimum of fifty utterances. (Cal. Code Regs., tit. 5, § 3030, subd. (11)(D).)

20. Eligibility under the category of specific learning disability requires that a pupil has a disorder in one or more of the basic psychological processes involved in understanding or in using language, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. The term "specific learning disability" includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. (20 U.S.C. §1401(30); Ed. Code, § 56337, subd. (a).) Basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization, and expression. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10).) The criteria permit the use of standardized achievement tests to measure the pupil's levels of academic competence and, for eligibility, require finding a severe discrepancy of at least 1.5 standard deviations between the cognitive ability of the pupil and his or her academic achievement. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(10)(B).)

21. A student may be eligible for special education in the category of other health impairment if he

“has limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that . . . is due to chronic or acute health problems . . . and [a]dversely affects a child's educational performance”

(Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).)

A student having a suspected or diagnosed ADHD may be eligible for special education in the category of other health impaired. (Ed. Code, §56339, subd. (a); see also Ed. Code, § 56337, subd. (a)[eligibility in specific learning disorder category due to ADHD].) In order

to be eligible, the student must show that his educational performance is adversely affected by the disorder, and must demonstrate a need for special education and related services by meeting the eligibility criteria for other health impairment set forth in the preceding paragraph. (Ed. Code, §56339, subd. (a).) If a student with ADHD cannot make that showing, his instructional program must be provided in the regular education program. (Ed. Code, §56339, subd. (b).)

22. Here, the District members of the IEP team reviewed and considered the assessments conducted for the triennial review, Student's latest grades, his present levels of performance, his success at meeting his individualized education program goals, along with their individual experiences with Student. The team did not find that Student's verbal and nonverbal communication, nor his social interactions, negatively affected his educational performance. Rather, the consensus was that Student was operating at a level consistent with his typical peers and developmentally appropriate. Significantly, the team did not find evidence of characteristics associated with autism, other than some mild symptoms that did not appear to affect his academic performance. In sum, the evidence proffered by District shows that Student did not qualify for special education under the category of autism. To the extent that Student exhibited some mild indicia of autism, it was not enough to affect his educational performance, and it was scarcely distinguishable, if at all, from his typical peers. Student did not meet the criteria for autism such as to be entitled to special education.

23. Neither the District's speech and language assessment, nor the current reports from Student's speech and language therapist, showed that Student qualified for special education as a student with a speech and language impairment. Student did not have an articulation disorder, a fluency disorder, or abnormal voice. Student did not score below the 7th percentile on two or more standardized tests. Reports from Ms. Top showed that Student did not have any need for intervention in the area of speech and language. The District met its burden to show that Student was not eligible for special education under the category of speech and language impairment.

24. There was no evidence that Student had a basic psychological processing disorder. District assessment data from the triennial assessment did not show a processing disorder. Student's classroom functioning and reports from teachers did not establish that Student had a processing disorder. The credible and reliable testimony of Mr. Andreoni further supports the conclusion that Student did not have a processing disorder.

25. Even if Student had a basic psychological processing disorder, Student must also have a severe discrepancy between cognitive ability and academic achievement to qualify in the category of specific learning disorder. Ms. Ellis, Student's special education teacher, testified credibly that Student's cognitive and intellectual abilities were congruent with his academic performance. Student's performance on the Kaufman test of cognitive ability was squarely at the 50th percentile. Student's performance on the test of academic performance administered by Ms. Ellis showed Student at or near average level across three

standardized tests. Student's most recent grades from his first trimester of kindergarten showed Student performing at a very successful academic level. There was nothing in Student's academic functioning that would indicate the presence of a severe discrepancy in any academic area. Accordingly, the District met its burden to show that Student was not eligible for special education as a student with a specific learning disability.

26. District proved that Student did not have limited vitality, strength or alertness due to any chronic or acute health problem, including ADHD. Based upon the observations of Student by several assessors, along with his performance on tests of academic functioning, and his most recent kindergarten grades, there was no evidence of ADHD affecting Student's academic performance. In particular, Student's successful educational performance strongly suggests that his education was not adversely affected by attention deficits or any other disorder.

27. For the reasons stated above, District proved that Student's attention deficits, including any ADHD, did not adversely affect his educational performance and was able to be adequately addressed without special education. District therefore proved by a preponderance of evidence that Student not eligible for special education in the category of other health impaired.

28. All information regarding Student indicates that he was functioning very well in the general education environment without accessing any of the special education support available to him. Notably, Dr. Andreoni's observations of Student thoroughly document that Student did not utilize his one-to one aide for any purpose inside or outside the classroom.

29. The totality of the evidence shows that the District met its burden to show that Student did not meet the eligibility criteria for autism, speech and language impairment, specific learning disability, or other health impairment, and that Student did not have a need for special education. The District may exit Student from special education immediately and cease providing all special education and related services.

ORDER

District's request to exit Student from special education is granted, and District may cease to provide special education programs or services to Student.

PREVAILING PARTY

Pursuant to California 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. The District prevailed on the issues presented.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATED: July 9, 2015

/s/
TED MANN
Administrative Law Judge
Office of Administrative Hearing