

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2008080491

**DECISION**

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings, State of California (OAH), heard this matter on December 15 and 16, 2008, in Los Angeles, California.

Student's mother and sister represented the Student (Student) during the hearing. Student was not present.

Donald Erwin, Assistant General Counsel, Office of General Counsel of the Los Angeles Unified School District, represented the Los Angeles Unified School District (District) at the hearing. Sharon Snyder also appeared on behalf of the District.

Student filed his due process request on August 13, 2008. On September 19, 2008, OAH issued an order granting the parties' request for a continuance of the due process hearing. The matter was taken under submission at the close of evidence on December 16, 2008.

**ISSUES<sup>1</sup>**

a) Did the District deny Student a free appropriate public education (FAPE) when speech and language (S/L) services were not provided, pursuant to the August 14, 2007 mediation agreement, from September 1, 2007, through January 30, 2008, and April 1, 2008, thorough June 19, 2008?

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<sup>1</sup> These issues were clarified during the telephonic Prehearing Conference (PHC) and set forth in ALJ Robert Helfand's PHC Order dated December 1, 2008.

b) Did the District deny Student a FAPE in school year 2008-2009 by its failure to provide behavior intervention implementation services as outlined in the January 11, 2008 Individualized Education Program (IEP)?

c) Did the District deny Student a FAPE in school year 2008-2009 by its failure to offer and provide appropriate S/L services?

## FACTUAL FINDINGS

1. Student is a 21-year-old man who is eligible for special education and related services under the category of autism.<sup>2</sup> Student attends University High School, a public school within the District, and has only a few more credits left to earn in order to complete the high school curriculum. He has passed the math portion of the California High School Exit Examination (CAHSEE), but as of the time of this hearing, had not yet passed the language arts portion of the exam.

### *The August 14, 2007 mediation agreement*

2. Student contends that the District denied him a FAPE because it failed to provide S/L services called for in the August 14, 2007 mediation agreement. The District contends that any failure to provide those services was due to the actions of Student and his family, not the District. The District also contends that Student's attempt to enforce the mediation agreement is beyond OAH's jurisdiction as a matter of law.<sup>3</sup>

3. On August 14, 2007, the parties entered into a final settlement agreement in the case of *Student v. Los Angeles Unified School District*, OAH case number N2007070115. Paragraph 3f of that agreement stated, in part, that the District would:

Fund up to one (1) hour per week of Speech and Language services to be provided by a non-public agency ("NPA") that is certified by the California Department of Education and has a master contract with the District. These services will begin no later than fifteen (15) business days after selection of an NPA and shall be complete by June 19, 2008. The services will be provided at Student's school of attendance or at the NPA. Any scheduled sessions that are

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<sup>2</sup> Student holds his own educational rights, but he wrote a letter authorizing his sister to represent him at the due process hearing. His letter explained that he would not be present during the hearing.

<sup>3</sup> On December 11, 2008, the District filed a motion to dismiss this issue based on a lack of jurisdiction. In the PHC Order, ALJ Helfand ordered that any motions be filed and served at least five *business* days prior to the hearing. The District argued that, although the motion to dismiss was filed only two business days before the hearing, it still should be considered because it involves a jurisdictional issue. Because Student had no opportunity to file any opposition to the motion prior to the hearing, no ruling was made during the hearing. The District's motion is addressed below, in Legal Conclusions 2 – 6.

missed due to unavailability of the NPA service provider shall be rescheduled in accordance with the NPA's master contract with the District. If Student fails to attend a scheduled session, the session will not be rescheduled.

4. The settlement agreement called for the District to conduct an S/L assessment and to provide one hour per week of S/L services through District personnel in addition to the NPA provided services. The settlement agreement recited that the services in the agreement "do not constitute, and shall not be construed as, an admission of what is a free appropriate public education" for Student. In addition, the parties agreed that the provided services would not be considered "stay put." The parties agreed that the settlement would be confidential "except as required by law and as necessary to implement and enforce the Agreement."

5. On August 21, 2007, Debra Martin, a District employee who coordinated NPA services for pupils, sent a letter to Student's mother listing four possible NPAs that could provide the S/L services called for in the mediation agreement. The letter requested that Student contact the providers to set up a schedule for services from one of them.

6. The letter concluded with the following paragraph:

It is important that you notify me if you are unable to schedule or obtain services from any of the above providers within three (3) weeks from the date of this letter. I am available to assist you with any problems you may have in placing your child in a nonpublic agency program. Please contact me at (213) 241-3373 if you have any questions or need any further information. Thank you for your cooperation.

7. Student's sister called the four NPA providers listed in the letter. She asked for services for Student on weekends or around 6:00 p.m. on weekdays. Three out of the four said there were no vacancies during the times requested by Student. Student was placed on a waiting list. One of the providers called and left a message. Student's sister returned the call and left a message, but never heard back from the provider.

8. In late December 2007, approximately three months after receiving the District's letter, Student's sister contacted the District and explained the problem Student was having with locating an available provider. She testified that she did not contact the District earlier than that because she thought she had to wait until all four of the proposed NPA providers said they were unavailable. Student was on a waiting list, and Student's sister knew from past experience that vacancies occasionally occur.

9. Once the District staff learned about Student's difficulties with the four proposed NPA providers, a District employee located Rehab Unlimited, an NPA provider who could provide S/L services to Student on Saturday. In January 2008, the District employee informed Student's family about Rehab Unlimited, and Student began receiving S/L services in approximately February 2008.

10. During April 2008, Student missed two sessions of S/L services with Rehab Unlimited. On April 5, 2008, the car broke down just as Student and his sister were about to leave. On April 12, 2008, his sister called to cancel the appointment because Student was ill. On April 19, 2008, Student and his mother were late in arriving to the session. The agency gave Student's mother a letter dated April 18, 2008, stating the agency could no longer provide services to Student because Student had cancelled appointments without 24 hours notice.<sup>4</sup>

11. On April 21, 2008, Student's sister sent a letter to the District explaining the situation regarding Rehab Unlimited and requesting a different NPA agency to provide the services to Student. Student's family was particularly annoyed with Rehab Unlimited because of Rehab Unlimited's conduct during March 2008. In March, the S/L pathologist from Rehab Unlimited had called to cancel a session on the day of the session because the S/L pathologist was sick. On another occasion in March, the S/L pathologist was not present when the family arrived for the session. Student's family felt it was unfair for Rehab Unlimited to cancel Student's services based on the same type of conduct the S/L pathologist had engaged in during March.

12. Merrilee Glick, the District employee who coordinated NPA services at that time, contacted Rehab Unlimited and confirmed that the NPA would still provide services to Student. She had difficulty reaching Student's family by telephone because the family's voice mail was not available.

13. On May 15, 2008, Glick sent a letter to Student's mother, confirming that Rehab Unlimited was still available to provide S/L services to Student. The NPA was holding an appointment time for Student at 5:00 p.m. on Tuesdays. Glick left her telephone number and asked Student's mother to call her with any questions.

14. Student's mother and sister believed that the 5:00 p.m. time for the services would not work for Student, because Student did not get home from school until around 4:30 p.m. It would be very difficult for the family to arrive at the session at 5:00 because of traffic. The earliest Student would be available would be 5:30 p.m. Student's family did not contact Rehab Unlimited to restart the services, and Rehab Unlimited did not provide any further services to Student during the 2007-2008 school year. Student's sister testified that she asked Glick for a different NPA provider and Glick told her that there was no one else. Student's mother testified that she was unhappy with Rehab Unlimited and did not want to go back to them.

15. On June 5, 2008, the IEP team met at the request of Student and his family. The family requested, among other things, that the District continue to provide NPA S/L services, in addition to District's S/L services. The meeting notes stated in part: "Per Due

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<sup>4</sup> According to the District's records, the dates Student missed were April 5 and April 19, 2008. However, the discrepancy in dates is not significant because there is no dispute that two days were missed.

Process agreement dated 7/07, NPA [S/L] services to continue per LAUSD agreement 1x weekly @60 min. Family needs to find appropriate service provider (have been on a waiting list and waiting for LAUSD contact.” (*Sic.*)

16. Student’s mother testified that she has a private S/L provider she would prefer to use. This S/L provider has been attentive to the family’s requests when providing services at the family’s expense in the past and has tried to accommodate those requests. Student’s family believes that Student should receive compensatory S/L services from their preferred provider to make up for the gaps in the services called for in the mediation agreement.

17. As discussed in Legal Conclusions 7 – 14 below, the evidence does not support a finding that the District denied Student a FAPE with respect to these NPA services. Student submitted no evidence to show that the missing NPA S/L services were necessary to assist Student to benefit from his special education. Further, the evidence shows that, at all times, the District acted properly to make the services available to the Student. The gaps in services were due to the action and inaction of Student’s family. While Student’s family may prefer a different provider, that preference does not make the services offered by the District improper.

#### *Student’s Behavioral Services and the January 2008 IEP*

18. Student contends that the District denied Student a FAPE during the 2008-2009 school year, because the District failed to provide behavior intervention services as called for in the January 2008 IEP. In particular, Student raises two problems with the services. First, Student contends that the individual providing behavior intervention implementation services to Student was not sufficiently trained. Second, Student contends that the individual was not providing the services called for in Student’s IEP. The law establishes certain educational requirements for individuals working for an NPA who provide behavioral intervention services for public schools. The law also requires individuals who provide those services to do so in conformity with the child’s IEP.

19. On January 11, 2008, Student’s IEP team met for his annual IEP meeting. The IEP team found that Student had receptive and expressive language deficits which affected his ability to access the general curriculum. He had educational needs in higher order thinking skills such as evaluation, synthesis of ideas, understanding inferences, allusions and analytical thinking, and needs in the area of executive management strategies (such as organizing his thoughts and actions simultaneously). Student also had behavioral needs, including problems with social skills, organization, and off-task behavior that interfered with his education.

20. The IEP contained goals and objectives in the areas of behavior, expressive and receptive language, communication skills, written expression, organization and task completion, and language arts (particularly with respect to the skills required to pass the CAHSEE). The behavioral goals in the IEP included goals related to positive interaction

with peers, following instructions, staying on task, and completing assignments. The team noted that Student had met all his goals from the previous IEP, except for his goal in writing.

21. The IEP called for Student to be placed in general education classes with supports and accommodations. The IEP proposed two 30-minute sessions of S/L therapy per week, autism program supervision, a transition plan, and numerous accommodations, including but not limited to extended time on tests, preferential seating, and breakdown of assignments into multiple parts. The IEP also noted the continuation of 60 minutes per week of NPA S/L services provided in the settlement agreement of August 2007.

22. Although the IEP called for accommodations to address Student's disabilities, it did not call for any modifications to the general education curriculum. Instead, Student was educated using the general curriculum and was on a track to receive a high school diploma. The IEP anticipated that Student would graduate with a diploma in June 2009.

23. To accommodate Student's behavioral issues, the IEP included a behavior support plan (BSP) to address issues of poor organization and planning, and called for Student to receive the services of a behavior intervention implementation provider (BII) and a behavior intervention development supervisor (BID). These BID and BII services were to be provided by an NPA paid for by the District.

24. A BII is an individual who provides one-to-one behavioral services for a child during the school day. The law requires an individual acting as a BII for an NPA to have a high school diploma and work under the supervision of an individual who possesses the qualifications of a BID. Individual NPA providers may require their employees who act as BII's to have additional education and experience, but that is not mandated by law. The law requires much higher levels of education and licensure for the BID who supervises the BII.<sup>5</sup>

25. BII's work on behavior intervention therapy with a child in accordance with the requirements of the child's IEP and BSP. They address the behavior that impedes the child from accessing the curriculum. They are not teachers or academic instructors.

26. A BID helps to develop strategies that the BII will use in assisting a child with problem behaviors. The BID supervises the BII and makes certain that the BII is implementing the appropriate behavioral interventions.

27. For the 2008-2009 school year, Student's BII was Jimmy Rudon. Rudon was still Student's BII at the time of this hearing. Rudon has received approximately 70 hours of training from his employer in areas such as behavior, applied behavior analysis techniques, and sensory issues.

28. The BID supervising Rudon is Margo Yunker. Yunker holds a Master of Arts Degree in education with a focus on teaching moderate to severely disabled children. She

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<sup>5</sup> These requirements are discussed in Legal Conclusions 15 - 17.

holds both general education and special education teaching credentials, and is a part-time faculty member at California State University at Northridge. She began working as a BID for Student in March 2008.

29. The NPA provider, the District and Student's family hold monthly meetings to monitor and discuss Student's progress. When the family questioned Rudon about his education and training during one of these monthly meetings, his supervisor refused to let him answer the question. Student's sister was later informed by District personnel that Rudon is in college and is working to become a screen writer. As discussed below in Legal Conclusions 15 – 17, the evidence supports a finding that Rudon and Yunker possessed the required education and training to provide behavioral services to Student. There was no denial of FAPE based on a failure by the District to have a proper individual provide the BII services.

30. As part of Yunker's work as the BID for Student, Yunker supervises and meets with Rudon, provides consultation to Student's classroom teachers, observes Student in class, and participates in meetings with District personnel and Student's mother.

31. Rudon provides the day-to-day behavioral implementation with Student. To assist with Student's IEP goal regarding positive social interaction, Rudon employs techniques such as monitoring Student's social contacts, modeling proper social interactions, having discussions with Student about proper and improper social comments, and facilitating social interaction between Student and his peers through activities such as school clubs.

32. To address Student's self-stimulating behavior in class, Rudon has worked out a physical prompt system with Student. The prompt system has worked well and Student's self-stimulating behavior has almost ceased. Rudon also assists Student with his IEP goal relating to staying on task. Rudon uses various types of prompts to help Student stay on task and stay focused in the classroom.

33. Student does not object to the tasks Rudon is doing, but believes Rudon should be doing more with Student. In particular, Student believes that Rudon should be providing academic assistance to help Student pass the CAHSEE. Student contends that Rudon is relying on what he believes to be his job description from his NPA employer instead of delivering the services called for in the IEP. The evidence does not support Student's contention.

34. The January 2008 IEP sets forth the duties of the BII, including facilitation of Student's BSP and assistance with Student's behavioral goals. The notes to the IEP state, in part: "BII on site to continue to help daily with note taking, executive functioning, social skills and behavior."

35. The evidence supports a finding that the BII was effectively assisting Student with the IEP behavioral goals and BSP. Terry Henderson, the teacher for Student's 12th grade English class, which is also a CAHSEE preparation class, testified that Rudon is

implementing the behavioral goals in Student's IEP. Henderson has seen very few negative behaviors from Student during this school year. Student can be a little distracted when working alone, but he comes back to task when prompted by Rudon. Student is currently getting an A in her classroom. Rudon has gradually been allowing Student to become more independent in accordance with the goals in Student's IEP.

36. Yunker's testimony also supports a finding that Rudon has been successfully implementing the BSP and behavioral goals. Student has started going to social clubs on campus and has started interacting more with peers. Rudon has been able to "fade" back more and more to let Student interact on his own. For example, after one interaction Student had with a girl from his art class, he commented to Rudon that he did not say anything inappropriate to the girl. That shows he is beginning to generalize his social skills.

37. Student's mother testified that she wants Rudon to work with Student on his language arts goals, but the IEP does not call for that (except to the extent that Student's off-task and other behaviors may interfere with his learning in language arts). The January 2008 IEP was very specific in listing whether the BII was responsible for implementing each of the goals. The language arts goals in Student's IEP did not list the BII among the "responsible personnel."

38. The evidence also supports a finding that Rudon has been properly assisting Student with note taking, as called for in the IEP. Student's family believes that this "note taking" language means that the BII is supposed to take notes for Student. However, the evidence does not support their interpretation of the language.

39. As Yunker explained, Rudon's function as a BII was to assist Student with the process of note-taking, so Student could take his own notes and remain on task. At times, Rudon might supplement the notes that Student took to catch things that Student had missed, but that was not his primary function. Student's teachers were there to instruct and assist Student in academic areas. That was not the BII's job.

40. Yunker's explanation was supported by the testimony of Gina Ryan, a District special education coordinator who attended the January 2008 IEP meeting. Ryan testified that the reference to "note taking" referred to encouraging Student to take notes in class and copy notes from the board.

41. Yunker's testimony is credible and persuasive. The IEP clearly differentiated between behavior assistance provided by the BII and academic instruction provided by the teachers. The evidence supports a finding that the "note taking" mentioned in the IEP referred to assisting with the process of note taking and that Rudon was properly carrying out that function.

42. The evidence also supports a finding that the IEP's reference to "executive functioning" did not refer to academic instruction by the BII. Carolyn Gelfand, the District's expert on autism, explained that executive functioning involves higher level organizational

skills that are within the cognitive domain. There may be many small components of a routine task that must be accomplished as part of the routine. The pupil with autism may learn the routine, but if any of the components of the routine go awry, the pupil with autism may not have the executive functioning skills to modify his or her actions to continue the routine.

43. For example, the pupil with autism may understand the routine of obtaining food in the cafeteria, but if there is a change in the steps of the routine – if there are 45 pupils in line one day rather than the usual 15 – the autistic pupil may become frustrated and have a “melt-down” or wander off instead of waiting in line. In an academic setting, executive functioning may involve the steps in the routine of writing a research paper.

44. The job of the BID and BII with respect to executive functioning is to help the autistic pupil develop strategies to help with executive functioning. Executive functioning is not a “skill” that can itself be taught to an autistic pupil.

45. The evidence supports a finding that Rudon was properly assisting Student with executive functioning, using techniques such as modeling behavior for Student and assisting Student with organizing his time for greater efficiency. The IEP’s reference to executive functioning did not refer to academic tutoring or require the BII to provide such tutoring for Student. Instead, the IEP properly places the teaching functions of Student’s IEP on Student’s teachers and other qualified personnel.

46. The main concern of Student’s family is that Student has been unable to pass the CAHSEE. However, Student has introduced no evidence to show that it is the function of the BII to teach Student the academic information he needs to pass the CAHSEE. Instead, the BII works on controlling *behaviors* that interfere with learning. The evidence supports a finding that the BII was properly assisting Student with elimination of problem behaviors and that Student had made behavioral progress. There was no denial of FAPE.<sup>6</sup>

47. Student also raised a concern about problems Student has had during the past year regarding improper affection for adult staff members at the school. The issue has been discussed at the monthly meetings and the BII has been working with Student on curbing that behavior, but the intervention has not entirely eliminated the behavior. Yunker has suggested to the District that Student take a health class, because it is not the BII’s function to educate Student on sexual issues.

48. The evidence does not support a finding of any denial of FAPE based on these inappropriate affection issues. Just because there are still behavioral areas to be worked on does not mean that the behavioral services have been improper or that the IEP is not being

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<sup>6</sup> Henderson explained during the hearing that Student did not pass the language arts portion of the CAHSEE in the past because he ran out of time and did not complete the essay portion of the test. The most recent time he took it, he was given extra time and he may have passed the test. (The test results have not come out yet.) However, even if Student does not pass the test that does not prove his BII has not been implementing the IEP.

implemented. The behavior services have been very effective in other respects and Student is successfully accessing the general curriculum. If the IEP team believes that this particular behavior interferes with his education, new IEP goals can be developed.

49. Student's sister also raised concerns at the hearing about the lack of a written behavior implementation plan provided by Yunker as the BID. She explained that Student's family complained during the monthly meetings about the lack of a written plan to implement the behavior services. Based on the family's concern, Melissa Burke, the Assistant Principal at the school Student attends, requested at their most recent monthly meeting that Yunker provide a written plan by the next meeting. The parties dispute the nature of the plan requested.

50. Burke testified that she requested Yunker to bring a concrete plan of action to the following monthly meeting. Yunker described this as a request by the District for Yunker to write down the steps for "fading" of the BII's assistance with Student. Student's sister testified that Yunker's description was incorrect and that the District had asked Yunker to present a precise and clear behavioral plan.

51. The evidence does not support a finding that the lack of a written plan by Yunker denied Student a FAPE, whether it was the type of plan described by Yunker or by Student's sister. Student has a BSP and IEP goals related to behavior. The behavior implementation based on those goals and the BSP has been effective and Student has been successful in his general education placement. That is sufficient documentation to meet the legal requirements. The District is free to request further documentation or accountability from the NPA provider, but that does not mean the District has denied a FAPE if the NPA has not yet produced that documentation.<sup>7</sup>

#### *Student's S/L Services During the 2008-2009 School Year*

52. On June 5, 2008, the IEP team met again at the request of Student and his family. Student's family requested the IEP meeting to discuss adding private educational therapy services, to change providers for the behavioral services, and to continue the S/L services provided by the NPA. However, the Student did not agree to the offer of services in the proposed June 2008 IEP, and Student continued to receive the S/L services called for in the January 2008 IEP during the 2008-2009 school year.

53. Kimberly Garner, an S/L pathologist employed by the District, provided Student's S/L services during the 2008-2009 school year. Garner has a Master's Degree in

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<sup>7</sup> Student's sister also complained that Burke, not Yunker, was the one who suggested the successful strategy of using a chart for addressing Student's behavior. The sister believes Yunker, as the BID, should be developing strategies of that type, not relying upon the District or the parents to suggest them. However, just because another member of the team at the monthly meetings suggested a successful technique, does not mean the BID is not providing proper services. One of the advantages of having a team is that the different members can provide input and suggestions.

communication disorders, and has been working for the District as an S/L pathologist since 2001. She has worked with hundreds of pupils during her time at the District, including pupils with disabilities on the autism spectrum. She assessed Student in the area of S/L in November 2007, and is familiar with his educational needs as they relate to S/L. She believes that the S/L services provided by the District were more than sufficient to meet Student's S/L needs. In her opinion, one 30-minute session of S/L services per week was sufficient to meet Student's needs in January 2008, and is still sufficient at the present time.

54. During the hearing, Student's sister clarified Student's contention with respect to these S/L services. Student does not contend that the services offered would not provide a FAPE. Instead, Student contends that Student did not receive the full amount of services called for in the IEP (two 30-minute sessions per week) during the 2008-2009 school year. The law requires a District to provide special education services to a child in conformity with the program contained in a child's IEP. A deviation from the IEP terms in a material respect constitutes a denial of FAPE.

55. The first day of school during the 2008-2009 school year was Friday, September 5, 2008. Garner began providing services to Student on September 22, 2008. Services usually start during the second week of school. However, during the start of the school year, the school changed its program from a six-period day to a four-period day, so Garner needed to obtain the pupil's schedules before providing the services.

56. Garner provided the following services to Student during the 2008-2009 school year:

- a. Week of September 8, 2008: no services
- b. Week of September 15, 2008: no services
- c. Week of September 22, 2008: 30 minutes
- d. Week of September 29, 2008: 30 minutes
- e. Week of October 6, 2008: 30 minutes
  
- f. Week of October 13, 2008: no services
- g. Week of October 20, 2008: 45 minutes
- h. Week of October 27, 2008: 30 minutes
- i. Week of November 3, 2008: 60 minutes
- j. Week of November 10, 2008: 45 minutes
  
- k. Week of November 17, 2008: 60 minutes
- l. Week of November 24, 2008: 60 minutes
- m. Week of December 1, 2008: 60 minutes
- n. Week of December 8, 2008: 60 minutes

57. Garner admitted that she did not provide the required 60 minutes per week of services to Student during the beginning of the school year. She explained that she had difficulty coordinating her schedule with Student's schedule. She could not provide services

twice a week for 30 minutes per session. Eventually, due to a schedule change, she began to provide the services one day per week for 60 minutes per session.<sup>8</sup> She intends to make up the missed sessions during the remainder of the school year.

58. In Garner's opinion, Student does not require 60 minutes of S/L therapy per week to meet his needs. Instead one 30-minute session of S/L therapy per week would be sufficient. She does not believe that Student's education suffered any harm based on the missed services.

59. As discussed in Legal Conclusions 19 – 25, the evidence supports a finding that the District has failed to implement the S/L services called for in the January 2008 IEP in a material respect. Of the 14 hours of S/L services that Student was supposed to receive from the start of school until the hearing, Student missed five and one-half hours, more than a third of those services. While Garner's opinion that Student does not need 60 minutes of S/L per week carries weight, it cannot supersede the IEP team's decision that Student requires 60 minutes of S/L services per week to meet his educational needs.

60. The District believes that any compensatory education awarded for these missed hours should be provided by District personnel to ensure continuity of services in Student's education. Student's sister expressed concern that the District staff has not had the time to provide the required hours so far, so she cannot see how they will have time to provide extra hours. Both parties' contentions in this regard will be addressed in the Legal Conclusions below.

## LEGAL CONCLUSIONS

1. The Student has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

### *The District's Motion to Dismiss*

2. The District filed a motion to dismiss Student's first issue regarding the failure to provide the NPA S/L services called for in the August 2007 mediation agreement. The District relies on California Education Code section 56501, subdivision (a), which lists the types of disputes that can be adjudicated in a due process proceeding. That section provides, in part:

The parent or guardian and the public agency involved may initiate the due process hearing procedures prescribed by this chapter under any of the following circumstances:

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<sup>8</sup> Student's sister testified that Student and his family prefer one 60-minute session per week instead of two 30-minute sessions. They do not contend that providing the 60 minute session violated the IEP. Instead, they are concerned with the weeks when the 60 minutes per week were not provided, either in one or two sessions.

(1) There is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child.

(2) There is a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child.

(3) The parent or guardian refuses to consent to an assessment of the child.

(4) There is a disagreement between a parent or guardian and a local educational agency regarding the availability of a program appropriate for the child, including the question of fiscal responsibility....

3. Student's first issue, as clarified during the PHC, is whether the District denied Student a free appropriate public education due to the gaps in the NPA S/L services. This issue does more than simply argue a breach of a mediation agreement. If the NPA S/L services were necessary for Student to benefit from his special education, the failure to provide them could constitute a denial of a FAPE.

4. Although the District does not cite to the case of *Wyner v. Manhattan Beach Unified School District* (9th Cir. 2000) 223 F.3d 1026, that decision has potential relevance to the motion to dismiss. In that case, the federal court held that the Special Education Hearing Office (which used to hear special education due process cases prior to OAH) did not have jurisdiction to enforce its order that the parties abide by the terms of a settlement agreement. Instead, a parent who believed that a school district had failed to comply had to bring a compliance complaint with the California Department of Education (CDE).

5. However, more recent decisions have clarified that there is a difference between a claim that a District is not complying with a settlement, and a claim that the services called for in the settlement are necessary for Student to receive a FAPE. In the latter situation, there is jurisdiction to hear the claim. (See, e.g., *Pedraza v. Alameda Unified School District* (N.D. Cal. 2007) 2007 WL 949603.)

6. In the instant case, the issue as clarified in the PHC Order alleges a failure to provide a FAPE due to the gaps in the NPA S/L services. That issue is properly within the jurisdiction of OAH and the motion to dismiss is denied.

*Did the District deny Student a FAPE when S/L services were not provided, pursuant to the August 14, 2007 mediation agreement, from September 1, 2007, through January 30, 2008, and April 1, 2008, through June 19, 2008?*

7. Under the federal Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. §

1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student’s IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).)

8. Related services (also known as designated instruction and services under California law) include “transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology...) as required to assist an individual with exceptional needs to benefit from special education....” (Cal. Code Regs., tit. 5, § 3001, subd. (z).)

9. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034], the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child’s IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 – 207.)

10. In the instant case, Student submitted no evidence to show that the missing NPA S/L services were necessary to assist Student to benefit from his special education. Student was already receiving S/L services from the District during the two time periods in question and was making educational progress. As set forth in Factual Finding 20, at the January 2008 IEP meeting, the team found that Student had met all his goals from the previous year except one. Henderson, his current English teacher, testified that he is able to access the general education curriculum without modifications. He is getting an A in his class and is very close to finishing his high school requirements.

11. Student called no experts to show that Student needed those NPA services. The District’s S/L expert testified that Student does not even need the full hour of District-supplied S/L services called for in his IEP, much less an additional hour of NPA services per week. There is no basis for believing that he needed an additional hour of NPA S/L services each week the year before. Student has the burden on this issue and failed to produce evidence to meet that burden.

12. This situation might have been different if the IEP team had found the NPA services necessary to provide Student a FAPE. However, no IEP team made that decision. Likewise, the settlement agreement recited that the parties did *not* agree that the services were necessary to provide a FAPE.

13. Even if Student had made a showing that the services were necessary, Student has not shown that the District failed to provide them. As discussed in Factual Findings 2 – 17 above, at all times the District made the NPA S/L services available to Student. The District staff swiftly dealt with any problems with providers as soon as Student made the District aware of those problems. Student chose to wait three months before informing the

District that the four providers were not available. Had Student followed the District's letter and contacted the District within three weeks, services could have been started much sooner. When Student's family finally contacted the District, the District staff rapidly located a provider to meet the family's requested weekend schedule.

14. Later, when the family was upset because they thought the NPA provider had cancelled services based on the missed appointments, District staff rapidly confirmed with the provider that services would continue. Student's mother and sister testified that the new 5:00 p.m. time offered by the provider would not work for Student, but there was no evidence that Student's family attempted to work with the NPA provider to move back the time to 5:30 p.m. (a half-hour later in the day). Instead, it appears that Student's family insisted on a different provider and made no effort to take advantage of the services offered. There was no denial of FAPE by the District.

*Did the District deny Student a FAPE in school year 2008-2009 by its failure to provide behavior intervention implementation services as outlined in the January 11, 2008 IEP?*

15. California regulations set forth the minimum educational requirements for NPA providers who offer behavior intervention services in a public school setting. Behavior intervention "shall be designed or planned only by personnel" who possess certain degrees or credentials, including a "credential authorizing the holder to deliver special education instruction," or a "master's degree issued by a regionally accredited post-secondary institution in education, psychology, counseling, behavior analysis, behavior science, human development, social work, rehabilitation, or in a related field." (Cal. Code Regs., tit. 5, § 3065, subd. (d)(2), (7).)

16. The individual who provides the actual behavior intervention services on behalf of the NPA (the BII) must either possess the necessary education to design or plan those services or must possess a high school diploma, work under the supervision of an individual who meets the requirements to design or plan the behavior intervention, and receive the specific level of supervision required in the pupil's IEP. (Cal. Code Regs., tit. 5, § 3065, subd. (e).)

17. As more particularly set forth in Factual Findings 23 – 32 above, Yunkers met the requirements to act as a BID for an NPA provider under California Code of Regulations, title 5, section 3065. She holds a masters degree in education and is credentialed as a special education instructor. Although Student did not establish exactly what Rudon's educational background is, based on the comments made by District personnel that he is working on a college degree in screen writing, it can be inferred that he has a high school diploma. The evidence established that he has received a significant amount of training from his employer and works at all times under Yunker's supervision. There was no denial of FAPE.

18. As more particularly set forth in Factual Findings 18 – 51, above, Student has not met his burden of proving that Rudon failed to perform his duties required under the IEP. The evidence established that Rudon is a behavioral aide who works with Student to address

the behaviors that interfere with Student's ability to access the general curriculum and gain educational benefit. Rudon is fulfilling that function, and Student has gained educational and social benefit from Rudon's services. Student's family may wish that he would provide academic tutoring as well, but that is not his function and is not what is required of him under Student's IEP. There was no denial of FAPE.

*Did the District deny Student a FAPE in school year 2008-2009 by its failure to offer and provide appropriate S/L services?*

19. As stated above in Legal Conclusion 7, in order to provide a FAPE, the special education and related services provided to the child must conform to the child's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) In the instant case, as discussed in Factual Findings 52 – 60 above, there is no dispute that Garner did not provide all the S/L services called for in Student's IEP during the 2008-2009 school year. Therefore, the services did not conform to the child's IEP.

20. The case of *Van Duyn v. Baker School District* (9th Cir 2007) 502 F.3d 811, addressed the issue of when the failure to provide the services called for in an IEP can give rise to a denial of FAPE. The court held that that “when a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP.” (*Id.* at p. 815.)

21. In the instant case, the IEP called for the District to provide 14 hours of S/L therapy between September 5, 2008, and December 8, 2008. The District failed to provide five and one-half of those hours, more than a third of the required time. Garner testified that she did not believe Student needed a full hour of S/L services per week. However, that was not her decision to make. The IEP team made that determination and the District was bound to follow that determination or seek to change the services through the IEP process. The problems with Garner's schedule do not justify the failure to provide the services. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1151.) If the District does not have sufficient personnel to meet Student's needs, then the District should make other arrangements to meet those needs.

22. The evidence supports a finding that the failure by the District to provide Student with five and one-half hours of S/L services during the 2008-2009 school year constitutes a material failure to implement Student's IEP and a denial of FAPE.

23. When a district fails to provide a FAPE to a child, compensatory education may be awarded. Compensatory education is an equitable remedy designed to “ensure that the student is appropriately educated within the meaning of the IDEA.” (*Parents of Student W v. Puyallup School District, No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) There is no obligation to provide a day-for-day compensation for time missed. The remedy of compensatory education depends on a “fact-specific analysis” of the individual

circumstances of the case. (*Ibid.*) The ALJ is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*School Committee of the Town of Burlington, Massachusetts v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996].)

24. In the instant case, it would be equitable to require the District to provide the entire five and one-half hours of speech and language therapy missed by Student. Student is 21 years old. He will “age-out” of the special education system soon. (Ed. Code, § 56026, subd. (c)(4).) He needs the full benefit of his IEP program and services in the time remaining.

25. The District believes that it is important to provide the make-up services through District staff in order to provide continuity in the Student’s program. The District’s position is well taken. However, Student’s sister raises an equally valid point when she discusses her concerns about the District’s ability to provide the hours. If Garner barely has time to provide one hour per week of services called for in the IEP, how will she provide additional services? Therefore, the best way to resolve this issue is to give the District a limited amount of time to provide the compensatory services. If the District staff is unable to provide those services within that time, Student may retain a speech pathologist of his choice to provide any remaining services and bill the District for the time.

## ORDER

The District shall provide five and one-half hours of compensatory speech and language therapy (compensatory services) to Student in addition to the speech and language services to be provided under Student’s IEP, as follows:

a. The compensatory services are to be provided by a District speech pathologist within 75 days of the date of this Decision. The services shall be in addition to any speech and language services called for in Student’s IEP.<sup>9</sup> Each session of compensatory services will be at least one-half hour long, although individual sessions may be longer than a half-hour. The District will provide Student’s family with a written report at least once every three weeks during the 75 day period, documenting the amount of compensatory services provided each week.

b. If the District is unable to provide the full five and one-half hours of compensatory services within 75 days, Student will be entitled to procure services to fill any remaining time through a speech pathologist of Student’s choice and to bill the District for the cost of the services, provided that all speech and language services are to be provided and

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<sup>9</sup> Any S/L therapy provided by District staff during a given week will first be credited to Student’s normal IEP requirements. Only services beyond the 60 minutes per week called for in Student’s IEP (or whatever Student’s IEP requires at that time) will be considered compensatory services.

a bill submitted to the District by the end of the 2008-2009 school year.<sup>10</sup> The District will pay any bill submitted within 30 days of receipt of proof of payment by Student or his family.

- c. Student's other claims for relief are denied.

#### 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. In accordance with that section the following finding is made: The District prevailed on issues 1 and 2. Student prevailed on issue 3.

#### RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: January 20, 2009

/s/

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SUSAN RUFF  
Administrative Law Judge  
Office of Administrative Hearings

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<sup>10</sup> For example, if the District is able to provide four and one-half hours of compensatory speech and language within 75 days, Student may seek a private speech pathologist of Student's choosing to provide the remaining hour. Student may then bill the District for the hour of service, as long as the private services are rendered and the bill submitted to the District by the close of the 2008-2009 school year.