

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

CORNING UNION ELEMENTARY  
SCHOOL DISTRICT,

v.

STUDENT.

OAH CASE NO. 2008100547

**DECISION**

Administrative Law Judge Darrell L. Lepkowsky, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Corning, California, on February 25, 26, and 27, 2009.

Patrick J. Balucan, Esq., of Atkinson, Andelson, Loya, Ruud & Romo, represented the Corning Union Elementary School District (District). District Superintendent Stephen Kelish, District Coordinator of Special Education / school psychologist Jolynn Aanenson, and Tehama County Special Education Local Plan Area (SELPA) Director Heidi Schueller, attended each day of hearing.

Advocate Richard Robertson, accompanied by his assistant Carol Napier, represented Student and his Mother. Mother was present each day of the hearing.

The District filed a Request for Due Process Hearing on October 16, 2008. OAH granted Student's request for a continuance for good cause on November 10, 2008. The record at hearing remained open to permit the parties to file written closing arguments. The parties both timely filed their written arguments by March 9, 2009. The ALJ closed the record and the matter was submitted as of that date.

**ISSUE**

Did the District's September 17, 2008 individualized education program (IEP), with addenda, offer Student a free appropriate public education (FAPE) in the least restrictive environment (LRE)?

## FACTUAL FINDINGS

### *Jurisdiction and Background*

1. Student is an eleven-year-old boy. During the relevant time he was eligible for special education first under the category of other health impaired (OHI) due to epilepsy and other health concerns, and later under the primary eligibility category of autism, with a secondary eligibility category of OHI. At all relevant times, Student lived within the boundaries of the District.

2. Student was diagnosed with a seizure disorder based upon an electroencephalogram he received on November 22, 2005. Beginning in February 2006, Dr. Kimberli Frantz, Student's pediatrician, requested the District to begin logging Student's staring spells, which she believed were usually petit mal seizures lasting less than a minute.<sup>1</sup> Dr. Frantz was also attempting to control Student's seizures through medication. On March 13, 2006, Dr. Frantz requested that the District place Student on a half-day schedule until she re-evaluated him two weeks later. On March 27, 2006, Dr. Frantz requested the District to cease permitting Student to use a computer and to continue him on a half-day schedule.

3. The District first found Student eligible for special education on March 28, 2006, under the eligibility category of OHI. The District made its eligibility finding based upon an increase in Student's epileptic seizures and the medication he took to control them, which were affecting his memory, learning, and behavior at school. The District developed an IEP for Student on March 28, 2006, in which it provided accommodations and modifications for Student in his general education classroom so that he could better access the curriculum. Additionally, the IEP placed Student in a resource specialist program (RSP) classroom for approximately nine-and-one-half hours a week. The IEP contemplated that Student would soon be returning full time to school. Mother consented to this IEP.

4. Student began having behavioral incidents at school. During one incident, while Student was in the Principal's office, he tried to take her phone away from her and then began knocking items off the desk and shelves in the office. Student eventually calmed down when he was redirected to a math activity. In an addendum IEP dated May 5, 2006, Student's IEP team determined that he needed a behavior support plan.

5. Dr. Frantz determined that Student could not return to school full-time. On August 21, 2006, she continued Student on a half-day schedule, again directed that he not use a computer, and directed that he not have any direct exposure to the sun. Dr. Frantz

---

<sup>1</sup> A petit mal seizure is the term commonly given to a staring spell, most commonly called an "absence seizure." It is a brief (usually less than 15 seconds) disturbance of brain function due to abnormal electrical activity in the brain. (<http://www.nlm.nih.gov/medlineplus/ency/article/000696.htm#Definition>)

indicated that Student could play on the playground as long as someone supervised him. The District created a schedule for Student in which he attended his general education classroom for an hour and 15 minutes each morning and then went to his RSP classroom for two hours and 15 minutes. The District requested Mother to provide a release to it so that it could obtain Student's health information, but Mother declined to provide the release.

6. At an IEP meeting on September 14, 2006, Student's IEP team determined that Student would attend school in his general education class, where his behavior was best, for approximately two hours a day. The District then agreed to provide Student with additional instruction at home under a "home hospital" program where his home hospital teacher would oversee his academic instruction.<sup>2</sup>

7. Dr. Frantz referred Student to the M.I.N.D. Institute Clinics at the University of California, Davis, where Dr. Celia Chang saw him in December 2006. Mother told the clinicians that Student was easily frustrated and threw tantrums due to his frustration. Mother also informed them that although in third grade, Student could not read, that he did not appear to understand everything orally conveyed to him, that although he could previously recite his alphabet, he no longer was able to do so, and that Student became agitated by loud noises such as a car alarm. Mother also commented that she had to give Student step-by-step instructions to get him to do anything because he took things so literally. Dr. Chang noted that based on his behaviors and use of language, Student might have an autism spectrum disorder. Dr. Frantz and Dr. Chang recommended that Student remain on his home hospital program due to his seizures, which were still not controlled. Student's IEP team adopted that recommendation in an IEP addendum dated January 11, 2007.

8. Student's IEP team held his annual IEP meeting on March 29, 2007. In pertinent part, the District offered to continue Student on home hospital for one hour a day, five days a week, to provide him with one hour a day, five days a week in a special day class on an elementary school campus, and to provide him with 30 minutes a day, four times a week of RSP support after school hours. Because Student was spending so little time in school, his IEP team deferred developing an updated behavior support plan (BSP) until Student returned to school. Dr. Frantz suggested limiting Student to on-campus time of only two 30-minute sessions of RSP class a week. With that change in the IEP, Mother agreed to it on April 24, 2007.

9. On July 2, 2007, Student was evaluated by Dr. Lisa Benaron of the Far Northern Regional Center for the purpose of determining whether Student had a possible autism spectrum disorder. Dr. Benaron reviewed Student's extensive medical history and his

---

<sup>2</sup> Home hospital instruction is provided to students whose doctors certify that, for medical reasons, they are unable to attend school. It is generally a short-term course of study, designed to assist the student to keep up with the curriculum until the student is able to return to a school setting. (See Legal Conclusions 8 and 9 below.)

numerous tests and assessments, as well as notes prepared by Mother. As part of the medical evaluation, the Regional Center also conducted an unstructured play observation of Student.

Dr. Berneron noted Student's past medical history of epilepsy, including the fact that his seizures were reportedly precipitated by loud noises. She also noted Dr. Chang's diagnosis of possible autistic spectrum disorder from December 2006.

10. In her report, Dr. Benaron noted that Student did not exhibit any behavioral problems at school until the latter part of first grade. She also noted that his behavior issues at home were significant, with Mother reporting that he would throw temper tantrums "like a two year-old." As of the time of the report in July 2007, Student's tantrums at home had decreased. Mother reported that his behavior at school was "disastrous" and worse at school than at home. Mother reported to Dr. Benaron that Student was annoyed by some voices, did not know when comments were inappropriate, and would cover his ears if he heard a voice that annoyed him. Mother also reported that Student disliked crowded places and when in public, often would crawl and hide under things like tables. Student disliked heavy clothing and would take off all his clothes if given the chance. Furthermore, Mother reported that Student disliked loud noises, hit himself in the head when upset, engaged in almost constant mouth movements, and seemed overwhelmed when around certain people or in strange places.

11. Based upon interviews with Student and observations of him by herself and by an assistant, Dr. Benaron noted that Student had qualitative impairments in social interaction marked by impairment in the use of multiple non-verbal behaviors such as eye-to-eye gaze, facial expressions, body postures, and gestures to regulate social interaction. She also noted that Student had a failure to develop peer relationships appropriate to his developmental level and that he lacked social or emotional reciprocity. However, Dr. Benaron did find that Student had no difficulty directing other people's attention to objects of interest.

12. Dr. Benaron also found that Student demonstrated qualitative impairments in communication, manifested by a difficulty maintaining back and forth conversations, some idiosyncratic speech, and the lack of a good imagination. However, Dr. Benaron noted that Student did not demonstrate any significant language delays by first grade, after having been given speech therapy at an early age. Dr. Benaron also found that Student demonstrated restricted, repetitive and stereotyped patterns of behavior, interests and activities, as manifested by the fact that Mother reported Student would have a tantrum if things were not in their usual place, and the fact that Student was preoccupied with spinning things for hours at a time. However, Dr. Benaron found that Student did not have any preoccupation with patterns of interest and did not appear to have any stereotyped and repetitive motor mannerisms, such as finger flapping.

13. In her report, Dr. Benaron noted that none of the previous assessments of Student had found that he presented on the autism spectrum. However, she found that Student did seem to have an autism spectrum disorder, based upon his atypical social interactions, tendency towards extreme literalness, lack of imagination, seeming unawareness

of the inappropriateness of his social responses, unusual intonation, poor to and fro conversational skills, and failure to use eye contact appropriately to modulate social interactions. Dr. Benaron noted that some children who have high-functioning autism can be overlooked during their early school years. However, since she had not had an opportunity to speak with Student's teachers with regard to their observations of him over the years, Dr. Benaron only made a provisional diagnosis of autism. Dr. Benaron was not called to testify at the hearing in this matter and therefore was not able to offer any insights into her report or clarify if she had at any point made a concrete diagnosis of autism spectrum disorder subsequent to her July 2, 2007 medical evaluation of Student. She did note in an addendum to her report that Dr. Frantz, who has taken care of Student since birth, informed her that she had always felt that Student showed autistic spectrum characteristics

14. On September 7, 2007, Dr. Frantz wrote a prescription for Student noting that he had a diagnosis of autistic spectrum disorder and seizure disorder and directing that Student continue on home hospital study for the school year. This prescription was given to the District. On December 21, 2007, Dr. Frantz revised her recommendation and agreed that Student could begin participating in small group study one hour a day, five days a week with his special education teacher.

15. Student's IEP team held an addendum IEP meeting on January 8, 2008. The team reviewed an assessment plan for Student with Mother, who agreed to the plan. The team determined that Student would continue receiving five hours per week of home hospital study and that he would begin two hours per week of special education services for reading and math, and would also receive one additional hour of special education services. Mother agreed to this addendum IEP.

#### *Student's 2008 Triennial Assessments*

##### *Occupational Therapy*

16. Student's triennial assessments were due in the spring of 2008. The District proposed an assessment plan to which Mother consented.

17. Student contends that the District's IEP does not properly consider his sensory needs and that his needs cannot be met in the District's proposed placement for Student. Student contends that his sensory needs require that the District continue to educate him at home under the auspices of the District's home hospital program. The District contends that it properly assessed Student and that he does not exhibit sensory needs that warrant either direct occupational therapy or a home hospital placement.

18. Amy O'Laughlin administered an occupational therapy assessment to Student in February 2008. O'Laughlin is a licensed occupational therapist who works for the Tehama County Department of Education. Student was referred to her for an assessment of his sensory processing as it related to Student's ability to function within the school setting. To prepare her findings, O'Laughlin reviewed Student's past IEPS, conducted teacher

interviews and reviewed a questionnaire she had them prepare for her, observed Student in the classroom, and requested Student's teacher and Mother to fill out the Sensory Processing Measure (SPM), which consists of two separate questionnaires regarding functioning in the classroom and in the home environments. Each category has a possible score of "typical," "some problems," or "definite dysfunction." The two questionnaires are typically scored individually and then are combined to obtain an Environment Difference score. Results of the profiles are used only in conjunction with clinical observations and educational information.

19. Due to the paucity of time he spent in the classroom, Student's teacher was not able to give him scores in the areas of social, body awareness and planning and ideas. She did, however, score him as typical in vision, typical in hearing, some problems in touch, and typical in motion and balance. Since the teacher was not able to score in three of seven areas, O'Laughlin could not state a total score for Student on the home portion of the Sensory Processing Measure.

20. With regard to auditory issues, Student would make noises, such as humming, singing, or yelling, during class quiet time. However, he did not show any distress or oversensitivity to sounds or voices. He was able to tolerate background music and other peers in the classroom without becoming distracted or over-stimulated. In the area of tactile responses, Student demonstrated intolerance to dirt on his hands and clothing and adversely responded to being touched by others. However, he did not demonstrate any aversion to textures and did not excessively seek out tactile stimulation in the classroom.

21. With regard to balance and motion (referred to as vestibular functioning), Student had a habit of fidgeting in his seat, had poor desk posture, poor coordination and appeared clumsy. However, he did not demonstrate poor attention as a result of his need for movement. With regard to his body awareness (also referred to as proprioception), Student walked heavily and preferred to run, hop, or bounce instead of walking. Student frequently changed positions while seated and at times would stand to work at tasks at his table.

22. With regard to fine and visual motor skills, the only atypical areas for Student were his inability to button or tie shoes, his poor posture, and his aversion to paper and pencil tasks.

23. While Student's teacher rated him as typical in three areas and noted some problems in one (in the area of touch), the scores Student's Mother gave him placed Student in the definite dysfunction range in the home environment on all seven areas of the Sensory Processing Measure. O'Laughlin attributed the discrepancy between the home and school environment scores to the structure and direct attention/instruction being provided in Student's current classroom or to the result of Student's limited time spent in school. Overall, O'Laughlin found that Student was a bright young boy who appeared to do well with structure, routine, predictability, and frequent praise. Although she noted some sensory issues, O'Laughlin found that it was difficult to adequately determine the impact of the sensory issues on Student's educational performance since he spent so little time in the

classroom. O’Laughlin ultimately determined that Student did not require specific occupational therapy services based upon the current information she had, particularly the lack of ability to assess fully Student’s issues in the classroom since he was only there for a few hours a week.

24. Mother obtained an independent assessment of Student in the areas of sensory and motor performance from assessors at the Department of Kinesiology at California State University, Chico on February 16, 2009, little more than a week before the hearing in this matter began. The assessment was conducted by Dr. Rebecca Lytle, Dr Teri Todd, and Josie Cline (collectively referred to as the “Chico assessors”). None of the assessors were called to testify at the hearing and it is therefore unknown if any are licensed occupational therapists or were trained or have a background in occupational therapy.

25. The assessment was conducted at the assessors’ clinic. Assessments administered were the Test of Gross Motor Development (TGMD), the Sensory Processing Measure (which had also been administered by O’Laughlin as part of the District’s triennial assessment in February 2008), and the Analysis of Sensory Behavior Inventory. The Chico assessors also conducted clinic observations and interviewed Mother as part of the assessment process. They completed the TGMD directly with Student. All other assessments were completed entirely through parent reports.

26. Mother’s ratings of Student for the SPM resulted in scores identical to the ratings she gave in the SPM Mother rated for the assessment conducted by O’Laughlin: Mother’s scores indicated that Student was in the definite dysfunction range of each of the seven areas covered by the assessment. The Chico assessors found that Student had greater sensory concerns than 99 per cent of his peers.

27. The Chico assessors also administered the Analysis of Sensory Behavior (ASB), which too was based solely on an interview with Mother. The ASB is used to collect information regarding behavior and responses as they relate to sensory stimuli. Six sensory modalities were assessed for Student: vestibular, tactile, proprioceptive, auditory, visual and gustatory-olfactory (taste and smell). The results from Mother’s completion of the ASB were similar to those on the SPM: Mother reported that Student avoided vertical vestibular motion, such as avoiding positions in which his feet are off the ground, but sought out some vestibular motion such as merry-go-rounds and being rocked. Student avoided some tactile areas, such as having his face washed and certain foods. He also avoided vibrating appliances and tended to give up easily on tasks that required him to provide resistance, such as pushing heavy doors. Additionally, Student protested or overreacted to unexpected or loud noises and seemed unable to pay attention when other noises were nearby. Finally, Student avoided eye contact, enjoyed the dark, seemed over-stimulated where there were a variety of visual objects, and avoided the outdoors on sunny days.

28. The TGMD is designed to evaluate gross motor skills in children three to 10 years of age. It measures 12 gross motor skills frequently taught to children in preschool and elementary school and includes two subsets: locomotion and object control. Student scored

under the first percentile in the combined score for each of the two subsets, signifying an extreme gross motor skill deficit.

29. The Chico assessors found that Student showed significant differences in both sensory sensitivities and in delayed motor skills. However, they also noted that the assessment results needed to be reviewed cautiously since Student did not demonstrate the severe concerns in the clinic that Mother observed at home. The assessors did find that Student demonstrated a low tolerance for direction or new challenges, had difficulty transitioning between activities, and was sensory seeking while he was at the clinic.

30. The Chico assessors did not recommend that the District provide direct occupational therapy to Student. Rather, they recommended accommodations for Student, such as that he work individually or in small groups and in quiet areas, that distractions be reduced and that he be given one-step instructions, that he be provided with sensory toys at his desk, that the school use positive reinforcement to encourage participation, and that natural lighting be used if possible. As discussed below, many of these recommendations are integrated into the Special Day Class offered by the District in the September 17, 2008 IEP and its addenda.

31. Both Mother and family friend David Roberts, both of whom were the only witnesses Student called in his case, testified emotionally and credibly that Student has exhibited unfavorable or extreme reactions to sensory stimuli, such as loud music and lights, outside of the school environment. Roberts, who has been a friend of the Student's family for many years and spends a considerable amount of time with them, stated that he has seen Student appear startled and uncomfortable after walking into a store with strong lightening. Roberts perceived Student's adverse reaction to fluorescent lighting to be so intense that Roberts purchased a type of light bulb that gives off natural light for both his home and Student's. Roberts and Mother also credibly testified that Student does not like the sound of wind and insists that the television sound be very low when the television is on.

32. However, the accounts of Mother and Roberts concerning Student's strong reaction to light and sound at home did not apply to the descriptions of Student's sensory responses at school. None of the educators who testified saw the same type of reaction to sensory input at school. Either they did not see anything in Student's reaction that appeared to indicate that he was not able to regulate his responses to the sensory input (as Student's teachers testified), or they did not believe that the Student's sensory issues required either direct occupational therapy or removal from the school environment (as exemplified in the occupational therapy report and testimony at hearing of O'Laughlin). Nor did Student's pediatrician, Dr. Frantz, ever inform the District that Student had intense reactions to sensory stimuli that would require either accommodations at school to remove Student from loud noises or fluorescent lighting or removal from a public school campus. Dr. Frantz credibly testified at hearing that she never noted Student reacting to sensory overload when she observed him during medical visits.

### *Speech and Language Assessment*

33. Terree McNary is a speech and language pathologist for the Tehama County Department of Education. She administered a speech and language assessment to Student on March 10, 2008, as part of his triennial assessment. McNary had previously assessed Student twice in the past. The purpose of her present assessment was to gather information on Student's communication functioning and how it related to his ability to communicate and learn in the educational setting.

34. McNary reviewed Dr. Benaron's medical evaluation as well as Student's previous assessments. She noted that Student had received speech and language therapy for approximately nine months when he was five years old, but had been discharged when he was judged to be within the normal limits with regard to articulation and language. McNary noted that District assessments of Student on three previous occasions did not find any significant speech delays and that Student demonstrated sufficient speech and pragmatic skills to support him in the educational setting.

35. McNary also reviewed Student's school file, observed Student at school, and consulted with District staff. She also administered the Expressive One-Word Picture Vocabulary Test, the Test for Comprehension of Language – 3, the Test of Auditory Processing Skills – 3 (Number Memory and Word Memory Subtests), the Comprehensive Assessment of Spoken Language (Pragmatic Judgment Subtest), and Informal Speech and Language Sampling.

36. McNary's observations of Student indicated that his speech was 100 percent understandable and that he could articulate all sounds as expected for his age. She noted no speech or articulation concerns for Student in the educational setting. Student's scores on vocabulary subtests indicated he understood the meaning of spoken words and grammatical information within normal limits as compared to his peers. However, Student was unable to complete some of the subtests because he became distracted and began commenting on the test pictures rather than focusing on the test requirements. McNary found that Student was able to comprehend the meaning of spoken language as expected for his age when he concentrates and remains focused. This was confirmed by Student's teachers.

37. McNary found that Student consistently used age-appropriate sentences of nine to 10 words with adequate grammar and word order. She noted that he was very verbal, and had no difficulty expressing his opinions, desires and feelings in an organized manner. Student's test scores on the Expressive One-Word Picture Vocabulary Test indicated that Student's spoken language was within average range although he sometimes had unexplained difficulty in retention, recall, and processing of information. On the Pragmatic Judgment Subtest of the Comprehensive Assessment of Spoken Language, Student demonstrated an inability to retain and recall information, which interrupted his ability to successfully demonstrate his pragmatic knowledge. McNary suspended testing on that subtest. However, she found that Student's scores on the test suggested that his ability to

judge appropriate language during everyday situations was borderline low average as compared to his peer group.

38. McNary recommended that teaching techniques used for Student should include task modeling, visual aides, hands-on activities, and short, uncomplicated verbal directions, in order to reduce Student's frustration and help him maintain focus. As discussed below, most of these recommendations were either added to the District's proposed IEP or were an integral part of the proposed SDC classroom. Most significantly, McNary found that Student needed to return to the school setting in order to provide him with the opportunity to practice the age-appropriate social interactions needed to stimulate the development of his social communication and pragmatic skills. However, based upon the information available to her at the time of her assessment, McNary did not find that Student required direct speech and language services. Mother has not contested the validity of McNary's assessment and there is no evidence in the record that contradicts McNary's findings or recommendations regarding speech and language issues for Student.

#### *Psycho-Educational Assessment*

39. School psychologist/Coordinator of Special Education Jolynn Aanenson conducted a psycho-educational assessment of Student. Her report is dated April 2, 2008. The purpose of her assessment was to determine Student's disability, if he still qualified for special education, his present intellectual functioning, his present academic levels and function of behaviors, and how well Student coped with the everyday demands of the educational environment.

40. Aanenson administered, or attempted to administer, the following tests: the Wechsler Intelligence Scales for Children – Fourth Edition (WIAT-IV); the Comprehensive Test of Phonological Processing (CTOPP); and the Adaptive Behavior Assessment System – Parent and Teacher Forms (ABAS). Aanenson also reviewed the Academic Evaluation completed by Elizabeth (Liz) Williams, Student's RSP teacher, the School Nurse's Report completed by Nurse JoAnn Boone, and the Speech and Language evaluation completed by McNary. Finally, Aanenson conducted observations of Student, reviewed his school records, reviewed Dr. Benaron's medical evaluation, and interviewed Mother.

41. Aanenson observed Student in his classroom where he was working one-on-one with his teacher, and in her office. Student responded promptly and appropriately to his teacher and transitioned easily between with the teacher's behavioral supports. However, when Student came to Aanenson's office with a peer to play an educational game, he was disheveled and dirty, appeared perplexed, did not focus on who was speaking to him, and did not appear to remember his peer's name. He required prompting to follow the game's rules and became agitated and tried to alter the game's rules when Student realized he was not winning.

42. Aanenson attempted to test Student at his home on three days in February 2008. On the first occasion, he did not initiate a greeting, displayed poor eye contact, and

perseverated on his toys. Student frequently ignored Aanenson during her attempt to test him and, at one point, started swearing while laughing, apparently oblivious to the fact that his behavior was inappropriate. He often did not seem to understand the verbal directions given for the tests. Student was better able to to complete tasks involving visuals.

43. On the third day of testing at Student's home, he demonstrated difficulty in understanding personal boundaries, behaved impulsively, and tried to grab things from Aanenson's hands despite being asked not to do so. Student engaged in perseverating behavior, and resisting transitioning from task to task. He also became agitated when he perceived that he was unsuccessful at a task.

44. Aanenson found that Student had significant deficits in social skills, displayed deficits with auditory processing, and displayed weaknesses with behavior when he could not complete a task or do an activity he preferred.

45. Aanenson interviewed Elizabeth Williams, who was then Student's RSP teacher. Williams reported that Student responded well to a response-cost point-based behavior system,<sup>3</sup> but that he also had been verbally and physically aggressive with Williams on several occasions that year. He also hit Mother, who was present during one of the occasions, when she tried to calm Student.

46. Anthony Wortham, Student's home hospital instructor for a few months in 2008, reported that Student would make progress academically, and then regress. Student did not act out while Wortham was his teacher, but he did become agitated on a couple of occasions.

47. Aanenson administered the WIAT-IV to Student in his home. However, she invalidated Student's scores due to his difficulty with the understanding of verbal directions. Aanenson found that results of Student's previous testing documented that his overall abilities fell within the low average to average ranges, with strengths in non-verbal reasoning and visual perception.

48. Aanenson administered the entire CTOPP to Student. However, she also found that the scores for this test should be considered invalid based upon his difficulty in understanding directions and with what he was required to do on the tasks of the test.

49. The ABAS II is a behavior rating scale used to determine proficiency with everyday life tasks. Student's then-current teacher and Mother completed the scales. Student's teacher was only able to complete three of nine subtests due to her inability to observe Student sufficiently because of his limited time attending school.

---

<sup>3</sup> Response cost is a procedure in which a specific amount of available reinforcers is contingently withdrawn following a response in an attempt to decrease behavior. Response cost is often used with token economy programs, or, as in Student's case, with points that the student earns or loses.

50. Aanenson found that comparing the ratings Mother gave Student, he had regressed considerably since testing in May 2006. Mother also reported that Student could perform a task one day and forget it the next. Aanenson noted that Student had delays in the area of communication, that he cannot state his home address, the days of the week in order, read and follow print, tell time correctly, write letters, or combine coins to produce the correct amount of change.

51. Based on her review of Student's records and interviews with school staff, Aanenson found that Student's most debilitating factor was his difficulty regulating his behavior. Student required continual behavioral supports, frequent breaks and calming strategies to complete tasks and prevent escalation of his behaviors. She noted that she was unable to collect specific data regarding the frequency, antecedent, consequent and environmental factors surrounding his behaviors because Student had been attending school minimally, and, when she did observe him at school, Student did not engage in the targeted behaviors. Aanenson recommended that the District conduct a Functional Analysis Assessment of Student and develop a Positive Behavior Intervention plan once he returned to school.

52. Aanenson noted that Student's adaptive behavior had regressed at home, and that Student demonstrated significant deficits in social communication, functional academics, and leisure activities at school. She also stated that the impact of the delays on Student's educational performance could not be determined until he returned to school for a sufficient amount of time. Furthermore, Aanenson could not explain why Student was so significantly delayed at home, and why he continued to regress there. However, Aanenson also found that the delays observed in the school setting were "hugely" impacted by the fact that the student has not been exposed to a full-time, consistent school routine and curriculum for over two years, and then when Student was at school, his behaviors interfered with his learning. Aanenson further stated that the District was required by statute to seek to return Student to school.

53. Finally, Aanenson recognized that Dr. Benaron had diagnosed Student as being high-functioning autistic. Aanenson recommended that his IEP team consider how that diagnosis would impact Student's school functioning. Aanenson also correctly stated that irrespective of Student's identified handicapping contention, his IEP team still needed to address his overall social, behavioral and academic needs.

54. Aanenson's assessment properly identified Student's unique needs and his deficits and gave appropriate recommendations to address those needs in the classroom.

#### *Behavior Assessment*

55. Karen Messler, an autism specialist with the Tehama County Department of Education, conducted an observation of Student on February 13 and April 9, 2008. On both occasions, Student was working one-on-one with his RSP teacher while other students and

adults were present in the classroom. During the first observation, Student entered the classroom quietly, worked on his tasks when redirected to the proper order of work, and appeared focused on what he was doing, and used a variety of appropriate social interactions during the course of the instruction session. Student laughed appropriately and made eye contact. When Aanenson, who was also observing Student, left the classroom, he gave her a hug.

56. During the second observation, the classroom was quieter than the first time, although there were other students and adults present as had been the case during Messler's first observation of Student. Student had many questions for his teacher about his tasks and the classroom, and argued with her over every step of the game they were playing. The teacher stopped the game when Student refused to follow the rules. At one point, he called his Mother and incorrectly told her that the teacher had been yelling at him when, in fact, she had been addressing him in a firm, but calm manner. Student appeared to be unaware of the other people in the room. Student repeatedly dialed his cell phone, complaining (apparently to his Mother) every time his teacher did not yield to his demands. Messler also noted that every verbal attempt by the teacher to calm Student appeared to escalate his behavior. At one point Messler intervened and demonstrated to the RSP teacher some other behavioral diversionary tactics to use with Student. Messler noted that Student spent about 45 minutes of the one-hour RSP session off task, refusing to do work, arguing with the teacher, yelling, wandering around the room and talking on the phone to Mother.

57. Messler recommended that Student's interactions with his peers be increased, that the District work on helping Student to understand other people's thoughts and feelings, that visual schedules and visual strategies needed to be emphasized for Student, that a compliance program be implemented with him, that school staff complete a list of reinforcers for Student, and that a positive reinforcement system should be considered for him.

#### *Academic Assessment*

58. Elizabeth (Liz) Williams, Student's RSP teacher, conducted an academic assessment of him in approximately February 2008. Since Student had difficulty following directions, Williams determined that it would not be appropriate to administer standardized tests to him. Rather, she used observations of Student and informal assessments. Williams, as Student's RSP teacher, saw him three hours a week for one-on-one instruction. She and Student spent part of their instruction time in the resource room with other students and staff present, and part of their time alone in a separate room.

59. Williams administered the San Diego Quick Assessment of Reading Ability to Student, which is designed to give an estimate of where a child is reading. The test addresses a student's instructional level as well as his or her "frustration" level. Student was reading at the pre-primer instructional level and at the primer level for frustration. This signifies that he was basically reading at or below a first grade level. However, since January 2008, Williams had been working on a new reading program with Student and he was progressing well in it, sometimes completing two of the lessons in one session.

60. In written language, Student was also very much behind grade level; he was able to write his first but not his last name.

61. In mathematics Students again demonstrated significant deficiencies. Based upon observations of Student's ability to count, read and write numbers, and do simple addition and subtraction, Williams determined that Student's mathematics abilities were somewhere between first and second grade level.

62. With regard to Student's behavior, Williams noted she had implemented a behavior point system for him for positive reinforcement and that instead of writing down his daily schedule, Student was using a visual scheduling system based on icons that attached with Velcro since Student responded better to visual stimuli. The scheduling board helped Student know what tasks were awaiting him each day. Williams further noted that Student often appeared oblivious to other people around him and typically did not interact with other students in the resource room. Williams recommended that the District work on improving Student's academic skills and work on his behavior by focusing on a positive reinforcement plan using visual strategies. Williams also suggested that Student might benefit from learning social skills in a small group setting.

*The April 21, 2008 IEP*

63. On April 18, 2008, Dr. Frantz wrote a note to the District indicating that she believed Student's hours at school should be increased gradually to a half-day by the end of the school year. That same day, Dr. Frantz called school nurse JoAnn Boone to discuss Student's educational issues. Dr. Frantz confirmed that she believed Student needed to return to school to spend time with his peers in the school setting, particularly since his seizure disorder was under fairly good control.

64. On April 21, 2008, Student's IEP team convened for his annual/triennial IEP review. Nurse Boone had updated Student's seizure protocols and presented them at this IEP team meeting. The team reviewed Student's assessments, reviewed Student's progress on his prior goals, and proposed five goals for him to address his academic and behavior deficits. The District's IEP offer included placement of Student full-time in an SDC with full-time aide support at school. The District proposed adopting Dr. Frantz's recommendation that Student begin slowly increasing his hours of attendance at school, starting with two hours a day, increasing by one-half hour increments per week until Student reached a half-day schedule by the end of the school year. The District also proposed a behavior support plan for Student to address his inappropriate classroom behaviors. Mother did not believe Student should return to school for more time than the 3 hours per week he already attended and questioned whether Dr. Frantz had really had the conversation with Nurse Boone concerning the possibility of Student returning to a full-time school day. The District also proposed conducting a functional analysis assessment (FAA) of Student in order to develop a behavioral intervention plan for him. Mother would not consent to the FAA.

65. Dr. Frantz has been a pediatrician for approximately 20 years. She has been Student's pediatrician since his birth. She has a long and close relationship with Student and Mother. Dr. Frantz first recommended that Student's school day be shortened in February 2006, and then recommended that the District place him on home hospital study, because she wanted to get his seizures under control. At hearing, Dr. Frantz confirmed that she had contacted Nurse Boone prior to the April 21, 2008 IEP to discuss Student's present medical condition and her desire to help him return full-time to the classroom once she had fully controlled his seizures. Dr. Frantz believed that the only way to work on Student's behavior issues and to adjust his erratic sleeping and eating times was to return him to a structured day based upon school attendance. It was Dr. Frantz's hope and expectation that Student would successfully increase his attendance at school to a half day by the end of the spring 2008 school semester and then, eventually, return full time. She was surprised and very pleased that the District was willing to provide Student with a full-time one-on-one aide to support his transition back to school and to communicate any problems he was having with her.

66. Dr. Frantz did not believe that there were any medical reasons to prevent Student from returning to school full time as long as he slowly increased his hours of attendance. She has other patients who have more medical problems than does Student who attend school full time. Dr. Frantz also acknowledged at hearing that she has never particularly noted any specific sensory needs that Mother alleges Student has, such as oversensitivity to fluorescent lights. Dr. Frantz was aware that Mother did not agree with her opinion that Student was ready to return to school although Dr. Frantz has explained to Mother that Student would significantly benefit from the socialization and behavior modification at school, which, in turn, would most likely have a positive affect on Student's home life. Dr. Frantz has not been able to convince Mother of the benefits of returning Student to school. Mother did not agree to the April 21, 2008 IEP.

67. As part of a clinical research program at the University of California, Davis, Student completed several psychological measures. Dr. Blythe Corbett prepared the report detailing the results of the tests she gave to Student. She found Student's cognitive abilities to be in the low average/borderline range, with an overall full scale intelligence quotient of 75. Based on administration to Student of the Autism Diagnostic Observation Schedule – Module 3, Dr. Corbett found that Student met the criteria for a child with autism spectrum disorder.

68. On August 25, 2008, the District convened an addendum IEP team meeting to address Mother's concerns regarding the proposed IEP. Mother stated that she continued to believe Student could not handle groups or the fluorescent lighting in the classrooms. She continued to take the position that Student should only be on campus a maximum of one hour per day. The District IEP team members reiterated their opinion that Student should return to school, gradually increasing his attendance time until he reached a full day class schedule. They also reiterated their offer to provide Student with a full-time one-on-one aide in an SDC that at the time only had five students. Mother declined to sign a release permitting the District to contact Student's doctors directly. She also continued to decline to consent to an FAA.

*The September 17, 2008 IEP and its Addenda*

69. The District reconvened Student's IEP team on September 17, 2008, in order to again address Mother's concerns regarding the District's IEP offer. In attendance at this meeting was Mother, a representative / administrative designee from the District, school psychologist Aanenson, regular education teacher Johnnie Taylor (who was providing home hospital instruction to Student), speech language pathologist McNary, Assistant Superintendent Heidi Schueller, special education RSP teacher Williams, a behavior specialist, the Assistant SELPA Director, and two nurses: Nurse Boone from the District, and Sharon Sinclair. The District had requested Sinclair to attend since Mother had expressed a lack of confidence in Nurse Boone based upon her mistaken belief that Boone had misstated her conversations with Dr. Frantz. Mother has never contended that any necessary participants to the IEP failed to attend.<sup>4</sup>

70. The IEP team reviewed in detail Student's present levels of academic achievement and functional performance, including the multidisciplinary assessments the District had administered to Student the previous spring. The IEP team updated Mother's concerns that Student had not made any progress at school, as well as noted her statement that Student did not feel safe at school. The District IEP team members again recommended that they be permitted to administer an FAA to Student so that the District could develop a behavior intervention plan for him.

71. The District included the five goals it had proposed for Student in the April 21, 2008 IEP. It included the goal it had developed to address Student's inappropriate behavior by trying to teach him to go to a break area when frustrated rather than responding by being physically aggressive. To address Student's deficits in number sense, the District goal focused on teaching Student to perform two-digit addition and subtraction using regrouping. To address Student's deficits in decoding, the District had developed a goal that focused on teaching Student sight words. To address Student's social/emotional deficits with his peers, the District had developed a goal to teach Student to initiate conversations with peers at school. To address Student's deficits in spelling, the District had developed a goal to teach Student to spell random three-letter words. Each of the goals contained clear standards for measuring Student's progress on each individual goal and each individual benchmark/objective, such as "75% accuracy in 4 of 5 trials as measured by teacher charted data."

72. In response to Mother's concerns about Student's lack of progress with regard to every-day living skills, the District developed an adaptive behavior/daily living goal to teach Student the proper order of the days of the week and how to read a calendar.

---

<sup>4</sup> The District, in fact, was always cognizant of its obligation to ensure that all necessary parties attended the IEP meetings. For example, the general education teacher who was scheduled to attend the October 9, 2008 addenda IEP team meeting became ill right before the meeting. The District found another fifth grade teacher who was available and that teacher joined the meeting as soon as he or she could.

73. Although Mother did not agree to these six goals at the September 17, 2008 IEP meeting, she later agreed to all, with minor modifications, at an addenda meeting the parties convened on October 24, 2008. The IEP goals are therefore not at issue in this case.

74. The District IEP team offered Student placement in the SDC classroom, with a one-on-one aide. In order to address Mother's concerns that Student was autistic, as described in the reports of Dr. Benaron and Dr. Corbett, the District added a directive that Student's lessons in the SDC program would be taught with visual and hands on manipulatives, and that Student's activities would be broken down into short segments. The IEP team also specifically added a directive that the classroom teacher would apply a structured reinforced system to Student. Additionally, again in response to Mother's concerns, the IEP team added speech consultation to staff by the speech language pathologist for 15 minutes a month in Student's classroom. The IEP offer specified the start and end date of the Student's placement as well as the location of the placement (that is, in an SDC on a District elementary school campus) and how long each day Student would spend in the classroom.

75. The SDC classroom into which the District proposed placing Student is taught by special education teacher Angelika Dino who has taught the class for three years. Dino has a master's degree in special education in addition to her special education teaching credential. She presently has 12 students in the class, not counting Student, and is assisted by three aides. With Student joining the class with his full-time aide, Dino's class would have a ratio of four adults for 13 children. Her class presently has two other autistic children. All 13 students are classified as mild to moderately disabled.

76. Dino's class starts its school day at 8:10 a.m. The school day ends at 2:20 p.m. Typically, the day begins with a morning meeting of the whole class, with one of the students, as Dino's helper, passing out stars to the students who have turned in their homework. Dino reviews the date, talks about the weather, reviews other pertinent daily facts, and someone feeds the fish. Then Dino reviews the daily schedule, reminds the students of what they worked on the previous day in order to connect them to the day before and to let them know what to look forward to that day. Dino then has the students do physical exercises to get them to move around and be able to focus on their next activity. The class then segues to its language arts module where the students work on spelling and defining, writing sentences, and focusing on writing skills. After recess, the class has "center time" for about an hour, where each adult in the class works with a small group of students. There is one center for fine motor skills, one for language arts, and one for math. In the fine motor center, the children work on skills such as cutting, coloring, and gluing. In the language arts center, they work on the sounds of words and letters, and work on reading fluency with the higher level students. At the math center, the students work on functional skills such as counting and paying with money and ordering from a menu. After center time the class dances a bit before lining up for lunch. Dino incorporates much physical activity into the students' day in order to assist them to stay focused as she believes that body movement helps students to wake up, to focus on the next activity, and helps them transition

between activities. The students then eat lunch mainstreamed with the general education third, fourth, and fifth graders. After lunch, Dino's class rotates between science and social studies before the school day ends.

77. Although Student has had several behavioral incidents in her classroom, including acting physically aggressive with her, Dino believes that she will be able to teach Student and help him learn to control his behaviors and progress academically. She testified that she already had seen some progress with him since he moved to her class from the RSP in September.<sup>5</sup> Dino has not seen anything that would prevent Student from being in her class for an entire school day. She changed her approach to Student after one of the behavior incidents with him to give him more time to socialize with other students. Although still not fluent in social skills, Dino has noted improvement in Student's class interaction. He follows instruction better when he is interacting with other children. He asks politely if other children want to play with him. Student's behavior is getting better when he loses a game.

78. Dino admitted that in the few weeks before the due process hearing, there was another serious behavior incident in which Student became violent and threw a chair at a bookshelf. In spite of that incident, Dino, who has successfully taught other children who had severe behavior problems, still believes that the more students with behavior and social relation problems come to school and interact with peers, the more they benefit from the structure and organization of the classroom. Dino acknowledge that it will take Student time to adjust to a full school day but she believes that he will, and she is willing to undertake the challenge in spite of Student's history of aggression.

79. The September 17, 2008 IEP also included a detailed behavior support plan that addressed Student's physical aggression in the classroom. It noted that Student tended to respond aggressively when he did not get his way or did not want to engage in a non-preferred task. Predictors also included times when there was a change in Student's schedule or when an adult did not comply with one of Student's requests. The plan detailed several environmental changes, structure and supports the IEP team believed Student need to change his behavior. Although Mother never specifically consented to the behavior support plan, she has never raised any specific objections to it and did not address it at the due process hearing or in Student's closing brief.

80. At the September 17, 2008 IEP meeting, the District again offered to slowly transition Student back to a full day in class, beginning with two hours a day. The District also again proposed conducting an FAA. Mother did not agree to the IEP since she continued to believe, as she still does, that Student cannot handle returning to school in a classroom and cannot adjust, even slowly, to a full day schedule. Mother did not consent to the IEP.

---

<sup>5</sup> It is not entirely clear in the record, but at some point during the 2008-2009 school year, Student, with his Mother's agreement, moved from Williams RSP class to Dino's SDC class for the few hours he continues to attend on campus.

81. On October 9, 2008, the District reconvened an IEP addendum meeting to review a behavioral incident involving Student. All necessary IEP team members were present. At this meeting, Mother agreed to the FAA and to develop a behavior intervention plan for Student. The team also discussed whether an autism diagnosis should be added as a primary or secondary eligibility classification for Student. Mother believed that autism should be Student's primary eligibility; the District believed it should be a secondary eligibility. Mother did not consent to the IEP.

82. The District convened another addenda IEP meeting on October 24, 2008, to consider Mother's request that the FAA be administered by independent assessor Dr. David McGee-Williams, and to again consider Student's eligibility classification. At the meeting, the District agreed to pay for an independent FAA, and to change Student's primary eligibility classification to autism and to make OHI his secondary disability category. As stated above, at this meeting, Mother agreed to the six goals in the September 17, 2008 IEP, which the District agreed to modify pursuant to her suggestions. Mother did not otherwise consent to the IEP.<sup>6</sup>

## LEGAL CONCLUSIONS

### Burden of Proof

1. As the petitioning party, the District has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### Parties' Contentions

2. The District contends that it offered Student a FAPE in the September 17, 2008 IEP and its addenda. In particular, the District contends that the September 17, 2008 IEP and its subsequent addenda offered Student a FAPE because it met Student's unique educational needs in light of his diagnosis of autism and his medical needs, which supported a concurrent eligibility finding of OHI. The District contends that its assessments of Student identified his academic deficits, his processing and memory deficits, his medical needs, his social needs, and his need to be presented information in a visual manner, and that it designed the IEP to address those needs. The District further contends that irrespective of the eligibility category it applied to Student, it correctly identified his unique educational needs associated with his diagnosis of high-functioning autism, and that the IEP it proposed met those needs.

---

<sup>6</sup> Dr. McGee-Williams subsequently assessed Student and wrote a report delineating the results of his assessment. Although Student's IEP team met in January 2009 to review the assessments, as of the date of the hearing neither Dr. McGee-Williams nor the District's behavior specialist, had developed a behavior intervention plan for Student.

3. Student contends that the District has been negligent in its responsibility to identify correctly Student's special education needs since 2003 based on behaviors he has exhibited since that time. Student contends that the District should have found him eligible for special education in 2003, three years before it actually found him eligible. Student also contends that the District should have determined he was autistic in 2003 based upon his behaviors, and in any case, it had concrete evidence that he was autistic based upon Dr. Lisa Benaron's diagnosis of autism in a report that Mother presented to the District in August 2007. Student also asserts that the District had further evidence that he was autistic when Dr. Blythe Corbett of the University of California at Davis' M.I.N.D. Institute found him to be autistic in a report dated August 21, 2008. Student thus contends that the District should have found that he was eligible for special education as autistic far earlier than it did on October 24, 2008. Student contends that since the District did not recognizing he was autistic when it developed the September 17, 2008 IEP, the goals and objectives in that IEP did not address his unique needs because they are not individualized for a student on the autism spectrum. Student further contends that he continues to require instruction in the home based upon his need to regulate his behavior in a safe environment. Finally, Student also contends that the District's IEP offer did not address Student's sensory needs. Student does not specifically dispute any other issues with regard to the District's offer of FAPE.

As discussed more fully below, the District has met its burden of proving by a preponderance of the evidence that it offered Student a FAPE in the September 17, 2008 IEP and its addenda.

#### Legal Requirements for a FAPE

4. FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

5. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (hereafter *Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with meaningful educational benefit in the least restrictive environment. (*Ibid.*)

7. Whether a school district denied a student a FAPE is determined by looking to what was reasonable at the time, not in hindsight. The courts have consistently found that a school district can only be held responsible for developing an IEP based on the information it had available at the time it developed it. (*Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983 (hereafter *Roland M.*); *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (hereafter *Adams*), citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (hereafter *Fuhrman*).)

In analyzing the adequacy of an IEP, the court in *Roland* found that the

. . . . actions of school systems cannot, as appellants would have it, be judged exclusively in hindsight. An IEP is a snapshot, not a retrospective. In striving for "appropriateness", an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated. [Citation omitted.] For another thing, the alchemy of "reasonable calculation" necessarily involves choices among educational policies and theories - choices which courts, relatively speaking, are poorly equipped to make.

(*Roland, supra*, 910 F.2d at p. 992.)

The court in *Fuhrman* determined that when considering whether an IEP complies with the provisions of IDEA, the IEP must be analyzed prospectively.

*Rowley's* requirement that a school district's program be "reasonably calculated" to enable a child to receive educational benefits is prospective; it is based on an evaluation done by a team of experts prior to the student's placement. At the time of the child's evaluation, the IEP must be reasonably calculated to enable the child to receive educational benefits. Thus [the court] would not view *Rowley's* test of "appropriateness" as whether the child actually receives educational benefit as a result of his school placement. Instead, the appropriateness of a student's placement must be assessed in terms of its appropriateness at the time it is created and not at some later date when one has the benefit of the child's actual experience.

(*Fuhrman, supra*, 993 F.2d at p. 1041; accord, *Adams, supra*, 195 F.3d at p. 1149.)

8. In addition, the educational program must be in the least restrictive environment (LRE). (See *Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398; cert. denied (1994) 512 U.S. 1207 (hereafter, *Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050].) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. The continuum of program options includes, “instruction in the home, in hospitals, and in other institutions to the extent required by federal law or regulation.” (Ed. Code, § 56361, subd. (i).)

9. Special education and related services may be provided in the home or hospital if the IEP team recommends such instruction or services. (Cal. Code Regs., tit. 5, § 3051.4, subd. (a).) “For those individuals with exceptional needs with a medical condition such as those related to surgery, accidents, short-term illness or medical treatment for a chronic illness, the individualized education program team shall review, and revise, if appropriate, the individualized education program whenever there is a significant change in the pupil’s current medical condition.” (Cal. Code Regs., tit. 5, § 3051.4, subd. (c).) When recommending placement for home instruction, the IEP team must have a “medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement.” (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).)

10. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

11. An IEP team is required to include: one or both of the student’s parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a) (2006); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

12. Additionally, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a) (2006); Ed. Code, § 56500.4.) A parent has meaningfully participated in the

development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrman, supra*, 993 F.2d at p. 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

13. An IEP must also include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4) (2006); Ed. Code, § 56345, subd. (a)(4).) The IEP must include: a projected start date for services and modifications; and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7) (2006); Ed. Code, § 56345, subd. (a)(7).)

14. An IEP must contain a statement of measurable annual goals related to “meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum” and “meeting each of the child's other educational needs that result from the child's disability.” (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

15. Whether a child receives a FAPE is not dependent on his or her eligibility classification. Rather, the inquiry focuses on what the child's special education needs are and if the school district met those needs. There is a clear distinction between a student's eligibility classification and what a student's needs for special education and related services are. Title 20 United States Code section 1412, subsection (a)(3)(b), as implemented by 34 Code of Federal Regulations part 300.111(d) (2006), states:

Construction. Nothing in this title [20 USCS §§ 1400 et seq.] requires that children be classified by their disability so long as each child who has a disability listed in section 602 [20 USCS §§ 1401] and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this part [20 USCS §§ 1411].

The case of *Heather S. v. Wisconsin* (7th Cir. 1997) 125 F.3d 1045 (hereafter *Heather S.*) is instructive. In that case, there was a disagreement as to what the student's primary handicapping disability was. Her school district had originally classified her as learning disabled and had placed her, with her parents' agreement, in learning disabled programs. A few years later, the student was diagnosed with attention deficit hyperactivity disorder and soon thereafter began experiencing seizures, which later escalated in frequency and intensity. The student began suffering difficulties in her academics and in relationships with

classmates. After assessing the student and noting her significant academic delays,<sup>7</sup> the school district developed an IEP that proposed changing the student's placement from a learning-disabled program to a borderline cognitive disability program at a different school. The student's IEP team also concluded that her primary handicapping disability was other health impaired. The student's parents thought that the school district had found student to be cognitively disabled. The parents filed a due process complaint on the issue of student's eligibility classification as well as their disagreement with the school district's placement offer. The first level hearing officer found that the school district had improperly labeled student as cognitively disabled. The reviewing officer reversed, finding no evidence in the record to support a determination that the school district had ever designated the student's eligibility as cognitively disabled.

On appeal, the Seventh Circuit agreed with the reviewing officer that the school district, in spite of the fact that certain members of the IEP team might have believed that student was cognitively impaired, had never specifically classified student as eligible for special education under that classification. Rather, the school district had classified her as OHI. Moreover, and most significant, the Seventh Circuit also found that whether the student was classified as cognitively disabled, OHI, or learning disabled was "beside the point."

The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education. A disabled child's individual education plan must be tailored to the unique needs of that particular child . . . The IDEA charges the school with developing an appropriate education, not with coming up with a proper label with which to describe [student's] multiple disabilities.

(*Heather S.*, *supra*, 125 F.3d at p. 1055 (citations omitted).)

Therefore, even if a school district failed to properly classify or label a student's disability, it will not have violated the student's rights to a FAPE unless it also failed to address the student's unique needs and failed to provide a program that met those needs.

### Determination of Issues

16. Student first argues that the District has failed to serve him since as early as 2003 or 2004 when Mother first approached the District about concerns she had with Student's educational performance, health issues, and behaviors. However, as the ALJ explained to Mother at the hearing, the instant case was filed by the District and only concerns whether the District's offer of special education and services in the September 17, 2008 IEP, with its addenda, provided a FAPE to Student. Any issues of whether the District

---

<sup>7</sup> The student's parents in *Heather S.* refused to permit the school district to administer any cognitive assessments to her.

somehow violated Student's rights before that time are not now before the ALJ for decision in this case and must be brought by Student in his own due process filing if he wishes the issues to be addressed.

17. Therefore, the issue before the ALJ is whether the District procedurally and substantively met the requirements of the IDEA in its offer of FAPE. Here, the September 17, 2008 IEP, as amended, met the procedural requirements of the IDEA, was designed to meet Student's unique needs, and was reasonably calculated to provide educational benefit to Student in light of the information known by the District at the time it made its offers.

18. Turning first to the procedural issues, the District has met its burden of proof that it complied with all its obligations under state and federal law. The IEP, as amended, met the requirements of specifying the start and end dates, frequency, duration and location of services. Additionally, a review of the IEP documents indicates that the correct personnel attended the meetings. (Factual Findings 69 through 74, Legal Conclusions 4 through 6, 10, 11, and 13.)

19. As stated in Legal Conclusion 14, an annual IEP must also contain a statement of measurable annual goals, including academic and functional goals, designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. The annual IEP must also include a description of the manner in which the progress of the pupil towards meeting the annual goals will be measured and when periodic reports on the progress the pupil is making toward meeting the annual goals will be provided to the parents. The September 17, 2008 IEP, as amended on October 24, 2008, contained six goals covering the areas of adaptive behavior and daily living, appropriate behavior in the classroom, number sense, decoding, initiation of social interaction, and spelling. Each goal was designed to address a specific deficit of Student's. Each of the goals contained clear standards for measuring Student's progress on each individual goal and each individual benchmark/objective, such as "75% accuracy in 4 of 5 trials as measured by teacher charted data." The IEP form contained an area for summarizing progress and an area for comments regarding Student's progress. The evidence established, and there appears to be no dispute, that all of these goal areas were areas of need for Student. Mother agreed to the goals, as modified by her, on October 24, 2008. (Factual Findings 71, Legal Conclusions 4, 5, 6, 10, 13, and 14.)

20. Additionally, the evidence demonstrates that Mother was an active participant in the IEP process and that the District listened to and considered her concerns, and incorporated her suggestions when appropriate. The District first placed Student on home hospital instruction in early 2006 because Mother provided the District with Dr. Frantz's recommendations that Student needed to decrease his school day and, later, that he could not attend school for most of the school day. The District did not seek to discontinue home hospital instruction until Dr. Frantz agreed it was no longer appropriate. The District modified the way Student was being taught in the classroom to include more visual and hands-on manipulatives in response to Mother's concerns. It modified the type of behavior

modification techniques it was using in the classroom based on Mother's input. When Mother expressed her distrust of a school nurse, the District brought in another nurse to the IEP meetings to alleviate those concerns. The District added goals to Student's IEP based upon Mother's input and modified the goals based upon her suggestions. Finally, the District agreed to Mother's request that an independent evaluator conduct an FAA of Student. The evidence thus demonstrates that Mother was an active participant in the IEP process. (Factual Findings 5 through 8, 14, 15, 16, 63, through 74, 81, and 82; Legal Conclusions 10 and 12.)

21. Mother raises three primary substantive disputes with the District's IEP. First, she contends that the District failed to properly classify Student as autistic before October 24, 2008. Second, she contends that the District's IEP does not meet Student's sensory needs. Third, she contends that Student's needs require that he primarily receives his schooling in the home. However, the evidence demonstrates that the District's IEP of September 17, 2008, with addenda, was reasonably calculated to provide Student an educational benefit in light of his unique needs and therefore substantively offered him a FAPE.

22. As stated in Legal Conclusion 7, a school district can only be expected to base an IEP offer on information available to it at the time it developed the IEP. It cannot be held responsible for failing to address a need of which it had no knowledge. In the instant case, the District's IEP addressed Student's sensory needs based upon O'Laughlin's occupational therapy report and the observations District staff had made of Student in the school setting. Student believes that the District failed to acknowledge all of Student's sensory needs, and points to the findings in the Chico assessment report to support his position. The Chico assessment, however, is of little utility in determining whether the District's IEP of September 17, 2008, as amended, denied Student a FAPE. First and foremost, it was not completed until February 16, 2009, well after every IEP meeting at issue in the instant case, and barely a week prior to the start of the instant due process hearing. The District therefore could not have known that Student might have sensory issues based upon an assessment that did not exist at the time it was making its IEP offers. The District had no information other than that in O'Laughlin's report and its staff's observations of Student upon which to base its belief that Student did not require direct occupational therapy services and that its SDC classroom would address the sensory needs it had observed Student to have. Although Mother and her friend David Roberts described in detail sensory deficits they observed of Student, their observations were based upon his needs outside of the classroom. The intensity of Student's response to sensory stimuli outside the classroom was never observed by his teachers or other District staff in the classroom setting and was never observed by Dr. Frantz during her medical examinations of Student.

23. Additionally, even assuming that the Chico assessment had been prepared prior to the IEP meetings at issue in this case, it still would not be sufficient evidence that the District failed to address Student's sensory needs. The Chico assessors never observed Student in the classroom setting or administered any assessments to him in that environment. As they noted in their report, all sensory assessments they administered were based upon parent reporting, which, in turn, was based upon Mother's observations of Student, which

occurred primarily outside of the school environment. Since the decision of whether a student requires occupational therapy as part of an IEP is based on a determination of whether he requires the therapy in order to access his education, the failure to observe Student in the school environment undermines the usefulness of the Chico assessment.

24. Furthermore, the Chico assessors administered the TGMD to Student, who had just turned 11 years old at the time of their assessment, although the test is normed for students aged three to 10. Since none of these assessors testified at the hearing, it is unknown whether the fact that Student was not in the age group for which the test was designed, invalidated the test results. In any case, the persuasiveness of the assessment was undermined by the fact that Student was not in the proper age group for the test and the fact that the assessors did not explain that discrepancy in their report.

25. Finally, the Chico assessors did not specifically recommend that Student receive direct occupational therapy services. Rather, they recommended accommodations for Student, such as that he work individually or in small groups, be given one-step instructions, that he be provided with sensory toys at his desk, that the school use positive reinforcement to encourage participation, and that natural lighting be used if possible. As stated in Factual Findings 76 and 77, many of these recommendations are integrated into the SDC taught by Dino. With Student and his aide, the ratio of students in the class to adults would be thirteen to four, offering very individualized instruction for each student. Additionally, Dino's students spend part of their class day in small groups at different learning centers, just as the Chico report recommends. Student's IEP provides for visual instruction and hands-on manipulatives, and his behavior support plan, as well as the behavior modifications already implemented by Dino with Student, involve the use of positive enforcement. With regard to the issue of the use of natural light with Student, the Chico report merely states that natural lighting should be used if possible; it does not concretely prohibit the use of any other type of lighting with Student. Additionally, Student has not proven that he is unable to function in a classroom that uses other than natural light.

26. Consequently, even if the Chico assessment had been conducted prior to the IEP meetings at issue in this case, it would be of limited persuasive value. The District's finding that Student did not require direct occupational therapy services in order to access his education or obtain benefit from it is therefore supported by the weight of the evidence. (Factual Findings 16 through 32; Legal Conclusions 4 through 7.)

27. Student also alleges that he should remain in his home hospital placement. However, the District has proven in its case that the SDC placement that it offered would provide Student with a FAPE. As stated in Legal Conclusion 6 above, a school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. The district need only show that its program was designed to meet the student's unique needs and was reasonably calculated to provide the pupil with meaningful educational benefit in the least restrictive environment. The IEP would provide Student with a one-on-one aide to redirect him when he was distracted or unfocused and to keep him safe in and out of the classroom. The SDC classroom would

provide Student with small group instruction, in a classroom with a child to adult ratio of almost three to one, as program that provides constant changes of activities, physical activity to keep the students focused, and an instructional program that focuses on each of the student's individual and unique needs. The IEP also provides a behavior plan to address Student's aggression and other undesirable behaviors.

28. Mother and David Roberts both gave genuine and sincere testimony describing their fears that Student was not able to cope with group instruction in school, even with a one-on-one aide. However, given that Student has not attended school full-time for over three years, their fears have the ring of a self-fulfilling prophesy: the longer that Student remains out of school, the more difficult it will be for him to readjust to life as a normal, full-time student. Given Student's issues, and the life he has lived for three years, isolated from peers except for three to five hours a week, it is not surprising that he has difficulty relating to peers and behaving according to expectations for students in school. Student has had very little opportunity to develop his social skills and little opportunity to learn to modulate his behavior. However, the fact that he does not always behave appropriately now does not mean that he *cannot* learn to do so through patient instruction and modeling of his behavior in the future. Student did not present any evidence, other than the lay opinions of Mother and Roberts, that he is incapable of slowly integrating back to a school campus. It is possible that the adjustment may be long and arduous, or that Student may not ultimately be able to make the transition back to full-time school attendance, but that does not mean that Dino's class is not appropriate for him at this time.

29. Furthermore, as indicated in Legal Conclusions 8 and 9, home hospital instruction is designed generally as a means of providing instruction to a child who is temporarily unable to attend school on campus. The most compelling evidence presented by the District in support of its belief that Student should return to school was offered by Student's pediatrician, Dr. Frantz. She has been his doctor since he was born. She testified in support of the District's position to return Student to school even though it was difficult for her to do so and even though it meant a possible chilling affect on her relationship with Student and Mother. Dr. Frantz has actively sought Student's transition back to school since April 2008.

30. Therefore, the District has met its burden of proof that its offer of placement to Student by gradually transitioning him back to school to attend an SDC provided a FAPE. (Factual Findings 1 through 82, Legal Conclusions 4 through 9.)

31. Student also argues that the District violated his rights because it failed to acknowledge that he was autistic or had autistic-like characteristics. However, the focus of the inquiry is whether the District developed an IEP that addressed Student's unique needs, not whether the District classified him correctly. As discussed above, the September 17, 2008 IEP, along with its addenda, addressed all of Student's unique needs that were known to the District at the time it offered the program. Even if the District should have classified Student as autistic prior to October 24, 2008, the program it offered addressed Student's

