

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2010020281

v.

MENLO PARK CITY ELEMENTARY  
SCHOOL DISTRICT.

**DECISION**

Charles Marson, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter on May 10 and 11, 2010, in Atherton, California.

Student's Father, an attorney at law, represented Student. Student's Mother was present for most of the hearing. Student was not present.

John D. Nibbelin, Attorney at Law, represented the Menlo Park City Elementary School District (District), and was assisted by paralegal Marian Watson. Olivia Mandilk, the District's Director of Student Services, was present throughout the hearing on behalf of the District.

Student filed an amended request for due process hearing on March 9, 2010. A continuance was granted on March 26, 2010. At the hearing, oral and documentary evidence were received. At the close of the hearing, the matter was continued to June 8, 2010, for the submission of closing briefs. On that day, the record was closed and the matter was submitted for decision.

**ISSUES**

1. From January 11, 2010, through the present, has the District denied Student a free appropriate public education (FAPE) by not providing Student with transportation to meet his unique needs?

2. Has the District denied Student a FAPE because it has not implemented the March 9, 2009 individualized education program (IEP) (as amended on March 25 and April 22, 2009) because it improperly delegated Student's education to his paraprofessional?

3. Has the District violated Parents' procedural rights by refusing to timely schedule an IEP meeting after it received a request from Parents in December 2009, to discuss Student's transportation, which denied their ability to meaningfully participate in Student's educational decision-making process?

### PROCEDURAL ISSUES

On May 13, 2009, Parents filed a request for due process hearing (complaint) on behalf of Student, alleging that the District had denied Student a FAPE for the 2009-2010 school year (SY) by predetermining its placement offer and by placing Student in a class having students of such widely varying ages and disabilities that the class was inappropriate for Student. That matter, *Student v. Menlo Park City School District*, was given OAH Case No. 2009050599. The hearing in that matter was held in September 2009, and on October 28, 2009, ALJ Peter Paul Castillo filed a decision in favor of the District on both issues.

The first amended complaint in this matter alleges that the District denied Student a FAPE for SY 2009-2010 by deciding, in the March 9, 2009 IEP (as amended on March 25 and April 22, 2009), not to change Student's placement based on his medical needs instead of his educational needs. At the start of the hearing in this matter, the District moved in limine to suppress any evidence on that issue on the ground that it constituted a second attempt to litigate the legality of the District's offer of placement for SY 2009-2010. The District correctly argued that the issue could and should have been raised in the previous action (OAH Case No. 2009050599); and that it was, therefore, barred by the doctrine of collateral estoppel. The motion was granted.

The District also moved, on the same ground, to preclude any evidence on Issue Number 2, but that motion was denied on the ground that the District had not established that the alleged improper delegation of Student's education to his paraprofessional was or reasonably should have been known to Parents when the previous action was litigated.

#### *Background*

1. Student is a 10-year-old boy who resides with Parents within the geographical boundaries of the District. He is eligible for, and has been receiving, special education and related services due to autistic-like behaviors. Student also has

type 1 diabetes, and requires blood glucose testing, and sometimes the ingestion of food, to raise his blood sugar level during the school day.

2. Type 1 diabetes is a disease in which blood glucose (sugar) levels are above normal. The pancreas makes insulin, a hormone that helps glucose enter the cells of the body. A diabetic's body either does not make enough insulin, or cannot use it adequately. Diabetes can cause serious health complications including heart disease, blindness, kidney failure, and lower-extremity amputations.

3. Some diabetics can have too much glucose in the blood (hyperglycemia) or too little (hypoglycemia). Student is vulnerable to both conditions, and always carries a diabetes kit containing medication. Hyperglycemia is usually treated with insulin; hypoglycemia is usually treated by the ingestion of food such as carbohydrates or with the hormone glucagon. Hypoglycemia is the more dangerous of the two conditions.

4. Student attends the District's Encinal School (Encinal), which is approximately two miles from his home. Student has two nondisabled sisters who were in the first grade during SY 2009-2010, and who attended the District's Oak Knoll School (Oak Knoll), which is approximately four miles from Student's home and a 15-minute drive from Encinal.

5. The District provides transportation to and from school for disabled students whose IEPs require it as a related service. It does not transport nondisabled students to and from school, with minor exceptions not relevant here.

6. On January 23, 2009, during a hearing on two consolidated due process complaints concerning Student, the parties entered into a settlement on the record that resolved both matters.<sup>1</sup> The parties agreed that, as soon as certain training was completed, Student's placement would be in a special day class (SDC) at Encinal. The parties also agreed that, during the regular school year, the District would transport Student to school by bus and Parents would transport him home, and that during the 2009 extended school year (ESY), the District would transport Student by bus both ways. The District also agreed to transport Student's two sisters to and from Oak Knoll on the special education bus. The settlement had a term of one year, and expired on January 22, 2010.

7. From the beginning of SY 2009-2010 until mid-January 2010, the District's special education bus normally picked up Student and his sisters at home,

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<sup>1</sup> Official notice is taken of the portions of the certified transcript of proceedings before ALJ Rebecca Freie on January 23, 2009, in *Student v. Menlo Park City School District*, OAH Case No. 2008110090, and *Menlo Park City School District v. Student*, OAH Case No. 2008110420, that set forth the settlement.

delivered the sisters to Oak Knoll, and then delivered Student to Encinal. Parents, usually Mother, drove to both schools in the afternoon to bring the children home.

8. On January 15, 2010, Olivia Mandilk, the District's Director of Student Services, notified Parents by letter that, when the January 2009 settlement expired on January 22, 2010, the District would no longer transport Student's nondisabled sisters to or from Oak Knoll on the special education bus. This change made it inconvenient for Mother to pick up all her children, as she had to wait for substantial periods of time at both schools while other parents picked up their children.

9. The parties agree that, in order to receive a FAPE, Student requires transportation to and from school as a related service. In January 2010, the District offered to transport Student to and from home by bus when the settlement expired.

#### *Safety of the District's Offer of Transportation*

10. At an IEP meeting on January 21 and in a letter dated the same day, the District offered to transport Student to and from Encinal. Parents did not accept the offer of transportation, and since mid-January have been transporting Student and his sisters to and from school by car. Logistically this requires both Parents to provide transportation. Father sometimes leaves work in Redwood City to drive Student home from school.

11. When a district provides transportation as a related service pursuant to an IEP, it must ensure that the student's transportation is reasonably safe. Parents contend that the District has not offered or provided Student a program that meets his unique needs because the transportation it proposes is unsafe. Parents claim that the District has made inadequate provisions for a medical emergency during the bus ride. They argue that Student, being nonverbal, cannot make his needs known by himself. They also contend that Student is not safe after school because Mother can no longer attend to Student's medical care when the school day ends at Encinal, since she now has to be at Oak Knoll picking up her daughters. The District argues that the transportation it has offered Student is safe.

#### *Student's Medical Care on Campus*

##### *Absence of Written Medical Protocols and Procedures*

12. The medical management of diabetes with insulin or glucagon at school is a specialized physical health care service, and requires that the District obtain and maintain written protocols and procedures for delivery of the service to each student who requires it. A medical professional such as a school nurse must develop the protocols and procedures in collaboration with the student's physician, supervise the implementation of prescriptions, and maintain communications with health agencies providing care to the student. The school district must also obtain two written

statements. One, from the student's physician, must detail the name of the medication and the method, amount and time schedules by which the medication is to be taken. The other, from the student's parents, must indicate the parents' desire that the school district assist the student in the manner set forth in the physician's statement. Both statements must be provided at least annually, or more frequently if the child's medical needs change. The parents of the other diabetic students in the District have provided these statements. At all relevant times, Parents have declined to provide them.

#### *Parents' Medical Plan*

13. Before SY 2008-2009, Student's SDC teacher and his one-to-one paraprofessional, among others, regularly engaged in Student's diabetes management. Parents had authorized them to do so, and Mother had trained them.

14. Patricia Christie became the District's school nurse in August 2008. She accepted the job because it offered an opportunity to "put some systems into place which ... weren't there." Ms. Christie was aware of legal restrictions on the administration of medicine to students by unlicensed school staff, and was determined to regularize those practices in the District and ensure compliance with law.<sup>2</sup> Accordingly, at some time in SY 2008-2009, she instructed District staff that she would take charge of Student's diabetes management on campus.

15. In August 2008, Nurse Christie met with Mother and Student to discuss his diabetes management. They did not reach an agreement. Ms. Christie asked Mother to obtain a signed statement from a physician setting forth orders for Student's diabetes management, and gave her forms for that purpose. Parents did provide an order from a doctor, but never furnished a signed physician's statement or a statement from Parents that would have lawfully authorized the District to manage Student's diabetes.

16. On March 9 and April 22, 2009, the District held Student's annual IEP meeting and made an offer to which Parents agreed in part. Parents attached to the IEP a "Medical Plan for Diabetes revised 4/22/09," which required that all food preparation and selection, blood glucose testing, and administration of medicines be done by Parents themselves. The only portion of the plan that authorized the District to do anything other than observe Student and call Parents was a provision for an emergency situation in which Student's blood glucose levels were too low:

What if [Student] passes out or has a seizure? If [Student] is groggy or unresponsive but conscious, rub an entire tube of cake icing (or glucose

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<sup>2</sup> The ongoing controversy over diabetes management on campus is set forth in *American Nurses Assn. v. O'Connell* (2010) 185 Cal.App.4<sup>th</sup> 393, 400-403.

gel) on the inside of his cheeks and gums while someone else calls 911 and his parents. Use a fingerful at a time so he won't choke.

If he does pass out, it is an emergency. 1. SEND SOMEONE TO CALL 911 RIGHT AWAY. 2. Test his [blood glucose] so you know if you are dealing with a high or a low. 3. If [Student] is low, administer the Glucagon immediately. (Emphases in original.)

17. The District's April 22, 2009 IEP included a proposal that District staff give Student medical care on campus. Parents did not agree to that portion of the offer. Instead, they announced in a letter dated May 6, 2009, that henceforth they would be providing all of Student's medical care themselves:

[W]e do not want any [District] staff member to perform invasive medical care on [Student]. [Student's] parents will continue to provide his medical care (such as blood glucose testing and insulin administration).

Thus under Parents' Medical Plan, no District staff could feed Student without parental permission, test his blood glucose levels, or administer medicine unless he seized or passed out. There was no evidence that Student has ever seized or passed out as a result of his diabetes.

18. Since Parents revoked permission for any District staff to provide medical care to Student, all the on-campus testing of Student's blood glucose levels and administration of insulin or glucagon has been done by Parents, or by their child care employee Carla Arias, who has no formal medical training but has been trained to take care of Student by Parents.

#### *Student's History on the Bus*

19. Student has ridden the District's special education bus many times without medical difficulty. During SY 2007-2008 and the 2008 ESY, Student rode the bus to and from school at Oak Knoll, a distance of about four miles, without incident. During the first half of SY 2008-2009, he also rode the bus both ways, part of the time to Oak Knoll, and part of the time to Encinal, a distance of two miles from his home. Starting with the settlement in January 2009, Student rode the bus to school at Encinal, stopping at Oak Knoll along the way where his sisters got off, and was driven home by Parents. It is about a 15-minute bus ride from Oak Knoll to Encinal. There was no evidence that Student suffered any medical problem during these years of riding the bus.

20. Parents argue that an incident in October 2007 shows that Student would be unsafe on the bus under the District's January 2010 offer. The bus was significantly late in arriving at school at the end of one school day. At the time, Parents were allowing school staff to test Student's blood glucose levels, but on that

occasion District staff failed to do so. When Mother learned that the bus had not come, she went to school and found Student sitting alone in a classroom, “visibly ill.” She found that his blood glucose level was 42, substantially less than it normally would be. She addressed this by feeding him and driving him home.

21. The single incident in October 2007 does not establish that the District’s current offer of transportation is unsafe. It did not happen on the bus, but on campus, and was an error in judgment by campus staff. After it occurred, Olivia Mandilk, the District’s Director of Student Services, spoke with Mother about the incident at length. The two agreed on several steps to prevent its repetition. They agreed, for example, that if the bus was late more than ten minutes again, the school would call Mother. As Ms. Mandilk testified, the District learned from this incident and it has not been repeated. Moreover, the incident occurred before the District employed Ms. Christie or Caitlin Laycock, Student’s paraprofessional and instructional aide. Ms. Laycock has worked with Student for a year and a half, and has been trained in managing his diabetes both by Mother and the school nurse. She now greets Student when he arrives at school and stays with him until he is driven away.

22. Ms. Mandilk described a second incident of concern to Parents. Early in December 2008, Student had been out of school for weeks when Parents decided to return him to Encinal. The District informed Parents in writing that they needed to let the District know if Student would be riding the bus, because it would take the District “a certain amount of time” to get Student on the bus schedule. Parents did not give that notice, but put Student on the bus on the morning of December 3. Student rode the bus home that afternoon and was left there without an adult in attendance. It is not clear from the record why this occurred. Although Father and Mother both testified, neither addressed the details of this incident. There was no evidence that Student suffered any adverse consequence from this event, but the parties agree it should not have happened.

23. The incident of December 3, 2008, also does not establish that the District’s current offer of transportation is unsafe. On this record, it appears to have been a single incident of a failure of communication. There was no evidence that it has recurred. It did not occur on the bus, and so does not reflect on Student’s safety going to and from school.

#### *The Bus Driver’s Training and Capabilities*

24. Parents testified that because Student is autistic as well as diabetic, he is unique and they are the only ones competent to train someone to provide medical care for him. No other evidence supported this claim. In any event, State law requires that medically related training of school staff be done by a qualified school nurse, qualified public health nurse, qualified licensed physician and surgeon, or other approved person.

25. The bus driver has been specifically trained in the management of Student's diabetes by the school nurse, Ms. Christie. Ms. Christie has a bachelor's degree in nursing from San Francisco State University and a master's degree in education, with an emphasis on special education, from San Jose State University. She has been certified by the State as a registered nurse and as a public health nurse since 1968. She has held a clear school nurse credential since 1989. During her career, she has worked in seven hospitals and is experienced in testing blood glucose levels. As a school nurse, she has cared for more than 200 students with type 1 diabetes. She is also a credentialed teacher with 18 years of teaching experience. She is well-qualified to train the bus driver in handling Student's medical difficulties if one should occur while he is on the bus. Since Ms. Christie is both a credentialed school nurse and a registered nurse, she is legally qualified to train school staff in diabetes management.

26. Ms. Christie's training of the bus driver was also adequate in fact. She met with the driver and the District's director of transportation in December 2009. She reviewed with the driver the general subjects of the medical care of students on the bus, diabetes management, and the symptoms of hypoglycemia. She and the driver reviewed the procedures the driver should follow in the case of a medical emergency. Ms. Christie also discussed Parents' Medical Plan and gave the driver a copy of it, along with other information from Parents. They examined a glucagon syringe and discussed the indications and procedures for its use. They discussed the symptoms of hypoglycemia that Student in particular might display, and emergency steps to be taken in case he did. They agreed that if Student changed his behavior, became pale or seemed to nod off, the driver would immediately pull over to check on him, and if necessary call 911, and then apply the glucose substance in Student's kit. Ms. Christie has discussed the management of Student's diabetes with the driver on three different occasions.

27. Ms. Christie testified that the driver "absolutely" understood her instructions. Those instructions are consistent both with Parents' Medical Plan and with the procedures authorized by statute for the treatment of a hypoglycemic emergency.

28. Parents argue that Ms. Christie's testimony at hearing demonstrated that she was unfamiliar with some of the details of Parents' Medical Plan, and therefore she could not have adequately trained the driver. That conclusion does not comport with the facts. Because Parents' Medical Plan prohibits school staff, including Ms. Christie, from giving Student medical care, she had no occasion to be familiar with the details of the plan at a hearing in June 2010. However, she was familiar with it when it mattered; she had it in hand in December 2009 when she trained the driver, discussed it with him, and ensured that he had a copy of it. Her training of the driver accurately reflected the contents of that plan.

29. Moreover, Ms. Christie has taken several steps to better understand Student's condition. After meeting Student in August 2008, and knowing that the combination of diabetes and autism is rare, Ms. Christie enrolled in a 10-week course on autism spectrum disorders at the University of California at Davis to better appreciate his needs. She read Student's available medical history and information supplied by Parents, and sat in on trainings that Mother gave school staff. She also took a refresher course in the management of diabetes in a school setting presented by the American Association of School Nurses. Ms. Christie testified that she incorporated what she learned about Students from Parents and from her training in her evaluation of Student's needs. Ms. Laycock was trained in managing Student's diabetes both by Mother and Ms. Christie, and testified that there was no significant difference between the two trainings. Ms. Christie would have discussed Student's situation directly with Student's doctors, but Parents would not permit it except under onerous conditions that made no allowance for emergencies.<sup>3</sup>

30. The preponderance of evidence showed that Ms. Christie was fully qualified to train the bus driver in dealing with any medical emergency Student might have, took additional steps to learn about Student's unusual needs, and appropriately trained the driver.

#### *Opinions of Student's Doctors*

31. Parents testified extensively about the symptoms and dangers of Student's medical condition. However, no doctor, nurse, or other medical professional testified in support of Student, or endorsed any of Parents' opinions, or opined that transporting Student by bus would be unsafe.

32. In February 2010, Parents gave the District two letters from physicians concerning Student's transportation. The first, from Dr. Sejal Shah at the Stanford University Medical Center, stated that Student is seen at the Center every three months. It advised that Student "needs to be supervised at all times by a school staff person trained how to check and treat hypoglycemia," and that on the bus Student "will also need to ride with a school staff person trained how to manage a hypoglycemic event." The second letter, from Dr. Isha Clark of the Menlo Medical Clinic, stated that Student had been in the Clinic's care for several years, and that Student "should be under direct supervision of a caregiver who has been trained on his [medical] plan at all times." Neither Dr. Shah nor Dr. Clark testified, and Parents would not permit school personnel to speak to them.

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<sup>3</sup> The January 2009 settlement provided that Parents waived Student's right to the confidentiality of medical information to the extent that the school nurse could speak to Student's doctors, but only if Parents were part of the conversation, and if she gave them 24 hours' notice of the questions she wished to ask. After that agreement expired in January 2010, Parents did not respond to the District's request for another waiver.

33. There is nothing in the letters from Drs. Shah and Clark with which the District disagrees. The bus driver is trained in the details of Parents' Medical Plan and in the management of a hypoglycemic event. Nothing in the doctors' views is inconsistent with the District's January 2010 offer of transportation, except perhaps their assumption that properly trained school staff could intervene when necessary. It appears that Student's doctors were unaware that Parents had forbidden such intervention unless Student seizes or passes out.

*Distraction of the Driver*

34. In his complaint and his prehearing conference statement, Student proposed, as a resolution, that the District be ordered to have an additional adult ride the bus in order to observe Student. Parents argued at hearing that, during the two-mile journey to and from their home, the bus driver could not adequately monitor Student's symptoms while also driving the bus. However, the evidence did not support that claim. Father testified that he frequently and safely transports Student by car, with no other adult in the car, and can adequately observe Student in the rear view mirror and adequately monitor any symptoms he might have. In addition, Parents have previously rejected a District suggestion that an additional adult ride the bus. In September 2009, when a substitute bus driver was to drive Student for two weeks, the District offered to have Student's paraprofessional, Ms. Laycock, ride the bus with Student. Mother refused, stating that it was unnecessary and would interfere with Student's feeling of independence, and ordered Ms. Laycock not to do it. In his closing brief, Student abandons the argument that another adult should ride the bus, and seeks only reimbursement for transporting Student by car.<sup>4</sup>

*The Restraints of Parents' Medical Plan*

35. Parents' concerns for Student's safety did not arise out of any particular incident. In fact, after the incidents of October 2007 and December 2008 described above, Parents permitted Student to ride the bus many times. Father was asked at hearing when he first realized that transportation of Student by bus was unsafe. He answered:

When it became clear that the District was more interested in doing the minimum of the minimum than actually taking care of the student's safety. . . .When Ms. Mandilk wrote a letter that ceased the transportation for the girls. . . . It showed the bitterness . . . and antipathy that the school district had for us.

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<sup>4</sup> In his closing brief, Student argues for the first time that the District's offer of transportation is generally unreasonable. Under this rubric, he asserts that Parents were not informed of the driver's safety training or allowed to participate in it. Since the general reasonableness of the offer was not addressed in Student's complaint and is not the applicable legal test, those matters are not discussed further here.

Mother made a similar statement in her testimony. Thus, Parents' concerns about Student's safety on the bus were prompted by the District's action in declining to bus his nondisabled sisters to school.

36. Parents do not expressly argue that Student cannot be safe on the bus unless the District busses his sisters to and from school, but their reasoning arrives at the same result. Mother testified that the purpose of having the District transport Student's sisters was so that she could pick up Student and perform his medical care right after school. When the District ceased that service, she testified, there was no way she could also pick up her daughters and keep all her children safe. This argument assumes that Parents are the only ones who can administer medical care in order to keep Student safe. And it assumes that Student's sisters must be driven to and from school by Mother in order to keep them safe.<sup>5</sup> Neither of these assumptions was supported by any medical professional, or any evidence other than Parents' opinions. Both assumptions were proved by a preponderance of evidence to be incorrect.

37. Parents' view of Student's safety needs assumes that their Medical Plan is a given, and the District must conform to it to ensure Student's safety. Parents argue in Student's closing brief, for example, that in the afternoon, when hours have passed after Student's last ingestion of food at lunch, and his blood glucose level is unknown, he could be endangered by the end of the school day:

. . . the inability of District staff to test blood glucose means that Student would wait more than 3 hours from his lunchtime test before he can be tested at home because testing occurs before lunch, at 11:40 a.m., and school does not let out until 2:30 p.m.

This concern is speculative, and nothing in the record suggests that such an emergency is likely. However, assuming *arguendo* that such a delay in testing Student's glucose would be risky, the delay is one insisted on by Parents. It is Parent's Medical Plan that imposes "the inability of District staff to test blood glucose." That Plan specifies the times at which Student can be fed and tested, and the people who can feed and test him. Ms. Christie would prefer to test Student shortly before he boards the bus, as she does other diabetic students, but Parents' Medical Plan forbids that. Since Parents have total control over their Medical Plan, that risk, if any, is not the responsibility of the District. Parents who decide to provide medical care for their child on a public school campus must by law provide a waiver of the District's responsibility.

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<sup>5</sup> The evidence showed that there is a San Mateo County Transit District bus for students that the sisters could take to and from Oak Knoll. Parents have rejected that option for reasons that they did not explain.

38. If Student were to suffer from hypoglycemia on the school bus, there also might be a delay in treating him. Such a delay would be the direct consequence of Parents' refusal to allow District staff to treat him unless he seizes or passes out. The District is obliged to offer transportation that is reasonably safe. It is not obliged to build its offer around Parents' Medical Plan, or around Mother's convenience in driving all of her children to and from school.

39. For the reasons above, Student did not discharge his burden of proving that the bus transportation offered him by the District in January 2010 would be unsafe. Ms. Christie and Ms. Mandilk credibly testified that they believed Student would be safe on the bus. Student's long history of riding the bus without incident, the shortness of the trip, Ms. Christie's diligent attention to Student's needs, the driver's adequate training, and the absence of any professional support for Parents' concerns all demonstrate that transporting Student to and from Encinal by bus would be reasonably safe.

#### *Delegation of Duties to Student's Paraprofessional*

40. The Individuals with Disabilities in Education Act (IDEA) permits the use of paraprofessionals who are appropriately trained and supervised in accordance with State law or policy. California law allows paraprofessionals to perform duties that, in the judgment of supervising certificated personnel, may be performed by a person not licensed as a classroom teacher. Student argues that, in contradiction to his April 2009 IEP, the District has unlawfully delegated duties to Student's paraprofessional Caitlin Laycock.

41. The validity and implementation of Student's April 2009 IEP were the subjects of Parents' previous litigation in *Student v. Menlo Park City School Dist.* (2009) OAH Case No. 2009050599, in which the District prevailed. The doctrine of collateral estoppel precludes the relitigation of an issue that was or could have been fully litigated and finally decided in a previous action between the same parties. It appeared from the evidence at hearing that Parents' information about Ms. Laycock's discharge of her duties was available to them beginning last spring. Thus, the District correctly argues that Student's contention concerning the delegation of duties to Ms. Laycock could and should have been raised in Case No. 2009050599. Therefore, it cannot be relitigated here.

42. In the alternative, Parents' argument that the District unlawfully delegated teaching duties in violation of the April 2009 IEP was not supported by the evidence. The relevant goals in that IEP list Student's paraprofessional as one of the persons responsible for implementing them. Student does not identify any particular provision of the IEP that the District might have violated in delegating duties to Ms. Laycock.

43. Ms. Laycock testified, and Student's SDC teacher Alex Ruth confirmed, that she provides direct instruction to Student. Ms. Laycock occasionally selects books for Student from a supply of books sorted by various levels of reading difficulty, although Mr. Ruth determines the appropriate level for Student. Ms. Laycock writes simple math problems for Student, using a range of numbers selected by Mr. Ruth. She spends more time individually instructing Student than Mr. Ruth. Parents argue that these practices are improper, but identify no law they might violate.

44. Mr. Ruth is a credentialed and experienced special education teacher. He established that he closely supervises Ms. Laycock and has trained her in State curriculum standards. He talks with her about Student every day before class. During periods when students are working on individual goals, he moves from student to student to oversee their work. Ms. Laycock frequently asks him questions, and together the two decide on teaching strategy and methods. Mr. Ruth talks to Student at the end of each day when Student is writing in his journal.

45. Diane Mathews is a credentialed and experienced special education teacher and a program specialist for the District. Her primary duty is supervising paraprofessionals. She established that Ms. Laycock received all the training required for a paraprofessional, and was specifically trained in the relative roles and responsibilities of teachers and paraprofessionals. Ms. Laycock was trained always to work under the supervision of a special educational professional. Ms. Mathews has also trained Student's teachers, including Mr. Ruth, in the proper use of paraprofessionals. As part of her duties, Ms. Mathews evaluates Ms. Laycock and the District's other paraprofessionals. She visits Mr. Ruth's class at least once a week and observes Ms. Laycock at work with Student. In Ms. Mathew's opinion, Ms. Laycock works in an appropriate capacity as a paraprofessional, and is outstanding in her job.

46. The evidence did not show that the District has improperly delegated duties to Ms. Laycock in violation of Student's April 2009 IEP, or any law. It showed, instead, that Ms. Laycock lawfully performs her duties according to the judgment, and under the appropriate supervision, of credentialed teachers, and as authorized by the April 2009 IEP.

#### *Timeliness and Staffing of the January 21, 2010 IEP Meeting*

##### *Application of the 30-Day Rule*

47. When a parent requests an IEP team meeting to review an IEP, the meeting must be held within 30 days from the date of receipt of the written request, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays.

48. On December 7, 2009, Parents requested an IEP meeting. The District held the meeting on January 21, 2010, and did not hold another until March 9, 2010. Parents argue that both these meetings were untimely, and that since not all required members of the IEP team attended the January meeting, it should not be regarded as an IEP meeting. The District argues that the meeting was timely and properly staffed, and therefore satisfied legal requirements.

49. Friday, December 18, 2009, was the last day of school for the calendar year. The District took its regular winter break, and did not reconvene school until Monday, January 4, 2010. The parties agree that the 10 weekdays from Monday, December 21, to Friday, December 25, and Monday, December 28, to Friday, January 1, 2010, were days of winter break and should be excluded from the calculation. Excepting only those 10 days, the last permissible day for the meeting was January 16, in which event the meeting held on the 21<sup>st</sup> was five days late. There were also six weekend days before, in the middle of, and after the schooldays of winter break. If those days are also exempted from the calculation, the meeting was timely. Weekend days before, during, and after a vacation are part of a vacation. The District therefore had until January 22, 2010, to hold an IEP meeting in response to the December 7, 2009 request, so the January 21 meeting was timely.

50. Only on the assumption that the District's "clock" was still ticking on all the weekend days in and around the 10 schooldays of winter break could the meeting be said to be late, and in that event it was only five days late. If the meeting was five days late, Student was not denied a FAPE as a result. A procedural violation of the IDEA and related laws results in a denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. Parents do not identify, and the record does not reveal, any injury to Student's education or Parents' participatory rights resulting from a delay of five days in holding the meeting.

#### *Staffing of the Meeting*

51. Parents also argue that the District was late in holding an IEP meeting because the January 21, 2010 meeting should not be counted as a meeting at all. Marcia Goldman and Donna Dagenais work for non-public agencies and provide related services to Student, and were present at previous IEP meetings but were not invited by the District to attend the January 21 meeting. From this, Parents conclude that the whole IEP team was not present, making the meeting a nullity.

52. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; and an individual who can interpret the instructional implications of assessment results. The January 21, 2010 IEP meeting was attended

by both parents; Chris Harrington, a school psychologist acting as administrator; Student's regular education teacher, Michelle Takeuchi; and Student's special education teacher, Alex Ruth. The meeting did not involve any assessment, and there was no showing that those who were present were incapable of interpreting any assessment Parents wished to discuss.

53. Other individuals who have knowledge or special expertise regarding the pupil may be invited to an IEP meeting at the discretion of the district or the parents. The January 21, 2010 meeting was not an annual meeting, and the District reasonably expected it to focus primarily on the parties' dispute over transportation, so it chose not to invite Ms. Goldman or Ms. Dagenais. Parents also chose not to invite Ms. Goldman or Ms. Dagenais, although they had done so on previous occasions.

54. The January 21, 2010 IEP meeting was attended by everyone whose attendance was required by law. Even if the meeting had been inadequately staffed, no prejudice resulted; Parents do not claim that the absence of Ms. Goldman and Ms. Dagenais had any adverse effect on the meeting.

*The January 19, 2010 Request for Another IEP Meeting*

55. Parents agreed to the District's proposal to have the IEP meeting on January 21, 2010. On January 19, after receiving the District's notice of the meeting from Mr. Harrington, the meeting's chair, Parents sent him an email protesting the facts that the District had scheduled the meeting for only an hour, had not invited Ms. Goldman or Ms. Dagenais, and had invited its lawyer.<sup>6</sup> In the email, Parents questioned whether the hour scheduled for the meeting was sufficient, and stated: "So we ask that you begin scheduling now with the team to determine when an IEP meeting can be held in good faith." Parents now characterize this passage as a request for a second IEP meeting, which was not held within 30 days.

56. The passage in the January 19, 2010 email on which Parents rely is ambiguous. It is possible to give it the reading Parents suggest. It is possible to read it as a request to increase the time allotted for the January 21 meeting. And it is possible to read it simply as a rhetorical flourish claiming that the District was not acting in good faith and that the January 21 meeting was not really a meeting at all.

57. On January 20, 2010, Mr. Harrington replied in writing to Parents' January 19 email. He pointed out that Student's annual IEP meeting was already scheduled for March 9, 2010, at which time he intended to have all appropriate team members present.<sup>7</sup> He stated that he did not think Ms. Goldman or Ms. Dagenais

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<sup>6</sup> Parents do not argue here that the presence of the lawyer was improper.

<sup>7</sup> Ms. Goldman and Ms. Dagenais attended the March 9, 2010 annual meeting.

needed to be included in the January 21 meeting, but added: “If you believe that Marcia and Donna need to be part of the meeting, we can see if they are available on the 21st, or we can reschedule the IEP for a date when they can be present.” Parents did not immediately respond to that suggestion.

58. Parents participated extensively in the IEP meeting on January 21, 2010. The meeting notes show that, at the meeting, Parents “requested to have an IEP to discuss placement,” and the District responded that placement could be discussed at the annual meeting on March 9. The District also proposed to advance the annual meeting and hold it before March 9. The day after the January 21 meeting, Parents wrote to Mr. Harrington asking for another IEP meeting on the theory that the meeting on January 21 was a nullity; but after negotiations, Parents agreed to keep the annual meeting scheduled for March 9.

59. On these facts, the District did not fail to convene an IEP meeting within 30 days of the January 19, 2010 email. That email did not clearly request another meeting separate and apart from the January 21 meeting. The District held a valid and properly staffed IEP meeting two days after the January 19 request, thereby satisfying that request. Parents agreed to the March 9, 2010 date for a subsequent meeting. Even if the District had failed to respond timely to the January 19 request, that failure did not deny Student a FAPE because, on this record, the delay had no adverse consequence to Student’s education or Parents’ participatory rights.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. Student argues, without authority, that the District has the burden of proving that the transportation it offered would be safe. However, as the petitioner, Student has the burden of proving the essential elements of his claim, including his contention that the District’s offered transportation would not be safe. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [163 L.Ed.2d 387].)

### *Limitation of Issues*

2. A party who requests a due process hearing may not raise issues at the hearing that were not raised in his request, unless the opposing party agrees to the addition. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.)

### *FAPE and Related Services*

3. Under the IDEA and State law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

4. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs, coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) Transportation is a related service. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

### *Parents' Right to Control Medical Care*

#### *Requirements for Diabetes Management in Schools*

5. Education Code section 49423.5 regulates the delivery of "specialized physical health care services" (SPHCS) by school personnel. SPHCS means those health services prescribed by the child's licensed physician and surgeon requiring medically related training for the individual who performs the services and which are necessary during the school day to enable the child to attend school. (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(1)(A).) Medically related training must be done by "a qualified school nurse, qualified public health nurse, qualified licensed physician and surgeon, or other approved programs ...." (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(1)(E)(2).)

6. The implementation of a prescription must be assisted and coordinated by a school physician or nurse, who must consult with appropriate personnel and maintain communication with health agencies providing care to the student. (Ed. Code, §§ 49423, subd. (a), 49423.5, subd. (a)(2); Cal. Code Regs., tit. 5, § 3051.12, subds. (b)(3)(D)(1)-(3).) It must be done pursuant to "protocols and procedures developed through collaboration among school or hospital administrators and health professionals, including licensed physicians and surgeons and nurses ...." (Ed. Code, § 49423, subds. (a), (b); Cal. Code Regs., tit. 5, 3051.12, § subd. (b)(1)(B).) A district is required to maintain "specific standardized procedures" for each student with exceptional needs who receives SPHCS. (Cal. Code Regs., tit. 5, 3051.12, subd. (b)(3)(E).) The implementation of a prescription also must be routine for the pupil, pose little potential harm to him, be performed with predictable outcomes, and must not require a nursing assessment or interpretation, or decision-making by the school personnel delivering the service. These arrangements must be made by the school's

physician or nurse “in consultation with the physician treating the pupil ....” (Ed. Code, § 49423.5, subd. (a)(2).)

7. The administration of insulin or glucagon for diabetes management is the administration of medicine and requires medically related training, and therefore is a SPHCS. (Ed. Code, § 49423.5, subd. (d); *American Nurses Assn. v. O’Connell* (2010) 185 Cal.App.4<sup>th</sup> 393, 406, 411)(hereafter *American Nurses*.) It may be provided in school only in compliance with Education Code section 49423. (Ed. Code, § 49423.5, subd. (b); Cal. Code Regs., tit. 5, § 3051.12, subd. (b).) A school district must obtain “a written statement from the physician detailing the name of the medication, method, amount and time schedules by which the medication is to be taken” and “a written statement from the parent . . . of the pupil indicating the desire that the school district assist the pupil in the matters set forth in the statement of the physician.” (Ed. Code, § 49423, subd. (b)(1).) The statements must be provided at least annually. (*Id.*, subd. (b)(3).)

8. Unlicensed school personnel, though trained, may not administer medicine for diabetes management unless authorized by a specific statutory exception. (*American Nurses, supra*, 185 Cal.App.4<sup>th</sup> at 421.) Section 49414.5, subdivision (a) of the Education Code sets forth such an exception for the emergency treatment of a diabetic student suffering from severe hypoglycemia:

In the absence of a credentialed school nurse or other licensed nurse onsite at the school, each school district may provide school personnel with voluntary emergency medical training to provide emergency medical assistance to pupils with diabetes suffering from severe hypoglycemia, and volunteer personnel shall provide this emergency care, in accordance with standards established pursuant to subdivision (b) and the performance instructions set forth by the licensed health care provider of the pupil ....

9. School personnel who provide treatment pursuant to Education Code section 49414.5, subdivision (a), must be trained in the recognition and treatment of hypoglycemia, the administration of glucagon, and basic emergency follow-up procedures such as calling 911 and contacting the pupil’s parent and licensed health care provider. (Ed. Code, §49414.5, subd. (b)(2).) When that training is conducted by a credentialed school nurse or registered nurse, it “shall be deemed adequate training for the purposes of this section.” (Ed. Code, §49414.5, subd. (b)(3).)

10. If SPHCS are made part of an IEP and parents elect to provide the required medical care during the school day themselves, they must sign a waiver relieving the school of responsibility. (Cal. Code Regs., tit. 5, § 3051.12, subd. (b)(3)(A).) This represents a legislative decision that a school district is not responsible for the consequences of a decision by parents to undertake the medical care of their children during the schoolday themselves.

### *The Duty of Safe Transportation*

11. A school district that transports a student has a duty to exercise reasonable care in the circumstances. (Ed. Code, § 44808; *Farley v. El Tejon Unified School Dist.* (1990) 225 Cal.App.3d 371, 376.) The transportation must be reasonably safe. (*Eric M. v. Cajon Valley Union School Dist.* (2009) 174 Cal.App.4th 285, 293; *Student v. Los Angeles Unified School Dist.* (2006) Cal.Offc.Admin.Hrngs. Case No. N2006020443.) However, the IDEA requires transportation of a disabled child only to address his educational needs, not to accommodate a parent's convenience or preference. (*Fick v. Sioux Falls School Dist.* 49-5 (8th Cir. 2003) 337 F.3d 968, 970; *Student v. Los Angeles Unified School Dist.* (2010) Cal.Offc.Admin.Hrngs. Case No. 2009080646.)

12. Administrative decisions are not binding precedent but can be instructive. In *Forest Area Community Schools* (Mich. SEA 2006) Case No. 2005-115b, 47 IDELR 117, 106 LRP 61061, a case remarkably like this one, an epileptic student had seizures that had to be medically addressed within one minute. The driver was trained to recognize and deal with the onset of a seizure, but parents argued that transportation by bus was unsafe without an additional adult. The Hearing Officer disagreed, since the bus route was short, the student's seizures were infrequent, and the driver could see the student in the same way the parent could when driving the student alone in a car (which the parent thought was safe). (See also *Student v. Los Angeles Unified School Dist.*, *supra*; *San Mateo-Foster City School Dist.* (1999) Special Education Hearing Office Case No. SN 1648-98.) Only when a student has a history of frequent and severe seizures have hearing officers ruled that an additional adult must accompany the student on the bus. (See *Chester School Dist.* (New Hamp. SEA 1995) Case No. 95-71, 23 IDELR 588, 23 LRP 3540; *Clark School Dist.* (S.Dak. SEA 1993) 20 IDELR 468, 20 LRP 2549.)

*Issue No. 1: From January 11, 2010, through the present, has the District denied Student a FAPE by not providing Student with transportation to meet his unique needs?*

13. Based on Factual Findings 1-39 and Legal Conclusions 1 and 3-12, the District did not deny Student a FAPE by failing to provide transportation to meet his unique needs. The evidence showed that the offered transportation would be reasonably safe because the trip was very short, Student has a history of taking the bus without incident, and the driver was adequately trained to intervene by an appropriately qualified and informed school nurse. No medical professional supported Parents' opinion that Student would not be safe on the bus, or that Parents were the only ones capable of caring for Student's medical needs or training someone else to do so.

### *Delegation to Paraprofessionals*

14. Under the IDEA, states may develop standards that allow paraprofessionals to assist in the provision of special education and related services if they are “appropriately trained and supervised, in accordance with State law, regulation, or written policy . . .” (20 U.S.C. § 1412(a)(14)(B)(iii).) In California, a paraprofessional may perform duties that, “in the judgment of the certificated personnel to whom the instructional aide is assigned, may be performed by a person not licensed as a classroom teacher.” (Ed. Code, § 45330, subd. (b).)<sup>8</sup>

15. Student relies on section 44835 of the Education Code, which forbids instructional work by a “student . . . nonteaching aide.” Since there was no evidence that Ms. Laycock is a student nonteaching aide, that prohibition does not apply. Student also relies on the No Child Left Behind Act of 2001, which provides that a paraprofessional may provide instructional service only “under the direct supervision of a teacher . . .” (20 U.S.C. § 6319(g)(3)(A).) However, OAH has no jurisdiction to enforce that Act. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029; *Student v. Oxnard Elementary School Dist.* (2009) Cal.Offc.Admin.Hrngs. Case No. 2007100205; *Student v. Brea Orlinda Unified School Dist.* (2008) Cal.Offc.Admin.Hrngs. Case No. 2008050301; *Student v. Garden Grove Unified School Dist.* (2006) Cal.Offc.Admin.Hrngs. Case No. N2005070363.) Even if it did, the evidence showed that Ms. Laycock was properly supervised at all times.

### *Collateral estoppel*

16. Under the doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision precludes litigation of the same issue in a suit on a different cause of action involving a party to the first case. Collateral estoppel applies to special education due process hearings in California. (*Student v. Los Angeles Unified School Dist.* (2007) Cal.Offc.Admin.Hrngs. Case No. N 2007010315; *Student v. San Diego Unified School Dist.* (2005) Special Education Hearing Office Case No. SN 2005-1018.)

17. Collateral estoppel precludes relitigation of an issue when five conditions are met: (1) the issue to be precluded must be identical to that decided in the prior proceeding; (2) the issue must have been actually litigated at that time; (3) the issue must have been necessarily decided; (4) the decision in the prior proceeding must be final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. (*People v. Garcia* (2006) 39 Cal.4th 1070, 1077.)

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<sup>8</sup> A paraprofessional may work in any of the variety of positions described in Education Code section 44392, subdivision (e).

18. Collateral estoppel is not avoided simply because a party chose not to make an argument or introduce evidence in the first proceeding. The doctrine bars relitigation by means of evidence that was, or could have been, presented in the first action. (*People v. Sims*, (1982) 32 Cal.3d 468, 481; *Teitelbaum Furs, Inc. v. Dominion Ins. Co.* (1962) 58 Cal.2d 601, 607; *Interinsurance Exchange of the Auto. Club v. Superior Court* (1989) 209 Cal. App.3d 177, 181.)

*Issue No. 2: Has the District denied Student a FAPE because it has not implemented the March 9, 2009 IEP (as amended on March 25 and April 22, 2009) because it improperly delegated Student's education to his paraprofessional?*

19. Based on Factual Findings 1 and 40-46, and Legal Conclusions 1 and 14-18, the District did not deny Student a FAPE by delegating duties to his paraprofessional in a manner inconsistent with his IEP. That argument is barred by the doctrine of collateral estoppel. In the alternative, Student's paraprofessional was appropriately trained and supervised and acted within the proper scope of her duties at all times.

#### *Timing of Requested IEP Meeting*

20. When a parent requests an IEP team meeting to review an IEP, the meeting must be held within 30 days, "not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the written request." (Ed. Code, § 56343.5.) The statutory phrase "days of school vacation in excess of five schooldays" is ambiguous in that it does not indicate whether weekends immediately before, after, or during a vacation constitute part of the vacation for the purpose of making the calculation the statute requires.

21. This question of statutory interpretation does not appear to have been previously addressed by a court or an ALJ. However, a statute must be construed in light of its purpose. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 121.) The apparent purpose of excluding days of school vacation from the 30 days within which a District must hold an IEP meeting is to exclude from the calculation those days in which the meeting participants are not at work and are unavailable to schedule or attend a meeting. The inclusion of weekends in the definition of a vacation is consistent with that purpose. If weekends are not part of vacations, every weekend during summer break would restart the 30-day clock, which would be senseless and destructive to the statutory purpose. Thus, the more reasonable interpretation of Section 56343.5 is that weekend days before, during, and after a vacation are part of the vacation for the purpose of the statutory formula.

22. Analysis of the statutory phrase "not counting days between the pupil's regular school sessions" yields the same result. If the last day of school in one calendar year is the end of a regular school session, and the first day of the next

session is the first Monday of school in the new year, then the weekends in between are excluded from the statutory calculation.

### *Required Members of an IEP Team*

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

24. When courts find that an IEP meeting is inadequately staffed, they do not conclude that the flawed IEP meeting is a nullity and cannot be considered in determining whether an IEP meeting was timely held. (See, e.g., *Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d 1072; *J.W. v. Fresno Unified School Dist.* (E.D.Cal. 2009) 611 F.Supp.2d 1097.)

### *Consequences of Procedural Error*

25. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

*Issue No. 3: Has the District violated Parents' procedural rights by refusing to timely schedule an IEP meeting after receiving a request from Parents in December 2009 to discuss Student's transportation, which denied their ability to meaningfully participate in Student's educational decision-making process?*

26. Based on Factual Findings 1 and 47-49, and Legal Conclusions 1 and 20-25, the District did not fail to hold a timely IEP meeting in response to Parents' request of December 7, 2009, or their email of January 19, 2010. The January 21, 2010 meeting was held within 30 days of the December 7, 2009 request according to the statutory formula as correctly applied. The January 19, 2010 email was not a clear request for a second meeting separate and apart from the January 21 meeting. If it constituted such a request, it was satisfied by the January 21 meeting. Parents agreed to the timing of the March 9, 2010 meeting. Even if those meetings were considered untimely, no prejudice resulted.

