

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS, ON BEHALF OF STUDENT,

v.

TEMECULA VALLEY UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2012060278

DECISION

Administrative Law Judge (ALJ) Robert F. Helfand, Office of Administrative Hearings (OAH), State of California, heard this matter in Temecula, California, on September 11, 12, 13, 17 and 18, 2012 and October 5, 2012.

Wendy Housman, Attorney at Law, represented Parents on behalf of Student (Student). Student's father (Father) was present throughout the hearing as was Theresa Sester, an advocate.

Sarah W. Sutherland, Attorney at Law, represented the Temecula Valley Unified School District (District). Kimberly Velez, District Director of Special Education, also attended throughout the hearing. Melanie Hertig, Assistant Director of Special Education, and Amy Koers, Attorney at Law, were also present at times during the hearing.

At the hearing, the ALJ received oral and documentary evidence. The following witnesses testified at the hearing: Father; Maureen Nixon; Kevin Groepper; Lynne Hardy-Lukes; Michele Cooper; Leslie Huscher; Gwen Riley; Sandy McKay; Breck Smith; Theresa Sester; Todd Barrowcliff; and Marie Owens.

At the request of the parties, the record remained open for the submission of written closing and rebuttal arguments. The parties filed their closing briefs on October 29, 2012. Rebuttal closing briefs were filed on November 2, 2012, when the matter was submitted.

ISSUES

a) Whether the District has failed to provide Student a free appropriate public education (FAPE) during school year 2011-2012 in that the District failed to (1) provide Student instruction in the core curriculum subjects of science and social studies, and (2) provide appropriate language and speech (LAS) services?

b) Whether the District denied Student a FAPE because the District denied Student's parents (Parents) meaningful participation in the individualized education program (IEP) decision-making process by failing to have in attendance pertinent a speech and language pathologist at the February 16, 2012 IEP meeting?

c) Whether the District denied Student a FAPE when it failed to assess Student in an appropriate manner in all areas of suspected disability, specifically in the area of speech and language?¹

Student's proposed remedy is that Student receive compensatory education in the amount of (1) 105 hours of tutoring by a nonpublic agency (NPA) within a two year period to compensate for missing instruction in science and social studies, and (2) 40 hours of individualized speech and language therapy.

FACTUAL FINDINGS

1. Student is a 12 year-old boy. He currently lives with his Parents within the geographical boundary of the Temecula Valley Unified School District (District). At the age of six, Student was diagnosed with an autistic disorder. Since April 2006, Student has been eligible for special education under the primary category of autistic-like behaviors and the secondary category of speech or language impairment. He is currently a seventh grader at the District's Garner Middle School.

2. During school year 2010-2011, Student attended the special day class (SDC) taught by Gwen Riley at Pauba Valley Elementary School (Pauba). Ms. Riley's class was a combined third, fourth and fifth grades. As part of his IEP, Student was to mainstream at lunch, library, computer lab, field trips, art program, science, social studies and physical education. Student was given a modified curriculum in his science and social studies classes.

3. California students in the sixth grade are required to be instructed in the areas of social studies and science. (Ed. Code, § 51210, subd. (c) and (d).) The California Department of Education has adopted sixth grade curriculum standards requiring instruction in science with a focus on earth science and in social studies with a focus on world history and geography in the area of ancient civilizations.

¹ In the Prehearing Order, this issue also included timeliness. Because the Student failed to offer any evidence or argue this issue in his closing written brief, the issue has been reformulated to exclude timeliness.

Student's Fifth Grade Year

4. Ms. Riley has a master's degree in special education and has taught special education for over 20 years with the last three years at Pauba. She described Student as a curious child who needs skills to be broken down, visual manipulation, and repetition to learn. As part of his program, Student was given 30 minute pull-out LAS service in a small group once per week. Ms. Riley was Student's teacher for three years at Pauba.

5. Ms. Riley, who was a member of Student's IEP team while he was in her class, stated that his placement in general education courses for science and social studies (taught by Linda Raymond) was not only to teach the California core curriculum in those subjects but also to allow Student mainstreaming opportunities to work on social skills. The curriculum for these classes was modified for her special education students. Ms. Riley would pre-teach the concepts prior to her class joining Ms. Raymond's class. After instruction from Ms. Raymond, Ms. Riley would then review the concepts learned to permit Student, and others, to learn the material. Student received grades of one (does not meet standards of performance) in math, language arts, science and writing for each trimester of his fifth grade year. He received a two (minimal performance) and then ones for social studies and a two for each trimester in reading. Ms. Riley explained that the grades were based on grade standards which were not modified. Student was pulled out of class to receive LAS services in a group of one or two other children.

6. Student took the California Modified Assessment (CMA) in his fourth and fifth grade years. The CMA is given to students who have an IEP whose disabilities preclude them from achieving grade-level proficiency in the state content standards.² In fourth grade, Student tested "proficient" in language arts and "below basic" in math. In fifth grade, Student tested "below basic" in both language arts and math while scoring "proficient" in science.

7. Because of his home address, Student was scheduled to attend Vail Ranch Middle School (VRMS) for sixth grade. Father opted to not schedule a transition meeting through Ms. Riley at VRMS as Father hoped Student would transfer to Gardner Middle School (Gardner). Father had spoken to a number of parents who recommended that he would be happier at Gardner since the Gardner staff is more "collaborative" with parents and not as rigid as compared to the VRMS teachers.

February 17, 2011 IEP

8. Student's annual IEP meeting was held on February 17, 2011, at Pauba. Father attended on behalf of Student. District attendees were Ms. Riley; Kristen Iven, administrative designee; Ms. Raymond, general education teacher; and Krista Lamphere, speech and language pathologist (SLP). The IEP team reviewed Student's progress on the

² "Grade-level proficiency" refers to the level of knowledge and degree of mastery of the California content standards for each academic area tested.

prior year goals, his present levels of performance, and adopted nine goals; of which three were in math, three in reading, two in writing, and one for communication. Student's communication goal had as a baseline that he "often needs prompting to use appropriate social language in unstructured settings." Student's goal was within one year he would "independently generate appropriate social language with peers in situations where he perceives that the peer is not responding in an acceptable manner during unstructured activities in three out of five opportunities as measured by observational data." Additionally, Student had five classroom goals which addressed his language deficits in making predictions, making inferences, and grammar.

9. The District's FAPE offer, as stated in the sections titled "Special Education and Services" and "Educational Setting," was for Student (a) to continue in a SDC for 224 minutes per day for the remainder of Student's fifth grade; (b) for SDC in the sixth grade at middle school to include language arts, language arts intervention, math, and math intervention; and (c) for LAS service for a weekly 30 minute group session. The offer called for 62 percent of Student's time to be outside the regular class and extracurricular and non-academic activities with 38 percent of time in regular class and extracurricular and non-academic activities. Student would not participate in the general education environment in reading, writing and math.³ Student's participation in "non-academic activities" was in "lunch, library, computer lab, field trips, art program, garden, *science*, *social studies*, and physical education." (Emphasis added.)⁴ Father signed and consented to the IEP on February 17, 2011.

10. Father testified that no one at the IEP meeting described the "intervention model" used in the sixth grade SDC at VRMS, where Student was scheduled to attend based on his residence address nor was he informed that Student would not be receiving science and social studies in a general education class with the modified curriculum or in the SDC. The IEP document for this meeting does not include any mention or explanation of the VRMS program. Ms. Riley testified that she had no specific recollection of the IEP meeting discussions. Thus, Father's testimony that no one from the District informed him what the VRMS SDC "intervention model" comprised, including that Student would not receive instruction in either science or social studies, was given more weight by the ALJ.

³ The IEP section "Education Setting," which stated opportunities for mainstreaming, was not limited by date. Thus, the mainstreaming listed was to be for the entire period that the IEP was implemented.

⁴ In the Notes section of the IEP document, the offer was stated thusly: "District offer of Specialized Academic Instruction (SDC Class) 5 times per week for a total of 1120 minutes per week until 5-27-11. [Student] will mainstream into the general education classroom for social studies, science, PE, garden, library, computers, and other specials. In middle school, 5-28-11 to 2-17-12, offer of FAPE is Specialized Academic Instruction, SDC, 4 times per day for 51 minutes each class session. Also included for 2-17-11 to 2-17-12 are speech services 25 times per year for 30 minutes per session. Offer of FAPE accepted."

Fall 2011

11. Student was placed in a SDC taught by Maureen Nixon. During the first two months of 2011-2012 school year, the class comprised approximately 19 children, which was later reduced to about 13 after an additional SDC was organized in October or early November 2011. Ms. Nixon earned a B.A. in communication disorders in 1976 from Marywood University and a M.S. in special education from California Baptist University in 2001. She has California multiple subject and learning disorder with autism authorization credentials. Ms. Nixon also has a speech corrections certification from another state. She was a speech and language therapist in New Jersey (1978-1981) and for the Riverside Unified School District (1996-1997). Ms. Nixon has been a special education teacher for 14 years at VRMS.

12. Starting with school year 2009-2010, the District adopted at VRMS an “intervention model” curriculum for Ms. Nixon’s SDC. The sixth grade curriculum utilized by Ms. Nixon provided instruction only in math and language arts. The time which would have been spent on science and social studies was replaced by additional instruction in math and language arts. The purpose in adopting the intervention model was to raise the low levels of the students’ English and math levels. Ms. Nixon indicated that her class would have mainstreaming opportunities during lunch, school activities, keyboarding class, home economics, and physical education. As to the parallel SDC at Gardner, the curriculum included science and social studies.

13. Father was proactive as it relates to Student’s education, especially academics, with a goal that Student would be able to receive a high school diploma and attend college. Student’s parents would work on lessons at home to mirror what was being taught at school. Father volunteered to help at school including joining the Watch Dog program, which were male volunteers assisting in campus safety, supervision of activities and tutoring. Father was asked to resign, after three weeks, from the program because he was constantly visiting his son’s class instead of being where he was assigned.

14. Father communicated frequently with Ms. Nixon by email. On September 21, 2011, Father emailed Ms. Nixon that parents were working on Student’s reading skills and giving Student extra math work. On September 26, 2011, Ms. Nixon responded to Father by describing what the class was then working on and that Student seemed “frazzled” working on division with remainders. Father responded on September 28, 2011, demanding that Ms. Nixon provide “specifics” as to Student’s progress academically, socially, behaviorally, in verbal and physical stimming, and reading. Father also stated he did not want “pre canned (sic) appeasement email responses.” Father also commented in emails that Student was regressing; the academic load was harder in the fifth grade class; and that Ms. Nixon was not utilizing proper tools and methods to ensure Student would be better prepared for standardized testing and to excel in the future. Father’s tone in his emails was aggressive and rude.

15. Because of the contentious emails, a meeting was held on or about October 24, 2011, with Ms. Nixon; Father; Theresa Sester, Student's advocate; and Kevin Groepper, the VRMS principal. Father reviewed the SDC schedule and his son's books and saw that the SDC curriculum did not include science and social studies. At this meeting, Father brought up his objection that the SDC curriculum omitted science and social studies, which were part of future standardized testing and required for high school graduation. Father demanded that Student be instructed in science and social studies. He requested that Student be placed in general education classes for science and social studies with aide support. Father was informed that a one-to-aide was not available to accompany Student to general education classes for science and social studies.

16. Ms. Nixon and Mr. Groepper testified that they discussed the possibility of Student attending Cliff Barrowcliff's SDC for science and social studies. The Barrowcliff SDC was similar in academic level with Ms. Nixon's class and was populated with students with multiple disabilities including attention disorders, emotional disturbance, and autism. In fact, several of Ms. Nixon's students attended the Barrowcliff class for science and social studies.⁵ Father testified that no such offer was made until the December 7, 2011 IEP meeting. Mr. Barrowcliff, who supervised the Watch Dog program, testified that he and Father were friendly, and Father had visited his class on three occasions prior to the December 7, 2011 IEP. Mr. Barrowcliff recalled that the only conversations between him and Father regarded the on-going problems between Father and Ms. Nixon. The transcript and notes to the December 7, 2011 IEP meeting reflect that staff would contact the other SDC teacher regarding having Student attend the other SDC for science and social studies and that Father requested an opportunity to observe the Barrowcliff class. (See Factual Findings 19 through 21.) Additionally, emails between Father and Mr. Groepper on December 11 and 12, 2011, discuss Father visiting the Barrowcliff class to observe instruction in science and social studies. The ALJ found Father's testimony credible as his testimony was detailed as opposed to the testimony of Ms. Nixon, Mr. Barrowcliff and Mr. Groepper; the IEP meeting notes and transcript corroborated his testimony; as does the December 11-12, 2011 email exchange. Thus, the ALJ finds that the District did not offer to place Student in the Barrowcliff SDC for instruction in science and social studies prior to the December 7, 2011 IEP meeting.

LAS Services Provided in 2011-2012 School Year

17. Student's LAS services were provided by Michelle Cooper, the SLP assigned to VRMS. Ms. Cooper conducted a social skills session for 51 minutes once weekly in Ms. Nixon's classroom. The class comprised eight students. Two of the students had no speech and language goals. The group was designed to work on pragmatics which included listening comprehension, non-literal language, facial expression recognition, figurative language, intonation patterns, use and understanding of idioms, turn taking, and responding appropriately to conversational topics. Additionally, non-literal language (which includes

⁵ One of Ms. Nixon's students also attended a general education class for science and social studies.

inferences) and grammar were also covered in the SDC language arts curriculum. Ms. Cooper was also active in the SDC and would also observe her students, including Student, outside the SDC classroom.

18. Ms. Cooper would begin the 51 minute session by discussing and modeling a concept (i.e., introductions). The group would then be broken into smaller groups to reinforce and practice the skill taught. Ms. Cooper was assisted by Ms. Nixon and classroom aides. Ms. Cooper opined that the group of eight would lead to an “authentic social experience” which permitted generalization of skills.

December 7, 2011 IEP Meeting

19. Father requested an IEP meeting without giving the reasons for the meeting, which was held on December 7, 2011. In attendance were Father; Ms. Nixon; Mr. Groepper; Ms. Teahan, Student’s physical education teacher acting as the general education teacher; Breck Smith, a District program specialist; Ms. Cooper; and Ms. Sester. After introductions were made and a procedural rights form was provided, Father was asked why he requested the meeting. Father explained that he was concerned with homework and the lack of science and social studies in the curriculum utilized by Ms. Nixon.

20. During the majority of the meeting, the team discussed the emails exchanged between Ms. Nixon and Father, as well as how their contentious relationship was affecting Student. Father said he was seeking help as to the strategies and modalities he could use when helping Student with his homework. Ms. Nixon, Mr. Groepper, and Ms. Cooper noted that Student seemed “stressed” as he was making comments about the teacher being fired, which may result from Student overhearing his parents talking. Ms. Nixon commented that Student’s comments of her being fired had upset the class which distracted the class. Ms. Nixon also noted she believed that Student was being “overwhelmed” with the amount of work he was doing at home. At Father’s request, the team adopted a change to Student’s communication goal to add that the SLP would be responsible for collecting data as to Student’s progress in meeting the goal.

21. Father expressed his concern that the SDC curriculum did not permit Student to have access to science and social studies. Ms. Nixon opined that Student was not at the level to participate in a collaborative science or social studies class; and should Student be placed in a general education class for those subjects with modifications, Student would become frustrated and stressed. Ms. Sester requested that Student be transferred to Gardner which incorporates science and social studies in the SDC curriculum. The team recommended Father seek transfer through the District’s transfer procedures. When Ms. Sester insisted that the transfer was an IEP issue because it related to Student’s instructional program, Ms. Smith and Mr. Groepper stated that it was not in the province of the IEP team to okay a transfer. Father was also informed that the Barrowcliff SDC did include science and social studies and this was a possible change which could be made. Father was told that VRMS staff would communicate with “the SDC teacher” regarding Student entering his class for science and social studies. After conferring with the teacher, staff “would respond

to the parent.” Ms. Sester also inquired as to the number of students in the Barrowcliff class. Father requested time to observe that class. Additionally at Father’s request, the team agreed to amend Student’s communication goal by listing the SLP as responsible for the goal.

22. Father was presented with an assessment plan to permit the District to conduct a triennial assessment. Parents’ consent was obtained on January 10, 2012.

Complaint to the U.S. Department of Education

23. Following the December 7, 2011 IEP meeting, Father filed a compliance complaint with the Office of Civil Rights of the United States Department of Education (OCR) contending that the District’s failure to provide disabled students in the Nixon SDC instruction in state mandated core curriculum was discriminatory. The District and the OCR reached a settlement of the compliance complaint where the District was obligated to offer science and social studies to students in the Nixon SDC.

24. On January 27, 2012, the District forwarded a proposed IEP Amendment for the purpose of adding instruction in science and social studies for 51 minutes per day. On January 31, 2012, Father, in an email to Mr. Groepper, noted that Student told him that his schedule had been changed to include science and social studies and he requested confirmation and a course curriculum. On February 13, 2012, Father returned the IEP amendment stating that he agreed with the IEP amendment, with the exception that science and social studies be in “the least restrictive environment.”

The 2012 Annual IEP Meeting

February 2, 2012 Meeting

25. On February 2, 2012, Student’s IEP team reconvened for his annual IEP meeting. Father voiced concerns that Student was not receiving instruction in science and social studies following the OCR complaint outcome. Father was informed that Ms. Nixon had earlier sent home via Student’s backpack an IEP addendum adding science and social studies to Student’s current IEP (the 2011 IEP), and that no response had been received. Father stated he never received it, and he was provided with a new copy. Father requested information on the curriculum to be taught in the two courses. Mr. Groepper and Ms. Nixon explained that they were in the process of developing one, although the textbooks which would be used were available for inspection at the school library. To compensate for the instruction in science and social studies missed, Ms. Nixon and Ms. Groepper stated that the class would receive additional instruction during a 26 minute daily period at the end of the school day.

26. The team also discussed Father’s concerns regarding homework, and the team discussed strategies that Parents could use at home to assist in getting Student to complete his homework. The team reviewed Student’s progress on meeting his 2011 IEP goals, which were met; and they reviewed his present levels of performance using Student created work

samples. Ms. Cooper recommended four speech-language related goals. The first goal was that Student would provide appropriate supportive statements in a given social situation with 70 percent accuracy on seven of 10 trials. Student's baseline was he able to make supportive statements with 30 percent accuracy. The second goal, in the area of comprehension, was that Student would correctly respond, verbally or in writing, to a comprehension question eliminating irrelevant facts in four of five trials with 80 percent success and with no more than one verbal prompt. The baseline for this goal was that Student would respond to a comprehension question with irrelevant facts in six of 10 attempts with 40 percent accuracy. The third goal was in the area of pragmatics which required Student to politely protest appropriately or ignore another's behavior during a spontaneous negative social interaction in a functional setting (i.e., lunch or break period) in four out of five observed instances. A fourth goal was in the area of verbal repetitions. This goal required Student to reduce self-stimulatory verbal behavior to extinction with no more than two verbal or visual reminders in a period in four out of five trials.

27 The team agreed to continue the annual meeting to a later date to complete its work. By email dated February 8, 2012, Father agreed with Ms. Nixon to continue the annual meeting to the morning of February 16, 2012. Ms. Nixon failed to inform Father that Ms. Cooper would be unavailable as she was assigned to a different school on that day. On February 13, 2012, the District forwarded to Father a written notice of the continued meeting which listed those members of the IEP team who were to attend. The notice did not include the SLP, Ms. Cooper, as attending.

February 16, 2012 Meeting

28 On February 16, 2012, Student's IEP team reconvened the annual IEP meeting without the presence of Ms. Cooper. Ms. Nixon discussed proposed goals and established baselines by reviewing Student's work and class performance. Father requested that there be additional communication goals which are more specific and cover generalization of social skills outside of the classroom environment. Ms. Nixon agreed to forward Father's requests to Ms. Cooper. Ms. Nixon also reviewed strategies and prompts she utilized with Student in class. Per Father's request at the February 2, 2012 meeting, Ms. Nixon gave Father a written curriculum for science and social studies. Father was dissatisfied with the curriculum and requested a meeting with the District curriculum director.

29 Father also inquired how the District was proposing to make up for the missed instruction in science and social studies. Father voiced his hope that Student would be able to transition to general education classes for science and social studies as he had done successfully in fifth grade. Ms. Nixon opined that she did not feel Student could succeed in a general education class even with modifications. Ms. Nixon suggested that Father visit a general education as well as her class.

30. The District members made an offer of FAPE of specialized academic instruction in a SDC for 204 minutes daily; group language and speech for 30 minutes 25

times per year; and autism consult for general education and SDC for between 10 and 30 minutes per week. Parents did not consent to the District's offer.

31. On February 27, 2012, Ms. Smith had forwarded to Father a document captioned "Prior Written Notice" (PWN) as to the District IEP team decision to deny Father's request to transfer to Gardner, an independent education evaluation to determine if Student met his 2011 annual goals, and to be provided with the SDC science and social studies curriculum. As to the transfer request, the PWN states that such a transfer is not an IEP decision and Student must go through the District's procedures for an intra-district transfer. As to the request for an independent evaluation as to goal progress, the PWN states that Student's progress was discussed and based on data presented at the IEP meetings. As to Father's request for the science and social studies SDC curriculum, the PWN notes that the request had been granted and Father was permitted to review the textbooks and the curriculum standards had already been provided to him.

The Triennial Assessment

32. Ms. Cooper has 16 years experience as a SLP. She received a B.S. in communication disorders from Minot State University in 1997 and her M.S. in clinical speech pathology in 2011 from Northern Arizona University. Since 2000, she has maintained a Certificate in Clinical Competency (CCC) and possesses a California certification as a speech language hearing specialist. From 1997 through 2001, Ms. Cooper worked as a SLP with the Imperial County Unified School District. Since 2001, she has been a SLP with the District. Ms. Cooper estimated that she has conducted at least 25 formal LAS assessments each year and hundreds during her career. Since school year 2010-2011, Ms. Cooper has provided LAS services to Student. Ms. Cooper conducted her assessment as part of the District's multi-disciplinary triennial assessment. Ms. Cooper authored a written report dated February 24, 2012.

33. Ms. Cooper's assessment was done over an eight day period and consisted of a review of Student's records, review of prior LAS evaluations, clinical observation, progress review and feedback from Student's parents and teacher. Ms. Cooper also reviewed the District's psycho-educational assessment which scored Student's IQ at 88, which placed him in the 12th percentile. In the areas of articulation/phonology, voice and fluency, Ms. Cooper assessed Student using observations rather than standardized testing. Student's voice was "observed to be age and gender appropriate." Ms. Cooper observed that Student used inflection and emotion in his speech and did not talk in a monotone. Student's fluency was observed to be within normal limits. As to articulation/phonology, Student's articulation was normal, except Ms. Cooper noted that Student had a bilateral lisp of some phonemes of speech due to the absence of upper cuspid and bicuspid teeth. Ms. Cooper recommended that Student's articulation be monitored to ensure normal sound development when Student's permanent teeth come in. Because there were no deficits in these areas noted, Ms. Cooper did not administer standardized testing.

34. In the area of language, Ms. Cooper administered seven standardized tests as well as utilizing informal assessments. Standard scores at 69 and below are in the “extremely low” range, 70 to 79 are “border line” 80 to 89 as “below average” 90 to 109 are “average,” and above 109 are “above average.” Student was given the Receptive One-Word Picture Vocabulary Test (RPVT) and the Expressive One-Word Vocabulary Test (EPVT). The RVPT measures an individual’s ability to name objects, actions, and concepts, while the EPVT measures the ability to recognize objects, actions, and concepts. Student earned standard scores of 103 in the RVPT and 107 in the EVPT. Student scored a 109 in the Test of Auditory Reasoning and Processing Skills which measures how a child thinks including his ability to reason, develop ideas, draw inferences, solve problems and acquire knowledge.

35. In the Listening Comprehension Test 2 (LCT-2), Student received a total standard score of 93 with subtest scores of main idea at 90; details at 103; reasoning at 77; vocabulary at 95; and understanding messages at 104. These results indicate that Student’s overall listening comprehension is average. The reasoning subtest measures a child’s ability to make inferences, explore beliefs and values, compare and contrast, make decisions, draw conclusions, and interpret data. These are components of pragmatics, which is Student’s main area of deficit.

36. The Clinical Evaluation of Language Fundamentals (CELF) measures a student’s strengths and weaknesses in communication. Student scored in the average to below average ranges in the CELF and its subtests. Student received a standard score of 82 in core language with 87 in receptive language, 87 in expressive language, 92 in language content and 80 in language memory. Student’s area of strength was understanding the content of language while language memory was an area of weakness.

37. The Comprehensive Assessment of Spoken Language (CASL) assesses a student’s oral language processing, word use, grammatical structure, ability to use language for higher level tasks, and knowledge and use of language in communicative contexts. Student received subtest standard scores of 99 in antonyms, 102 in grammatical morphemes, 89 in sentence comprehension, 80 in non-literal language, and 66 in pragmatic judgment with a core language score of 83. Student’s scores in the area of figurative/pragmatic language skills were significantly below his scores in literal language skills.

38. The Social Language Development Test: Elementary (SLDTE) is a test of social language skills for adolescents. The test focuses on taking perspectives; making correct inferences; solving problems with peers; interpreting social language; and understanding idioms, irony and sarcasm. Student received a total standard score of 88 with subtest standard scores of 99 in making inferences, 95 in interpersonal negotiation, 95 in multiple interpretations, and 69 in supporting peers. Student’s total test score places him in the average range of functioning but the supporting peers subtest that requires Student to make supportive statements in social situations was significantly below average.

39. Ms. Nixon and Parents completed the CELF pragmatics profile which identifies specific tasks relating to rituals and conversational skills. Ms. Nixon scored

Student at 129 and Parents scored him at 104. A score below 136 indicates inadequate communication abilities. Ms. Nixon, in an interview with Ms. Cooper, indicated that Student struggled to make positive comments to peers, was often frustrated communicating about the behavior of peers, engaged in self talk and had extreme reactions to unfamiliar female students. Father, in a questionnaire, indicated that Student could function in structured social situations with a little prompting; but in unstructured social situations, Student was unable to read environmental or situational cues appropriately.

40. Ms. Cooper noted that Student was able to maintain conversations for more than five exchanges during the assessment, although at times, he was unable to stay on an appropriate topic. She also noted that Student was unable to read nonverbal cues which were intended to redirect conversational topic.

41. Ms. Cooper summarized that Student “exhibits a disorder in the areas of pragmatic language in comparison to his cognitive ability.” Ms. Cooper recommended that Student “will require more cues, models, examples, explanations, and checks for understanding than the typical student.” She concluded that Student’s delays in pragmatic language development “may impact” Student’s educational performance.

March 8, 2012 Triennial IEP Meeting and Completion of the IEP

42. On March 8, 2012, the IEP team reconvened for the Triennial IEP meeting. In addition to the IEP team members who were in attendance at the February 16, 2012 meeting, Richard Addison, a school psychologist who had conducted the psycho-educational assessment and Ms. Cooper were present. Ms. Nixon reviewed the results of the academic testing she administered and Mr. Addison discussed his psycho-education assessment. Ms. Cooper then presented her assessment results. The assessment demonstrated that Student had difficulties in making inferences, drawing conclusions and comparing and contrasting points of view. As to the use of Student’s IQ, Ms. Cooper stated:

“I noted [Student’s] IQ in Mr. Addison’s report and then we compare how he did on his speech and language assessments and we assume they would be in that area and if there is a difference then we consider that to be a disorder in the area of speech and language in either articulation, phonology, voice fluency or language.”

Ms. Cooper orally proposed an additional goal to be added that would require Student to be able to identify context clues and to infer unstated information when given a short paragraph with 70 percent accuracy over three sessions with minimum cues. Neither Father nor his advocate replied to the proposed goal. At the end of the meeting, Ms. Cooper suggested that the team schedule another date to reconvene the IEP meeting as the team had not finished. Ms. Sester then informed the team that Student would be shortly transferring to Gardner as Parents had moved to the Gardner attendance zone area. Ms. Sester also informed the team that Father planned to have “a lot of independent assessments” to

determine if Student was actually meeting his IEP goals. Ms. Sester also stated that after these assessments were completed, Father would schedule an IEP meeting at Gardner.

43. Student transferred to Gardner on April 11, 2012. Marie Owens, a District resource specialist at Gardner, attempted to schedule a continuation of the annual and triennial IEP meetings. Father told her he would need to get back to her as he wanted to obtain some independent assessments first. At the time the hearing commenced, the IEP meeting had not occurred.

Private LAS Evaluation Obtained by Parents

44. Parents retained Lynn Hardy-Lukes of Temecula Valley Therapy Services (TVTS) to conduct a pediatric speech-language evaluation. Ms. Lukes received a B.S. in speech and hearing sciences in 1988 from Texas Tech University and a M.S. in communication disorders in 1990 from the University of Texas at Dallas. She possesses a California state SLP license, and since 1991, she has maintained her CCC. Since 1990, she has been employed as a SLP in private practice; except for from 2005 through 2007, Ms. Lukes was a SLP with the District at the Paloma Elementary School. She estimates that she conducted approximately 30 speech language assessments during her time with the District. From 2007 through 2010, Ms. Lukes provided speech services for middle school age children at Big Springs Education Center, a nonpublic school in Murrieta, California. In 2008, Ms. Lukes founded, TVTS and continues as its clinical director.

45. Ms. Lukes conducted her evaluation on two days (March 15, 2012, and another day the following week), although her report states the evaluation was on a single day, March 15, 2012. The report, which was dated March 15, 2012, actually was written about two weeks later. The first assessment day was for one hour and 30 minutes and was stopped because Student appeared fatigued. The second day assessment lasted approximately one hour. As part of her preparation, Ms. Lukes reviewed material provided by Father comprising the February 2, 2012 IEP document; samples of Student's school work; and emails from Father to Ms. Nixon and Mr. Groepper dated February 28, 2012.⁶ Father provided information as to how Student was performing in Ms. Nixon's class. She also interviewed Parents as part of the intake process which included a medical history. Ms. Lukes never observed Student in the classroom setting nor spoke with Ms. Cooper or Ms. Nixon or anyone else from the District.

46. In conducting her evaluation, Ms. Lukes noted behavioral observations, completed an informal speech assessment, and administered standardized tests. The standardized tests administered were the Test of Language Development-Intermediate (TOLD-I: 4), Test of Problem Solving: Revised (TOPS-R), and the Expressive Vocabulary Test (EVT-2). During the evaluation, Student had one-sided conversations with the

⁶ Father did not provide to Ms. Lukes copies of either the Cooper LAS assessment or the psycho-educational assessment reviewed at the March 8, 2012 IEP meeting or earlier LAS assessments.

examiner and appeared to be unable to interpret the listener's prospective or body language. In the EVT-2, which tests semantics, Student scored in the "average" range with a standard score of 99.

47. Ms. Lukes did not administer standardized tests for speech production as she did not observe any articulation errors during Student's spontaneous speech. She also observed that Student's oral motor skills appeared within normal limits as was his fluency. As to voice, Ms. Lukes noted that Student was "normal" as to vocal quality, volume, resonance, and respiration. Ms. Lukes observed that Student "demonstrated impairment in prosody⁷ characterized by a flat, monotone voice."

48. In the TOPS-R, Student received a standard score of below 55 which placed him in the third percentile and was in the "severe" range. This test is administered by showing the examinee pictures and then being asked questions about the pictures. Student had difficulty in inferring details and seeing the "big picture." This illustrated Student's social problem solving deficit.

49. The TOLD-I:4 is scored with a Total Composite for spoken language and five composite scores with six subtests. Student's Total Composite was in the "poor" range with a standard score of 78 which placed him in the seventh percentile. His composite scores were "average" in semantics (standard score of 90). He scored "below average" in listening (86) and speaking (86), while scoring "poor" in organizing (76) and grammar (72). On the individual subtests, Student scored in the "average" range in picture vocabulary and multiple meanings, "below average" in morphological comprehension and relational vocabulary, and "poor" in sentence combining and word ordering. Ms. Lukes concluded that Student was impaired in the areas of pragmatic language, auditory comprehension, and verbal expression.

50. Ms. Lukes summarized her evaluation results by stating that Student presents with (a) a moderate language disorder in the areas of semantics, syntax (oral language grammar), morphology, and/or pragmatics, and (b) a mild voice disorder characterized by a flat, monotone pitch with very little variance in prosody. Ms. Lukes recommended that (a) Student be referred to an occupational therapist for sensory integration dysfunction, and (b) Student receive speech-language therapy twice weekly for 25 weeks with a progress review in six months.⁸

51. Ms. Lukes also recommended treatment goals with Student's long-term goal for him "to demonstrate age-appropriate speech and language skills." Her recommended

⁷ Prosody is the "melody" and "rhythm" of speech and is composed of pitch, intensity, and duration of the utterance. (Grossman, Ruth B., et al, *Lexical and Affective Prosody in Children with High-Functioning Autism*, J. Speech Lang. Hear. Res., 2010 June 53(3): 778-93.)

⁸ Ms. Lukes did not state whether the recommended speech-language therapy should be individually or in group sessions.

short-term goals for Student did not address the “mild voice disorder.” The goals were as to “WH” questions, comprehending non-literal language, comprehending age appropriate paragraphs, demonstrating age appropriate turn taking, appropriate topic maintenance, and demonstrating appropriate perspective taking during structured role playing of different social situations.

52. Following her evaluation, Ms. Lukes began providing speech and language services to Student which Ms. Lukes described as being “medical” in nature. These services were paid through Student’s health insurance.

The Appropriateness of the District LAS Assessment and LAS Services

53. Student’s speech expert, Ms. Lukes, testified regarding two issues: (1) the appropriateness of the language and speech services provided to Student in the 2011-2012 school year while attending VRMS, and (2) the appropriateness of the speech and language triennial assessment. For the reasons discussed below, the ALJ gave greater weight to the testimony of Ms. Cooper than that of Ms. Lukes.

Appropriateness of the Cooper Assessment

54. Ms. Lukes conceded that Ms. Cooper had followed test protocols appropriately, had scored the standardized tests correctly, and reported the core scores in a “sufficient” manner. She was critical of Ms. Cooper’s report in that she omitted mention of progress made by Student since the last assessment and that Ms. Cooper failed to report subtest scores of the CELF. As to omitting Student’s progress since the last assessment, such information was available to Parents and the IEP team as each annual IEP sets forth Student’s present levels of performance and progress on meeting goals. She also opined that the TARPS was not an accurate test to measure auditory reasoning and processing skills as it relies too much on rote rather than problem solving. Ms. Lukes failed to cite any authority to corroborate her opinion.

55. Ms. Lukes noted that Student had scores in the below average range or lower in many subtests of the standardized testing. Ms. Lukes was critical of Ms. Cooper taking into account Student’s IQ in analyzing the test results especially as it relates to the areas of semantics, syntax, and morphology.⁹ Ms. Lukes contended that using IQ scores is not appropriate because speech and language difficulties can have an effect to lower IQ scores. In support, Ms. Lukes stated that the American Speech-Language Hearing Association (ASHA)¹⁰ does not accept cognitive referencing in conducting speech-language evaluations. Ms. Lukes failed to offer any corroboration to support this contention.

⁹ These are all related to pragmatics.

¹⁰ ASHA is the professional, scientific and credentialing agency for audiologists and speech-language pathologists.

56. Ms. Lukes also was critical of the failure of Ms. Cooper to diagnose that Student presented with a mild voice disorder characterized by a flat, monotone pitch with little variance in prosody. Ms. Cooper, during her assessment and while providing speech and language services to Student, did not observe evidence of a voice disorder. Ms. Cooper conferred with Student's SLP at Pauba, Krista Lamphere, at the beginning of school year 2011-2012, and there was no mention that Student had any such disorder. Additionally, Ms. Cooper interviewed Ms. Nixon for her assessment, often conferred with her, and had much contact with Student throughout fall 2011, and there was no evidence of Student having a voice disorder as Ms. Cooper personally observed Student using appropriate inflection and emotion during conversations. Ms. Lukes saw Student on two days for a total of about three to four hours. On the first day, Student's testing was stopped after approximately one and a half to two hours because he was fatigued which may have had an effect on Student's flat tone. She did not conduct any observations outside of her clinic. The ALJ gave great weight to Ms. Cooper's testimony which was corroborated by the weight of the evidence testimony that Student did not demonstrate a mild voice disorder.

Appropriateness of the Lukes' Assessment

57. Ms. Cooper was critical of the Lukes assessment in that it omitted any information as to classroom performance, used a single test to diagnose problems, Ms. Lukes' observations as to Student's pragmatic skills were unreliable, and Ms. Lukes used a test which was no longer valid. It is undisputed that Ms. Lukes failed to make any observations outside of her clinical setting nor did she attempt to confer with either Ms. Nixon or Ms. Cooper.

58. Ms. Lukes used both the TOPS-R and the TOLD-I:4 to measure Student's pragmatic skills level. Ms. Cooper questioned the use of the TOPS-R as a reliable measure as a new version (TOPS-3) was released in 2005. Ms. Cooper testified that she spoke to a representative of the test publisher who stated the TOPS-R was invalid six months following the release of the newer version. Ms. Lukes countered that she had spoke to an unknown person at ASHA and was informed that it had no position as to whether outdated tests were valid after a new version was published. Ms. Lukes admitted that during the phone call she did not specify the test nor did she contact the test publisher. Ms. Lukes testified that she utilized the TOPS-R to measure Student's pragmatic skill level. The test examiner's manual states as follows:

Although the skills tested on the *TOPS 3 Elementary* are necessary for developing social competence, it is not primarily a test of pragmatic or social language skills. Rather, it should be part of a battery of tests/observations used to assess pragmatic competence.

Here, Ms. Lukes did not administer a battery of tests as to pragmatics and social communication, nor make observations to support the accuracy of the results from the TOPS-R, had the test been valid.

59. Ms. Lukes used a report form which contains boxes to be checked to indicate an examinee's performance. Under pragmatics, Ms. Lukes indicated that Student does not do the following: get listener's attention, initiates activity, reacts to humor, and takes turn. Ms. Cooper had constantly observed Student doing all of these, plus she noted that Student has a good sense of humor. Ms. Lukes' conclusions are based on minimum contact with Student as opposed to Ms. Cooper who had instructed Student for about seven months and had frequent contact with him at school. The ALJ gave greater weight to the testimony of Ms. Cooper for those reasons.

Appropriateness of the LAS Services Provided During 2011-2012 at VRMS

60. Ms. Lukes opined that the level of LAS services provided to Student was not appropriate. Ms. Lukes recommended that Student should have received one-to-one speech therapy for his voice deficit. She also opined that Student should have received a one-to-one session followed by small group sessions to deal with his pragmatic deficits. As to the Lukes recommendation regarding voice, the evidence failed to support Ms. Lukes' contention that Student had a mild voice disorder as discussed above. Ms. Lukes offered no recognized authority to support her opinion that Student's social communication deficits require a one-to-one session as well as a group session. Ms. Lukes did acknowledge that Student should be given speech therapy in a group of no more than two because he has attention issues. Again, Ms. Lukes failed to cite any authority to corroborate her opinion. Ms. Cooper opined that the social skills followed by the small group breakouts permits Student to learn and then generalize what he learned. At the IEP meetings, there was no dispute that Student was meeting his annual goals which demonstrates that Student was making educational progress as to his LAS deficits. Thus, the LAS services provided by the District during the 2011-2012 school year were appropriate.

Compensation for Missed Instruction

61. In April 2012, the District decided to offer the Achieve 3000 program to compensate for the missed social studies and science instruction. The Achieve 3000 is an on-line computer program which provides instruction tailored to an individual's reading level. The program uses many visuals, which is effective with children on the autistic spectrum, and a writing component.

62. On May 18, 2012, Mr. Groepper forwarded a letter to Parents¹¹ requesting a meeting "to determine whether and how your child will access the available compensatory education services, and develop a written plan to accomplish such that includes any supplementary aids and supports necessary for your child to access the services." The letter goes on to state that "your child may access the available compensatory services at a school site or your home during the upcoming summer."

¹¹ The letter was a form letter sent to the parents of all students in Ms. Nixon's class.

63. On June 6, 2012, a meeting was held with Father, Ms. Sester, Mr. Groepper, and Sandy McKay, a District administrator. Ms. McKay explained the Achieve 3000 program that could be accessed during the summer either at school or at home under the supervision of a special education teacher. Father was concerned that this program may not be appropriate for Student because of his attention problems. Father preferred that Student receive direct individual instruction from a special education teacher. The District personnel believed that Father was not interested in the Achieve 3000. Father said he would consider it and get back to the District. Ms. Sester and Father believed that the offer of this program was “take it or leave it” and that no other accommodations or modifications could be discussed later. Father never contacted the District as to whether the Achieve 3000 was acceptable.

64. On October 4, 2012, Arthur Zeidman, Director of the San Francisco Enforcement Office of the OCR, forwarded a letter to the District superintendent.¹² Mr. Zeidman noted that the Achieve 3000 was “aligned with the Common Core Standards for Science and Social Studies,” set-up assistance was offered, and a special education teacher would oversee and monitor students’ progress and be the primary contact for parents. Mr. Zeidman concluded that the District met its obligations under the settlement agreement relating to Father’s OCR complaint.

65. Leslie Huscher testified on behalf of Student as an academic expert relating to compensation for the science and social studies instruction missed during the first semester of school year 2011-2012. Ms. Huscher has a B.A. in liberal studies from Concordia University in Irvine and an M.A. in education from Cal Poly Pomona. She possesses a clear multiple subject teaching credential and a credential in special education. From 1984 through 1990, she was an elementary school teacher. From 1990 through 2001, she was a special day class teacher for elementary and middle school. In 2001, she founded Big Springs Educational Therapy Center and School which provides special education related services and operates a nonpublic school.

66. Ms. Huscher calculated that Student missed a total of 52.5 hours of instruction in science and an equal amount in social studies based on the assumption that Student would receive 30 minutes of actual instruction daily in those subjects. Ms. Huscher admitted that her calculations were not based on Student but only in general terms. As to the Achieve 3000 program, Ms. Huscher was unfamiliar with the program except what she discovered conducting research on-line. She described Achieve 3000 as a self-study program directed by a teacher. Based on what she learned during her short research, Ms. Huscher stated it “looks like a good program.”

¹² The District on October 26, 2012, requested that the ALJ take official notice of the letter. Student did not file a responsive pleading. On November 1, 2012, the ALJ issued a written order granting the request.

Student's Request for an Independent Education Evaluation

67. On March 1, 2012, Father, via email, requested that the District fund independent education evaluations (IEE), which was prior to receiving the District assessment reports. On April 17, 2012, Father, via email to Ms. Smith, renewed his request for District funded IEE's. Ms. Smith responded by email on April 18, 2012, requesting clarification as to what areas Father was requesting IEE's. Ms. Smith, by email, on April 24, 2012, renewed her request for the areas Father wanted to be evaluated. On April 24, 2012, Father responded via email. Father requested IEE's be conducted in the areas assessed by the District during its triennial assessment. On May 11, 2012, Ms. Smith, on behalf of the District, responded by email that the District was granting the request by Father to fund IEEs in LAS and psycho-education. A copy of the email was also forwarded to Father via regular mail.

LEGAL CONCLUSIONS

1. In a special education administrative due process proceeding, the party seeking relief has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this case, Student has the burden of proof.

2. A child with a disability has the right to a free appropriate public education under the Individuals with Disabilities Education Act (IDEA or Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA. The primary goal of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes public education and related services." (20 U.S.C. § 1400(d)(1)(A); see *J.L. v. Mercer Island School District* (9th Cir. 2009) 592 F.3d 938, 947 (*Mercer Island*).)

3. Under special education law, the parent of a disabled child has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (See *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029 [holding OAH jurisdiction was limited to the point that it did not have jurisdiction to enforce its own orders].)

Issue a: Whether the District failed to provide Student a FAPE during the 2011-2012 school year in that the District failed (a) to provide instruction in the core curriculum subjects of science and social studies, and (b) to provide appropriate LAS services?

4. A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).) Special education is defined as specially designed instruction and services (DIS), provided at no cost to parents, that meets the unique needs of a child with a disability and permits him or her to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include transportation, and developmental, corrective, and supportive services, such as mental health counseling services, that may be required to assist the child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

5. "Language and speech development and remediation" are considered to be a DIS. (Ed. Code, § 56363, subd. (b)(1); Cal. Code of Regs., tit. 5, § 3051.1.)

6. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500 [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].) A disabled child's IEP must be tailored to the unique educational needs of that particular child, who, by reason of disability, needs special education and related services. (*Ibid.*)

7. 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 Dist.* (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.*) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.)

8. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*).) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).) Under this "snapshot rule," it must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

9. In *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court

addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA. Under *Rowley* and state and federal statutes, the standard for determining whether a district's IEP substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley, supra*, at p. 200.)

10. In *Rowley*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at p. 198.) School districts are required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *Mercer Island, supra*, 592 F.2d at p. 947.)

11. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203, fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2d Cir. 1998) 142 F.3d 119; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *M.H. v. Monroe-Woodbury Central School Dist.* (S.D.N.Y. March 20, 2006, No. 04-CV-3029-CLB) 2006 WL 728483, p. 4; *Houston Indep. School Dist. v Caius R.* (S.D.Tex. March 23, 1998, No. H-97-1641) 30 IDELR 578; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp. 442, 449-450.) The issue is whether the IEP was appropriately designed and implemented and is reasonably calculated to convey a student with a meaningful benefit. (*Rowley, supra*, 458 U.S. at p. 192; *Adams, supra*, 195 F.3d at p. 149; *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439 (*Fresno*.)

12. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general education classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. 300.114(a)(2)(ii).)¹³

13. A material failure to implement an IEP violates the IDEA. *Van Duyn v. Baker Sch. Dist 5J* (9th Cir. 2007) 503 F.3d 811, 821-822 (*Van Duyn*.) Since the IDEA defines a

¹³ All references to the Code of Federal Regulations are to the 2006 version.

FAPE as special education and related services that ...are provided in conformity of the child's IEP, "[a] material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Ibid*; see also *Savoy v. District of Columbia* (D.D.C. 2011) 844 F.Supp.2d 23, 31.) The materiality standard does not require that the child demonstrate educational harm to prevail on a failure to implement claim. (*Wilson v. District of Columbia* (D.D.C. 2011) 770 F.Supp.2d 270, 275.)

Issue a (1): The District failed to provide Student a FAPE by its failure to properly implement the February 17, 2011 IEP by its failure to provide instruction in science and social studies.

14. Student contends that he was denied a FAPE because the February 17, 2011 IEP was not implemented because he was not given instruction in science and social studies while attending VRMS as provided in Student's IEP. The District contends that Student has not met his burden to demonstrate that he was denied a FAPE.

15. The District materially failed to implement the February 17, 2011 IEP when Student entered the sixth grade at VRMS. Student's February 17, 2011 IEP placed him 38 percent of the time in the regular education environment which included attending general education classes in science and social studies, where he was provided a modified curriculum. The purpose of this mainstreaming was not only to instruct Student in concepts of the core curriculum but also to expose him to non-disabled peers in a social situation. Thus, the District's failure to provide instruction in these core curriculum areas and to have Student mainstream in those classes amounts to much more than a minimal discrepancy between the services provided and those required by the February 17, 2011 IEP. Also, Student demonstrated that he received educational benefit in attending these general education classes by meeting all his annual academic and communication goals as noted on his February 2, 2012 IEP and testing "proficient" on the science CMA. (Factual Findings 4 through 6, 8 through 16, and 26.)

Issue a (2): The District provided appropriate LAS services pursuant to the February 17, 2011 IEP.

16. Student alleges that the District deprived Student of a FAPE in the February 17, 2011 IEP by failing to provide him with appropriate LAS services. Student contends that the District altered the delivery of LAS services from the small group pull-out services required in his IEP and provided at Pauba to a social skills class format at VRMS, which deprived Student from receiving small group instruction. Secondly, Student contends that he should have received one individual therapy session and a small group session to address his social skills therapy. Thirdly, Student contends that the LAS services were not appropriate because Student's deficits in syntax, grammar, and semantics as well as his voice disorder were not addressed.

17. The District contends that Student's language deficits were addressed in the areas of syntax, grammar, and semantics through his academic goals and services. The District further contends that Student does not have a voice disorder. As to the delivery of services, the District contends that the delivery of services at VRMS conformed to Student's IEP.

18. The District provided LAS services in conformity with the February 17, 2011 IEP. The District provided Student's LAS services with a different form of delivery to those services he received at Pauba. Ms. Cooper delivered social skills instruction in a classroom setting comprising eight students, of which six had LAS goals. Following that instruction, the students were then broken into small groups for the 30 minute group sessions.¹⁴ The IEP did not limit the manner in which the LAS services were to be delivered. (Factual Findings 8 through 18 and 60.)

19. Student's unique needs in LAS were addressed by the services provided pursuant to his February 17, 2011 IEP. First as to Student's contention that the LAS services failed to address his "mild voice disorder," Student failed to meet his burden to demonstrate that he, in fact, had such a disorder. Student's sole evidence to support whether he had a voice disorder was the opinion of Ms. Lukes based on her informal observations during her two day evaluation over approximately a three hour time period. The District's contrasting evidence was more convincing in that Ms. Cooper, who had been providing LAS services to Student for almost eight months, had conducted a LAS assessment, and had frequent contact with Student, failed to find a voice disorder. Also based on the LAS goals in the February 17, 2011 IEP, Ms. Lamphere, the Pauba SLP, had not proposed a goal relating to Student's voice or intonation.¹⁵ Secondly, Student's annual goals in the February 17, 2011 IEP incorporated the pragmatics not only in his communication goal but also in several of his academic goals. Ms. Cooper testified that her social skills class was designed to work on all areas of pragmatics including listening comprehension, non-literal language, idiom use, turn taking, and responding appropriately to conversational topics. The areas of syntax, grammar, and semantics were covered through five of his academic goals. (Factual Findings 8 through 18, 32, 33, 47, and 54 through 60.)

Issue b: Whether the District denied Student a FAPE because the District denied Parents meaningful participation in the IEP decision-making process by failing to have in attendance the SLP at the February 16, 2012 IEP?

20. Student contends that the absence of Ms. Cooper at the February 16, 2012 IEP meeting deprived Parents of the right to meaningfully participate in the IEP decision making

¹⁴ In his closing brief, Student mistakenly contends that the LAS services were provided to a class of 13 to 18, which is based on the size of the entire Nixon class.

¹⁵ Interestingly, Student's counsel never inquired to either Ms. Riley or Ms. Nixon whether they had observed Student with a flat monotone voice with little variation in prosody.

process. The District admits that Ms. Cooper was not present at the meeting. The District contends that Parents did meaningfully participate in the IEP decision making process.

Procedural Violations

21. Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (f)(2)(A)-(C); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*).)

22. Procedural errors during the IEP process are subject to a harmless error analysis. In *M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 650, fn. 9, the Ninth Circuit decided that failure to include a regular education teacher at the IEP team meeting was a procedural violation of the IDEA. Utilizing the harmless error analysis, the court determined that the defective IEP team was negatively impacted in its ability to develop a program that was reasonably calculated to enable M.L. to receive educational benefits. (*Ibid.*) In separate opinions, concurring in part and dissenting in part, Judges Gould and Clifton agreed that the procedural error was subject to a harmless error test, and considered whether the error resulted in a loss of educational opportunity to M.L., but disagreed in their conclusions. (*Id.* at pp. 652, 658.)

Parent Participation in the IEP Process

23. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1).) In this regard, an educational agency must ensure that one or both of the parents of a child with a disability is present at each IEP team meeting. (34 C.F.R. § 300.322(a); Ed. Code, §§ 56341.5, subd. (a), 56342.5.) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904]. Parental participation in the IEP process is also considered "(A)mong the most important procedural safeguards." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

24. Under these guidelines, an educational agency must permit a child's parents "meaningful participation" in the IEP process. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131-1132.) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485; *Fuhrman, supra*, 993 F.2d at p. 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her 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; *Fuhrmann, supra*, 993 F.2d at p. 1036.) Parents have an adequate opportunity to participate in the IEP process when they are "present" at the IEP meeting. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subd. (a).) An adequate opportunity to participate can include a visit by the parent to the proposed placement. (*Fresno, supra*, 626 F.3d at p. 461.) An adequate opportunity to participate can occur when parents engage in a discussion of the goals contained in the IEP. (*J.G. v. Briarcliff Manor Union Free School Dist.* (S.D.N.Y 2010) 682 F.Supp.2d 387, 394.)

Required Attendees at IEP Team Meetings

25. The IDEA and California education law require certain individuals to be in attendance at every IEP team meeting. In particular, the IEP team must include: (a) the parents of the child with a disability; (b) not less than one regular education teacher of the child, if the child is or may be participating in the regular education environment; (c) not less than one special education teacher, or where appropriate, not less than one special education provider of the child; (d) a representative of the school district who is knowledgeable about the availability of the resources of the district, is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum; (e) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described above; (f) at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (g) whenever appropriate, the child with a disability. (20 U.S.C. § 1414 (d)(1)(B); Ed. Code, § 56341, subd. (b)(1)-(7).)

Student failed to meet his burden that the absence of Ms. Cooper from the February 16, 2012 IEP meeting constituted a harmless error.

26. The District did commit a procedural violation of the IDEA by the failure of Ms. Cooper, the SLP providing Student LAS services who was a required IEP team member, to attend the February 16, 2012 IEP meeting, but such error was harmless. The February 16, 2012 meeting was a continuation of the February 2, 2012 annual IEP meeting. At the February 2, 2012 meeting, the IEP team reviewed Student's progress on meeting the annual goals of the preceding annual IEP, his present levels of performance, and Ms. Cooper presenting new annual LAS goals which were reviewed. Because of time constraints, the annual meeting was not completed. After Ms. Nixon and Father agreed to a new date, the District sent a written notice of the new date which omitted Ms. Cooper as an attendee. Thus, Parents were on notice that she would not attend. At the February 16, 2012 meeting, Father requested additional LAS goals. Student's triennial meeting was scheduled and it was agreed that further goals would be discussed at that meeting. On March 8, 2012, the IEP team reconvened and Ms. Cooper was present. In fact, the annual IEP had not been completed as of the hearing commencement because of the Parents' failure to agree to a new meeting date. Student has not demonstrated, nor introduced any evidence, to show that his parents were unable to effectively participate in the IEP decision making process. (Factual Findings 25 through 31, 42, and 43.)

*Issue c: Whether the District denied Student a FAPE when it failed to assess Student in an appropriate manner in all areas of suspected disability, specifically in LAS?*¹⁶

27. Student contends that the District's LAS assessment was not appropriate. In his closing brief, Student stated his contentions thusly:

Thus, while Ms. Lukes testified that the actual tests performed by Ms. Cooper did not appear to be incorrectly scored or were not, per se, inadequate *in the execution* (emphasis in original), her interpretation of [Student's] scores missed the mark...

(Student's Closing Brief at p. 15.) Student specifically contends that Ms. Cooper's analysis of the test data was inappropriate because she took into account Student's IQ score. Student alleges that the "inappropriate" LAS assessment prevented the IEP team from properly evaluating the LAS services Student requires to meet his unique needs at the annual and triennial IEP meetings.

28. The District contends that the District LAS assessment was comprehensive, thorough, and utilized standard tests in accordance with best practices.

29. In order to assess or reassess a student, a school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, §56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental and procedural rights under the IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) Here, there is no dispute that the District complied with these requirements.

30. Assessments must be conducted in a way that: (1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; (2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and (3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: (1) selected and administered so as not to be discriminatory on a racial or cultural basis; (2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (3) used for purposes for which the assessments are valid and reliable; (4) administered by trained and knowledgeable personnel; and (5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subs. (a) & (b), 56381, subd. (h).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was a deficit in reading skills].) No single measure, such as a single

intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subs. (c) & (e).)

31.. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

32. A student may be entitled to an IEE if he or she disagrees with an evaluation obtained by the public agency and requests an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) In response to a request for an IEE, an educational agency must, without unnecessary delay, either: 1) File a due process complaint to request a hearing to show that its evaluation is appropriate; or 2) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(b)(2); see also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].) Here, the District has granted Student's request for an IEE in LAS. (Factual Finding 67.)

33. A child is eligible for special education under the category of Language/Speech Disorder when he or she demonstrates difficulty understanding or using spoken language to such an extent that it adversely affects the child's educational performance and cannot be corrected without special education and related services. (Ed. Code, § 56333.) The disorder must be determined meet one or more of criteria including:

(a) Abnormal Voice where the child's voice is characterized by persistent, defective voice quality, pitch, or loudness. (C.C.R. tit. 5, § 3030 subd. (c)(2).)

(b) Language Disorder where the child has an expressive or receptive disorder has at least a 1.5 standard deviations below the mean, or below the seventh percentile, for his or her chronological age or developmental level on two or more standardized tests in the areas of morphology, syntax, semantics, or pragmatics. (C.C.R., tit. 5, § 3030 subd. (4)(A).)

The District's LAS assessment was appropriate.

34. Ms. Cooper is qualified to conduct a LAS assessment based on her education and almost 16 years experience as a school SLP. Ms. Cooper used a variety of technically sound instruments and did not use a single measure as the sole criterion for determining whether Student had a disability. Student's expert conceded that Ms. Cooper had correctly followed testing protocols, including administration, scoring and reporting of scores. Student's principal objection was that Ms. Cooper analyzed Student's test results utilizing his IQ score. As stated in Legal Conclusion 34, it is proper to consider Student's standardized scores in relation to Student's developmental level, which includes his IQ score. Thus, Student has failed to meet his burden on this issue. (Factual Findings 17, 18, 32 through 41, 45, and 53 through 60.)

REMEDIES

Compensatory Education

35. Compensatory education is an equitable remedy designed to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497 (*Puyallup*)). Compensatory education is designed to compensate a student who was actually educated under an inadequate IEP, and it is a prospective award of educational services designed to catch-up the student to the level he should have been absent the denial of FAPE. (*Brennan v. Regional School Dist. No. Board of Educ.* (D. Conn. 2008) 531 F.Supp.2d 245, 265.)

36. The remedy of compensatory education depends on a "fact-specific analysis" of the individual circumstances of the case. (*Puyallup*, 31 F3d. at 1497.) The court is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*School Comm. of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385.]) There is no obligation to provide day-for-day compensation for time missed. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) An award of reimbursement may be reduced if warranted by an analysis of the equities of the case. The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d at pp. 1496-1498.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

37. The failure to implement the February 17, 2011 IEP deprived Student from receiving a FAPE in two ways. First, Student did not receive instruction in two areas of the required core curriculum, science and social studies from the beginning of the 2011-2012 school year to February 13, 2012. Secondly, Student was deprived of the benefit of being educated with his nondisabled peers which would benefit his social development. (Factual Findings 3 through 6, 8 through 16, and 26; Legal Conclusions 15.)

38. The District offered to compensate for the lost instruction by providing access to the Achieve 3000 on-line program which was supervised by a certified special education teacher. This program adjusts its instruction level based on the student's reading level. This program was determined to meet the requirements of providing compensatory instruction in the areas of science and social studies. Student offered no evidence to the contrary. In fact, Student's academic expert, Ms. Huscher, conceded that her limited research on the program makes it look "like a good program." Thus, the District's offer of Achieve 3000 offered appropriate compensatory education for the actual instruction missed. (Factual Findings 61 through 66.)

39. The second aspect is more troubling. Ms. Riley stated that Student was placed in general education classes in science and social studies, with a modified curriculum and accommodations, to not only learn the core curriculum but to be exposed to nondisabled peers for his social development. Although the curriculum was modified and Student received accommodations, he was able to educationally benefit as he met his annual IEP goals and also scored "proficient" on the science portion of the CMA, evidencing that he was able to learn. By being educated with nondisabled peers, Student would have had good role models and an opportunity to socialize with them. Receiving compensatory academic instruction will not compensate Student with the opportunity lost. In order to compensate, Student should receive an opportunity to attend class with nondisabled peers. (Factual Findings 2 through 6, 8 through 10, 25, and 26.)

ORDER

1. The District will convene an IEP meeting within 15 business days of the date of this decision to provide Student an opportunity to attend general education class in either social studies or science and to determine what modifications and accommodations Student requires to access said class.

2. The District will provide Student with the Achieve 3000 program during the 2013 extended school year under the supervision of a certified special education teacher as originally proposed.

3. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on issue a(1) and the District prevailed on issues a(2), b, and c.

