

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

GARDEN GROVE UNIFIED SCHOOL  
DISTRICT.

OAH Case No. 2014110961

**DECISION**

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on November 18, 2014, naming the Garden Grove Unified School District. The matter was continued for good cause on December 22, 2014.

Administrative Law Judge Paul H. Kamoroff heard the hearing for this matter in Garden Grove, California, on March 10, 11, 12, and 16, 2015.

Bruce E. Bothwell, Attorney at Law, appeared on behalf of Student. Student's mother attended each day of the hearing. Student was not present during the hearing. OAH provided Mother a Vietnamese interpreter during each day of hearing.

Tracy Petznick Johnson, Attorney at Law, appeared on behalf of District. Lorraine Rae, Assistant Superintendent of Special Education and Student Services for District, attended each day of the hearing. Molly Fults, District program supervisor, attended part of one day of hearing.

The record closed on April 3, 2015, upon receipt of written closing briefs.

## ISSUES<sup>1</sup>

1. Whether District procedurally denied Student a free appropriate public education arising from an individualized education program meeting held on October 8, 2014, and November 6, 2014, by predetermining the educational program offered to Student?
2. Whether District denied Student a FAPE for the 2014-2015 school year, by failing to offer an appropriate placement in the least restrictive environment?
3. Whether District denied Student a FAPE in the fall of 2015, by failing to offer an appropriate placement in the least restrictive environment?
4. Whether District denied Student a FAPE from October 8, 2014, through the fall of 2015, by failing to offer appropriate behavior services and supervision?
5. Whether District denied Student a FAPE from October 8, 2014, through the fall of 2015, by failing to offer appropriate speech and language therapy?

## SUMMARY OF DECISION

Student was a young boy with autism who requested that District provide him a comprehensive home behavior therapy program. Student asserted that his unique behavioral needs warranted the juxtaposition of extensive home-based behavioral therapy with some mainstreaming in a general education classroom.

District averred that Student required instruction in an autism specific classroom, with behavior services provided in class and in a school based clinic, to meet his individual needs.

For the following reasons, this Decision finds that District's IEP of October 8, 2014, and November 6, 2014, was not predetermined and offered Student a FAPE in the least restrictive environment.

## FACTUAL FINDINGS

### *Student*

1. Student was a six year-old boy who resided with his parents within District's boundaries during the applicable time frame. Student has been and continues to be eligible

---

<sup>1</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

for special education under the eligibility category autism. At the time of the hearing, he attended Post Elementary School, a District school, within a kindergarten moderate-severe autism specific special day class.

2. Student's attention and ability to communicate were severely impacted by his disability. His inability to functionally communicate, concurrent with sensory modulation delays, frustrated Student, which manifested in off-task behaviors. He required frequent prompting and redirection to attend to any task. Student did not initiate conversation, paid little attention to his peers, and required prompting and redirection to communicate with peers or adults. It was normal for Student to attend to tasks for less than one minute, ignore his surroundings, walk away from tasks, and he frequently covered his ears even when there was no apparent noise within the immediate environment. He required aide assistance for all social and academic tasks.

3. Student's disability also impacted his executive functioning. Student experienced difficulty in reading, writing and math. In each area, he was below grade level and demonstrated scores at the preschool level. Student had the ability to progress academically, but at a rate which was not commensurate to his same-aged peers. Student had been placed in moderate-severe autism specific special day classrooms, with some mainstreaming with typically developing peers, throughout his educational career. At the time of the hearing, Student continued to be placed in a similar special day class as the result of a private settlement agreement. For the 2014-2015 school year, District sought to continue addressing Student's academic needs in a kindergarten autism specific classroom. Student opposed this offer. Rather, for his kindergarten year, he sought to forgo an academic placement and to focus on remediating his behaviors within a home based behavior program, with some mainstreaming in a general education classroom for socialization.

#### *Conduct Prior to the October and November 2014 IEP Meetings*

4. Student filed a prior request for due process against District in July 2013. To resolve this matter, District and Student entered into a settlement agreement in October 2013. The terms of this agreement included that District would provide Student (1) placement in a preschool moderate-severe autism specific special day class for two hours daily; (2) an individual, intensive behavior intervention aide; (3) speech and language services at four sessions per week individually, for 15 minutes per session, along with one 30 minute group session each week; (4) one hour weekly of clinic based occupational therapy, through a nonpublic agency; (5) one hour weekly of clinic based speech and language therapy, through a nonpublic agency; (6) 20 hours of applied behavior analysis (ABA) therapy at Student's home each week, through a nonpublic agency; (7) eight hours per month of ABA supervision, and; (8) revised goals, dated May 28, 2013. The parties agreed that stay put would not include the nonpublic agency provided services.

5. While District was implementing the terms of the agreement, Parents placed Student in a general education private preschool, The Sunflower School, which he attended two days per week with aide support, in addition to attending District's preschool autism specific classroom.

6. The settlement agreement expired at the end of the 2013-2014 school year. Since then, Student's parents had not consented to any new IEP offers from District. Consequently, as of the hearing, Student was receiving the services and placement agreed upon in the agreement, with the exception that District was no longer required to provide the nonpublic agency services, and the classroom placement had been increased to a full day kindergarten program, from 8:15 a.m. to 12:05 p.m., daily. For the 2013-2014 school year, District had placed Student in a preschool moderate-severe autism specific special day class at Carrillo Elementary School. For the 2014-15 school year, for stay put, District placed Student in a kindergarten moderate-severe autism specific special day class at Post. The Post autism special day class which Student attended under stay put was the same placement offered in the October 8, 2014, and November 6, 2014 IEP's, which formed the basis of this dispute. The classrooms at Carrillo and Post were similarly designed to provide a small, structured environment for pupils with autism. Each had special education credentialed teachers, two aides, and 8 to 11 students. Each classroom utilized specialized instruction, visual schedules, token reinforcement, and activity stations. Each had occupational therapy and speech and language therapy imbedded in the classroom, which students received in addition to their IEP services. District's preschool autism specific classroom paralleled its kindergarten autism specific classroom in structure, therapy, and teaching methodology.

7. Following the settlement agreement and in preparation for Student's triennial IEP meeting, held on October 8 and November 6, 2014, various District and independent assessors completed evaluations of Student.<sup>2</sup> District assessments included a multidisciplinary report conducted by District's psychologist, Juan Escobar, and District's speech-language pathologist, Rochelle Vorwald. The independent evaluations included a psychoeducational report from Dr. Robin Morris, a speech and language assessment by Barbara Pliha, and behavior reports from Behavioral Health Works, and Creative Behavior Interventions. Behavioral Health Works was a nonpublic agency funded by District which provided at-home ABA services for Student during the 2013-2014 school year.<sup>3</sup> Creative Behavior Interventions was a nonpublic agency funded by the Regional Center of Orange County, which provided Student 10 hours per week of at-home ABA services beginning in September 2014. In large part, the assessors found that Student had progressed during the 2013-2014 school year, despite still having significant delays attributable to his disability.

---

<sup>2</sup> In California, the term "assessment" is used interchangeably with "evaluation."

<sup>3</sup> ABA is a behavior modification methodology which focuses on the observable relationship of behavior to the environment, including antecedents and consequences.

Qualified District staff carefully reviewed each evaluation and used this input to determine Student's baselines and present levels of performance, to develop annual goals, and to develop the educational program offered during the October and November 2014 IEP meetings.

### *The Triennial IEP Meeting*

8. District convened the first part of Student's triennial IEP meeting on October 8, 2014. Along with Student's mother, all the necessary IEP team members were present at the IEP team meeting: District program supervisor Molly Fults; school principal Joy Ellsworth; school psychologist Mr. Escobar; Behavioral Health Works clinical director Timothy Sullivan; Behavioral Health Works case supervisor Shane To; a Post general education teacher; Post special education teacher Michelle Lowrie; District speech pathologist Ms. Vorwald; an occupational therapist; District intensive behavioral intervention program specialist Shannon James; and Creative Behavior Intervention home supervisor Bridgette Molina, who attended as Mother's advocate.

9. District convened the second part of Student's triennial IEP meeting on November 6, 2014. District convened a second part of the IEP meeting so its staff could have additional time to review and consider the independent reports, some of which were provided to District just prior to the October meeting. Student's mother attended the November meeting, along with all necessary IEP team members.

10. The IEP team members were qualified to provide and design an educational program specially designed to meet Student's unique needs. Specifically, they were knowledgeable about the general education curriculum and the continuum of special day classes and resources available to Student. District team members, including the general education teacher, school principal, Ms. Lowrie, Ms. Vorwald, Mr. Escobar, and Ms. James, were familiar with the typical kindergarten classroom at Post, which instructed 30 students in each class, the mild-moderate special day classes, which instructed 25 students and utilized the same grade level curriculum as the general education class, and the autism specific class, which instructed 8 students and applied a modified curriculum. District team members had knowledge about implementing goals in general education, each special day class setting, and the home setting. Several members were qualified to interpret the instructional implications of Student's assessment results, including Mr. Escobar, Ms. James, and Ms. Vorwald.

### THE BEHAVIOR REPORTS

11. The IEP team discussed Student's special and unique needs. The three nonpublic agency members, Mr. Sullivan and Ms. To from Behavioral Health Works, and Ms. Molina from Creative Behavior Interventions, along with District's intensive behavior intervention supervisor Ms. James, had specialized expertise and knowledge about Student's

behaviors, as his direct providers for behavior therapy. Each provided the IEP team with Student's present levels of performance in the area of behavior, which District used to develop Student's IEP.

12. The IEP team reviewed a behavioral services progress report by Behavioral Health Works. Behavioral Health Works completed the progress report on September 30, 2014, which contained data that had been collected as recently as August 31, 2014. The progress report reflected data taken for 18 home based goals in the areas of communication, pre-vocational, social-emotional, pre-academics, adaptive living skills, and psychomotor development. Student had made progress towards 11 goals and had met 7 goals. Behavioral Health Works recommended 8 new goals in the same areas, which District utilized in the development of new IEP goals. Neither the progress report nor the two Behavioral Health Works representatives who attended the IEP meeting reported that Student manifested significant maladaptive behaviors.

13. The IEP team next reviewed a functional behavior assessment report conducted by Dr. Denise Eckman of Creative Behavior Interventions. Functional behavior assessments are used to identify controlling variables for maladaptive behaviors as the basis for intervention designed to decrease the occurrence of these behaviors. Dr. Eckman evaluated Student in May, September and October 2014, and completed her report on October 4, 2014. Dr. Eckman was a clinical psychologist who earned her bachelor's degree in 1997, her master's degree in clinical psychology in 1999, and her doctorate in 2005. She founded Creative Behavior Interventions in May 2011, and served as its president and executive director.

14. As a clinical psychologist, Dr. Eckman felt it was important to provide a functional behavior assessment to all pupils with autism, irrespective of the student's level of behavior functioning. Accordingly, each client of Creative Behavior Interventions, including Student, received a functional behavior assessment upon enrollment. Student had last been provided a functional behavior assessment in April 2013, which was conducted by the nonpublic agency Behavioral Education for Children with Autism. For her report, Dr. Eckman observed Student at Post and Sunflower schools, and in the home setting, and she administered the standardized test Verbal Behavior Milestones Assessment and Placement Program. The Verbal Behavior Milestones Assessment and Placement Program assessed a pupil's ability in 16 domains related to language skills, instructional skills, and behaviors.

15. In every area assessed, Student had progressed since the 2013 functional behavior assessment. Student showed substantial progress in listening skills, from a 1 and 1/2 level ability level in 2013, to a level 5 in 2014. Additionally, Student had advanced to be able to imitate several phonemes<sup>4</sup> and some whole words, but still had difficulty with

---

<sup>4</sup> Phonemes are distinct units of sound, like 't' in cat and bat, or 'd' in lad or bad.

articulation and pronunciation. He was able to match pictures to words, was compliant to instruction and responded well to various reinforcers. Student was easily motivated by books, toys, and his iPad.<sup>5</sup>

16. Behaviorally, Student was not disruptive in class and engaged in tantrum-like behaviors infrequently; once every two hours, for a duration of one minute. He was easily calmed down and receptive to redirection when agitated. Overall, Student showed increased compliance and decreased challenging behaviors in the home, community and school settings.

17. Dr. Eckman's report recommended that Student be provided a structured environment, positive reinforcement, modification of tasks, priming, a visual schedule in class, a consistent schedule, prompts, and a token economy system.<sup>6</sup> These recommendations mirrored the environment and methodologies used in District's autism specific classrooms.

18. District accepted the Behavioral Health Works progress report and the Creative Behavior Interventions functional behavior assessment and used these reports for developing Student's baselines, present levels of performance, goals, and, in part, placement.

#### THE INDEPENDENT SPEECH AND LANGUAGE EVALUATION

19. The IEP team next reviewed an independent speech and language report conducted by Barbara Pliha. Ms. Pliha was a speech-language pathologist who was the director of Pliha Speech and Learning Center and Student's expert witness. She conducted Student's speech and language assessment in September and October 2014, which included standardized tests. Ms. Pliha had not met Student prior to her testing, and she did not observe Student at home or at school as part of her assessment.

20. Ms. Pliha's standardized testing found Student to be seriously delayed in all areas of speech and language development.<sup>7</sup> Student received a score of less than 1 percent in his ability to produce phonemes in all word positions. This meant he was more delayed than over 99 percent of his same-aged peers. Student received a similar score, at less than the first percent, in his understanding of receptive vocabulary. Student attained scores at the first percent in auditory comprehension and expressive communication. In the area of

---

<sup>5</sup> An iPad is a tablet computer.

<sup>6</sup> Priming is an intervention that introduces information or activities to the learner prior to their use.

<sup>7</sup> Ms. Pliha utilized the Kaufman Speech Praxis Test for Children; Goldman Fristoe Test of Articulation, Second Edition; the Peabody Picture Vocabulary Test; Preschool Language Scale, Fourth Edition; and the Pragmatic Language Observational Assessment.

functional language in social contexts, Student exhibited delays in his ability to initiate conversation, change topics, and to functionally communicate. Overall, Student was profoundly delayed in expressive, receptive and social language skills.

21. Ms. Pliha also identified Student as having apraxia of speech. Developmental dyspraxia, also referred to as apraxia, is the inability to plan and execute non-habitual motor-speech tasks, including the inability to coordinate the oral movements necessary to produce and combine phonemes to form syllables and words in the absence of oral paralysis. District accepted Ms. Pliha's apraxia identification.

22. Ms. Pliha recommended that District should provide Student speech and language in concert with a child with apraxia, and testified that Student required therapy 10 times per week. However, her report cited the American Speech-Language Hearing Association for recommendations pertaining to a child with apraxia of speech, which recommended that children with apraxia should receive speech and language therapy three-to-five times per week. This discrepancy between her testimony and her report diminished the persuasiveness of Ms. Pliha's service recommendation.

23. Student also required that the methodology of speech instruction be specific to an apraxia disorder. In this regard, Ms. Pliha recommended that either the "prompts for restructuring oral muscular phonetic targets" or the "Kaufman Speech to Language" methodologies be utilized. Each methodology was used to address speech production disorders, including apraxia.

24. District's special education teacher Michelle Lowrie and Ms. Vorwald carefully reviewed Ms. Pliha's report and developed draft goals with input from her assessment. Ms. Vorwald also referred to Ms. Pliha's testing and research to develop the IEP offer for speech and language services, which included therapy five times weekly. Ms. Vorwald was trained and experienced in both the "prompts for restructuring oral muscular phonetic targets" and the "Kaufman Speech to Language," and she applied both methodologies when instructing Student. Finally, Ms. Pliha's report assisted District staff, including the school psychologist, program specialist, teachers, and speech pathologist, in formulating a placement offer. Student, who was profoundly delayed in speech and language, would therefore benefit from District's offer of speech and language therapy, five times weekly, attendant with placement in the language enriched autism special day class.

#### DR. MORRIS'S EVALUATION

25. The October and November 2014 IEP team reviewed an independent psycho-educational evaluation which had been conducted by Robin Morris, Psy.D., M.F.T.<sup>8</sup> Dr. Morris completed her evaluation of Student in June 2014, along with an addendum to her

---

<sup>8</sup> Dr. Morris was a clinical psychologist who specialized in working with infants and children. She earned her bachelor's degree in 1991, her master's degree in clinical psychology in 1992, and her doctorate in 1997.

report in October 2014. Dr. Morris was familiar with Student, and had previously assessed him in November 2012 and September 2013. For her 2014 report, Dr. Morris reviewed Student's records, interviewed teachers and assessors, observed him in a general education classroom at Sunflower, the preschool autism specific special day class at Carrillo, the kindergarten autism specific special day class at Post, and she administered informal and standardized tests.

26. At Carrillo, Student had progressed in his ability to attend and to utilize spontaneous language. He finished his work quickly and was able to hold a scissors and pencil independently. Student would smile at other students, but had little interaction with peers at Sunflower, Carrillo or Post. Student required prompting and redirection to imitate peers in both his special day and general education classes. Student understood routines and was able to function in a small group setting. He did not exhibit maladaptive behaviors but would sometimes get lost during instruction and required prompting. At home, Student continued to receive ABA services from Creative Behavior Interventions. There, too, Student had grown in his ability to attend and in functional communication.

27. Student achieved a cognitive ability index score of 70, with a median score of 100, which placed him at a very low level of functioning. Nonetheless, on the Psychoeducational Profile Revised, which was designed to provide a clinical measure for a child with a developmental disability, Student had progressed 11 months in each subtest, including verbal and preverbal abilities. Academically, Student had progressed in all areas since Dr. Morris' September 2013 evaluation. In addition, in one year, Student had progressed 18 months in receptive language and 13 months in expressive language. Overall, Dr. Morris' testing found that "in the last year, Student is noted to have made progress in many developmental areas."

28. In the area of behavior, Student had shown improvement as well. Student was compliant in the classroom, could follow routines, and was not disruptive to others. Regarding the autism specific classroom at Carrillo, Dr. Morris concluded:

"The special day class setting has awarded [Student] the ability of receiving emphasis on language and repetition and skills broken down into smaller parts. His typical classroom setting is highly structured, offering a small class size and two full time teachers. This classroom offered many social opportunities."

29. The areas of disability attributable to Student, including deficits in receptive and expressive language, poor attention, and a need for redirection, fell beyond the scope of what could be successfully remediated in a general education classroom or through solely clinic based services. Rather, Student required the assistance of an education specialist and repeated instruction by a teacher in a small group to advance academically. Student's independent assessment demonstrated that District's moderate-severe autism specific classrooms fit squarely with Student's individual needs. Qualified District staff utilized Dr. Morris' assessment to develop Student's IEP offer for goals, services and placement.

## DISTRICT'S TRIENNIAL EVALUATION

30. District conducted its triennial assessments of Student over five days in September and October 2014. Student was five years, nine months old and beginning kindergarten. The triennial assessments were performed by Mr. Escobar and Ms. Vorwald. Mr. Escobar received his master's degree in education in 2005, and holds a pupil personnel services credential as a school psychologist. He was a behavior intervention case manager and had worked as a school psychologist for the District since September 2011. Mr. Escobar's assessment consisted of testing, records review, observation, and parent and teacher interviews.

31. Ms. Vorwald administered the speech and language portion of the assessment. Ms. Vorwald was a speech-language pathologist who held a master's degree in speech-language pathology. She had worked as a speech-language pathologist for approximately nine years. She had provided speech-language therapy to Student individually, in a small group, and in class.

32. District's assessments were conducted in a way that used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, and included information provided by Student's mother. The assessors did not use any single measure or assessment as the sole criterion for determining whether Student had a disability. Each used technically sound instruments that assessed the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used were selected and administered so as not to be discriminatory on a racial or cultural basis. They were provided in a language and form most likely to yield accurate information on what the Student knew and could do academically, developmentally, and functionally. Mr. Escobar and Ms. Vorwald administered the tests to Student in English, because that was Student's primary language. The assessments were used for purposes for which the assessments are valid and reliable, were administered by a trained and knowledgeable school psychologist and speech pathologist, and administered in accordance with any instructions provided by the producer of each assessment. Mr. Escobar and Ms. Vorwald determined which tests were required based on information known at the time. No single measure, such as a single intelligence quotient, was used to determine eligibility or services.

33. Mr. Escobar administered various standardized tests for Student. Student was just beginning kindergarten. Student was seriously delayed in the area of cognition, falling below the first percentile. Academically, Student received scores at the kindergarten level in the letter-word identification subtest, below kindergarten on writing samples, passage comprehension, and spelling, and far below grade level on the applied problems subtest. In reading, Student was below average, at the pre-school level, in each area tested: alphabet, conventions, meanings and reading quotient. Student was similarly delayed in all areas of math. Inventories and rating scales corroborated past diagnoses of autism, and revealed that Student still had delayed self-help skills. Overall, Student, while impacted by autism, had the ability to learn and progress.

34. In addition to his direct testing, Mr. Escobar was familiar with Student from having supervised the autism specific special day class at Post. These observations, his direct testing, and his review of Dr. Morris' evaluation, helped form his opinion that Student required intensive, small group instruction in a moderate-severe, autism specific special day classroom. Student did not independently interact with peers, and required prompting and frequent redirection to participate socially and academically. Student acted similarly during recess and while mainstreaming with his typical peers, which occurred daily during recess, physical education, breaks and, less frequently, during school assemblies. Student required the facilitation of an aide to interact with both his special day class and typically developing peers.

35. District's speech and language evaluation yielded similar results to those attained by Ms. Pliha: Student was profoundly delayed in receptive, expressive and social language. However, a comparison of District's 2014 speech and language evaluation with a February 2013 speech and language evaluation conducted by the nonpublic agency Cornerstone Therapies, along with Dr. Morris' May 2014 testing, revealed that Student had made strides in his language abilities. For example, Student had gained 7 months of skills in auditory comprehension, 18 months in receptive language, and 13 months in expressive language.

36. Ms. Vorwald's testing, observations, and review of independent reports informed her service recommendation and she credibly testified that Student would meaningfully benefit from direct services, five times weekly, and a small, structured, language enriched special day class. Based upon Ms. Vorwald's testing and experience, Student's limited attention span, and her reliance upon research provided by the American Speech-Language Hearing Association, she persuasively recommended that Student receive four, 15 minute individual sessions, and one, 30 minute small group session, of speech and language therapy each week. The group therapy included Student and one peer. The District IEP team appropriately adopted Ms. Vorwald's recommendations.

37. Following its review of the independent and District evaluations, the IEP team reviewed Student's progress towards his prior annual goals. Per the Settlement Agreement, Student had worked on goals developed on May 28, 2013, in the areas of speech, language, functional communication, fine and gross motor, behavior, academics and self-help. Student had met 11 of 19 goals, and had made some progress towards the remaining goals. The IEP team developed 16 new goals in the areas of speech, language, math, language arts, vocational, social/emotional, adaptive living skills, postural control, sensory processing, visual motor, bilateral coordination, social skills, and functional communication.

38. District staff encouraged Mother to participate and ask questions during the IEP team meeting. She did so, along with her advocate Ms. Molina. Each was an active participant during the IEP discussion. IEP team recommendations were revised based upon Student's independent assessors' input, including an increase in behavior supervision and the addition of monthly, team clinic meetings.

39. Based upon Student's independent assessments, input from Student's mother, and information from District staff, District offered Student the following special education services: (1) specialized academic instruction, 19 hours per week; (2) intensive behavior intervention services, discrete trial training,<sup>9</sup> after school at District's behavior intervention clinic, 90 minutes per day, four days each week; (3) an ABA individual aide for the entire school day; (4) behavior intervention supervision by a behavior intervention case manager, six hours per month; (5) clinic meetings including parents, classroom teacher, District behavior intervention staff and the Regional Center of Orange County, at 30 minutes per month; (6) individual speech and language services, four times per week, at 15 minutes per session; (7) small group speech and language therapy, at 30 minutes weekly; (8) individual occupational therapy at 45 minutes per week; (9) collaborative occupational therapy, 30 minutes weekly; and (10) extended school year services which included specialized academic instruction, speech and language therapy, an individual ABA aide, and clinic based intensive behavior intervention services.

40. Finally, the IEP team discussed, with parent participation, a continuum of placements, including general education, resource specialist program, mild-moderate and moderate-severe special day classes, and home-based instruction. Student's teacher, Ms. Lowrie, reported that Student had benefitted from the autism special day class at Post. Student required a small, structured environment with a low teacher-to-student ratio, visual schedules, a language enriched environment, and modified academic instruction. The curriculum and student-to-teacher ratio in the general education and mild-moderate special day classes were too high. Each class utilized an unmodified grade level curriculum, which was too advanced for Student, and each classroom had 25-to-30 students. In contrast, the curriculum in the autism specific classroom was modified and permitted individualized instruction. This classroom also utilized picture schedules, a low student-to-teacher ratio, and embedded speech and language therapy. District staff, including Mr. Escobar, Ms. Fults, Ms. Vorwald, and Ms. James, agreed, and testified persuasively during the hearing, that Student required a moderate-severe autism specific classroom to meet his individual needs. The curriculum and program in the autism specific classroom was designed for pupils like Student, who manifested serious developmental delays attributable to autism. In accord with these recommendations, and with input attained through the various independent assessments, District correctly offered Student placement in the Post autism specific special day classroom, for Kindergarten and for the first grade, up to the next annual IEP meeting, which was scheduled for October 7, 2015. Student would continue to receive mainstreaming with his typical peers during recess, physical education, which was incorporated into recess, breaks, field trips, and during school assemblies.

---

<sup>9</sup> Discrete trial training is a strategy derived from ABA. It is a very structured method in which tasks to be learned are presented to the learner in a series of separate (discrete), brief sessions (trials) during which he or she is expected to focus solely on the task. Successful attempts are rewarded; unsuccessful attempts are corrected through prompting.

41. Student's parents refused to consent to the IEP offer. Mother, who had observed Student at Carrillo and Post, requested to observe a general education classroom before considering the IEP offer. Mother wished to continue the ABA program which had been agreed to in the settlement agreement, with school placement exclusively in a general education classroom. Although District staff disagreed that Student could benefit educationally from a home ABA program with placement in a general education classroom, it nonetheless agreed to Mother's request to observe its general education classroom and attempted to facilitate this observation. Mother failed to follow through with this request and refused to avail Student of the offered services, outside of what was being provided under the stay put terms of the settlement agreement. As a result, as of the hearing, Student had not received the clinic based intensive behavior intervention services, the behavior supervision services, the clinic meetings, or the updated goals.

#### *Testimony of Student's Witnesses*

42. A summation of Student's challenge to the IEP offer is that he was incapable of learning during whole group instruction and could benefit solely from individualized instruction. Student contends that his behaviors were so severe that he should forego an educational program altogether, and focus primarily on behavior remediation. In accord with this belief, each of Student's witnesses, including his mother, Dr. Morris, Ms. Pliha, and Dr. Eckman, asserted that he required 25-30 hours per week of home based ABA therapy to meet his individual behavior needs, with limited school placement, 10 hours weekly, in a general education classroom, for socialization.

43. These witnesses asserted that the autism specific classroom at Post was inappropriate, primarily because it contained other pupils with autism, which reduced Student's ability to imitate peers. Yet, Dr. Morris had reported that the similarly designed autism specific classroom at Carrillo had met Student's individual needs. In fact, Dr. Morris' 2014 report had recommended a classroom with precisely the same design and program to what was contained in the autism specific classroom at Post. Similarly, Dr. Eckman's 2014 report recommended that Student be provided a structured environment, positive reinforcement, modification of tasks, priming, a visual schedule in class, a consistent schedule, prompts, and a token economy system. All of these recommendations were met in the autism specific classroom.

44. Dr. Eckman maintained a strongly held belief that Student required an extensive home based ABA therapy program, in great part because related research recommended this level of ABA for a child with autism. Dr. Eckman cited research from the book Educating Children with Autism (2001), and, per this research, she recommended that Student receive 25-30 hours per week of ABA therapy. Yet, this research, if applied universally to all children with autism, would yield predetermined IEP's as autism is a spectrum disorder as those with autism have varying deficits and degrees of deficit.

45. Dr. Eckman and Dr. Morris also complained that Student required a District based functional behavior assessment and behavior support plan to address his serious maladaptive behaviors. However, none of the independent behavior assessments reported that Student manifested serious maladaptive behaviors. Similarly, each direct service provider who testified, including Ms. James, Ms. Vorwald, and Ms. Lowrie, credibly testified that maladaptive behavior was not a significant concern for Student. Although he had a short attention span, Student was not disruptive in the classroom and was easily redirected when he did become distracted.

46. As evidence that Student manifested serious behavior difficulty, Dr. Eckman and Dr. Morris pointed to daily behavior logs which were compiled by Student's aide following the triennial IEP meeting. However, these logs were incomplete, failed to summarize data, and only showed a minor increase in some maladaptive behaviors. More importantly, the data acquired in these logs arose following the IEP offer, during a period of time in which District recommended behavior services, including goals, intensive clinic behavior services, supervision, and clinic meetings, were not being implemented as Parents failed to consent to District's IEP offer. There is no question that Student required intensive behavior intervention, which dovetails with the District's offer for comprehensive services in this area.

47. None of Student's witnesses believed that he required a school program specific to academic development. Each witness averred that Student could not benefit from group instruction of any sort, even when accompanied with an individual aide. Rather, each described that Student's IEP should focus on ABA therapy provided at home until an unspecified time in the future, at which point Student could benefit from classroom based academic instruction. Dr. Morris postulated that Student could, presently, receive some instruction in a mild-moderate special day class. However, when it was pointed out that the mild-moderate special day class applied grade level curriculum, Dr. Morris reemphasized that Student's IEP should focus on behavioral development, rather than academic instruction. Student's witnesses were contradicted by evidence that Student had already benefitted academically from the autism specific classroom at Carrillo. There was no evidence provided which showed that he was no longer able to attain a meaningful educational benefit from the same or similar program which was offered at Post.

48. Although highly qualified, Student's witnesses were not as persuasive as District witnesses. Student's witnesses' disregard for his academic instruction and emphasis on a highly restrictive, home behavior program, was not as persuasive as testimony from District's psychologist, classroom teacher, speech and language pathologist, and intensive behavior intervention supervisor, who credibly reported that Student had benefited from the autism specific classroom, and would continue to do so if provided the level of services recommended in his triennial IEP.

## LEGAL CONCLUSIONS

### *Introduction – Legal Framework under the IDEA*<sup>10</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)<sup>11</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a))

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (“*Rowley*”), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth

---

<sup>10</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>11</sup> All references to the code of federal regulations are to the 2006 edition, unless otherwise indicated.

Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof on all issues.

#### *Issue One: Predetermination of the IEP*

5. Student contends that District predetermined the offer of placement in the moderate-severe special day class at Post. Predetermination in the development of an IEP occurs when “(A) school district. . . independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.” (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131-1132 (*Vashon Island*)). Predetermination also occurs when an educational agency enters an IEP meeting with a “take it or leave it” position. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1084.) Here, the evidence did not establish that District predetermined the educational plan that was offered in the October 8, 2014, and November 6, 2014 IEP.

#### PARENT PARTICIPATION

6. Special education law places a premium on parental participation in the IEP process. States that accept federal funding must ensure, inter alia, that parents 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* (9th Cir. 2001) 267 F.3d 877, 882.)

7. Under these guidelines, an educational agency must permit a child's parents "meaningful participation" in the IEP process. (*Vashon Island, supra*, 337 F.3d at p. 1131.) The standard for "meaningful participation" is an adequate opportunity to participate in the development of the IEP. (*Id.* at p. 1133.) 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. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 461.) An adequate opportunity to participate can include participation at the IEP meeting by outside experts retained by the parents, and the incorporation of suggestions made by such experts into the IEP offer. (*D.S. v. Bayonne Board of Educ.* (3rd Cir. 2010) 602 F.3d 553, 565; see also *W.T. v. Board of Educ. of the School Dist. of New York City* (S.D.N.Y. 2010) 716 F.Supp.2d 270, 288 [reports from child's private school].) 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.)

8. By the foregoing authority, Parents in this case had a more than adequate opportunity to participate in both the October 8, 2014, and November 6, 2014 IEP meetings for Student. Mother was present at both meetings, and accompanied by her advocate. At the October 8, 2014 meeting, Mother presented independent reports and testing results that were reviewed by the team members, including District personnel who had assessed Student. Parent brought outside experts who presented reports and discussed Student's needs. Staff from Behavioral Health Works and Creative Behavior Interventions attended and discussed their knowledge of Student. The independent behavior staff had a large hand in the IEP process through their input which informed the baselines and present levels of performance that the team eventually adopted. Although not present, Dr. Morris and Ms. Pliha, through District personnel review of their independent reports, had a very large hand in the IEP process as their reports informed the drafting of goals, services and placement recommendations. Mother had an opportunity to visit the placement that was eventually proposed. At the October and November 2014 meetings, the District assessors discussed their respective evaluations and took comments. At this meeting, the team discussed and agreed upon goals for the coming school year. Team members, including Mother, her experts and advocate, had an opportunity to speak, and, in fact, made comments and asked questions. The final offer in the November 6, 2014 IEP contained recommendations made by Parents' representatives. The team offered increased behavior supervision and monthly clinic meetings on the strength of recommendations made by Dr. Morris and Dr. Eckman. The team accepted the diagnosis of speech apraxia, and the methodology of how to treat Student's apraxia, based upon recommendations made by Parent's expert Ms. Pliha. The team accepted that Student required intensive behavior intervention services, and offered discrete trial training in an after school behavior clinic and during class through an individual ABA aide, based in large part upon Parent's independent behavior reports. In fact, the autism specific classroom offered by District was based, in part, on Parent's independent psychological evaluation. The evidence established that the District team members did not suppress any viewpoint, did not prevent other team members from speaking, and did not ignore any inquiries.

9. At an IEP meeting, the parents of a child with a disability do not have a veto power over the proceeding. (*Vashon Island, supra*, 337 F.3d at p. 1131.) Likewise, just because the team does not adopt the program preferred by parents, does not mean that the parents have not had an adequate opportunity to participate in the IEP process. (*B.B. v. Hawaii Dept. of Educ.* (D.Hawaii 2006) 483 F.Supp.2d 1042, 1051.) Here, Parents had an adequate opportunity to participate in the development of the IEP for Student, and, therefore, they meaningfully participated in such process.

10. Based upon the foregoing, District complied with the relevant procedures that govern the development of an IEP. The evidence presented does not support a determination that the October 8, 2014, and November 6, 2014 IEP, was predetermined.

*Issues Two and Three: The Appropriateness of the Autism Specific Classroom through the Next Annual IEP Meeting*

11. Student has challenged the substance of the moderate-severe autism specific classroom offered by District in the October 8, 2014, and November 6, 2014 IEP. District was required to provide Student a classroom and instruction designed to meet his unique needs in the least restrictive environment. Here, the evidence established that Student required a special day class to receive an educational benefit and the educational placement offered in the October 8, 2014, and November 6, 2014 IEP, was appropriate to meet Student's individual needs in the least restrictive environment.

THE LEAST RESTRICTIVE ENVIRONMENT

12. Both federal and state law requires a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a) ; Ed. Code, § 56040.1.) "Least restrictive environment" reflects the preference by Congress that an educational agency educates a child with a disability in regular classroom with their typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403 (*Rachel H.*)) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil 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 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) ; Ed. Code, § 56040.1.)

13. In light of this preference for the least restrictive environment, and to determine whether a child can be placed outside a general education setting, the Ninth Circuit Court of Appeals, in *Rachel H.*, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the

student. (*Rachel H.*, *supra*, 14. F.3d 1398 at p. 1403.) An alleged violation of least restrictive environment is analyzed under the substantive FAPE analysis. (*Vashon Island*, *supra*, 337 F.3d at p. 1136.)

14. Here, there is no genuine dispute that Student cannot participate full time in a general education classroom. Each witness who testified agreed that Student's cognitive and academic skills fell far below what could be accommodated in a general education setting. In her report, Student's expert Dr. Eckman recommended that Student be provided a structured environment, positive reinforcement, modification of tasks, priming, a visual schedule in class, a consistent schedule, prompts, and a token economy system. These recommendations precluded placement in a general education classroom, and fit squarely with District's autism specific classroom.

15. Per cognitive testing by Student's expert Dr. Morris, Student was far below his typical peers, attaining an ability score of 70, and was far below his peers in reading, writing and math. Regarding the autism specific classroom, Dr. Morris found that Student appropriately received instruction which emphasized language, repetition, and skills broken down into smaller parts, in a highly structured setting that offered many social opportunities. There was no question, based upon Dr. Morris or Dr. Eckman's independent evaluations, that Student required the autism specific special day class to benefit educationally.

16. District's psychologist Mr. Escobar similarly found that Student was below the first percentile in the area of cognition, and delayed in writing, spelling and math. Mr. Escobar was familiar with Student from having supervised the autism specific special day class at Post. These observations, his direct testing, and his review of the independent reports, helped form his opinion and he credibly testified that Student required intensive, small group instruction in a moderate-severe, autism specific special day classroom. Student did not independently interact with peers, and required prompting and frequent redirection, to participate socially and academically. Ms. Vorwald's testing, observations, and review of independent reports informed her recommendation, and her credible testimony that Student required a small, structured, language enriched special day class.

17. Given the District and independent evaluations, Student required a special day class to benefit educationally. Consequently, the first tier of analysis under *Rachel H.* is met: Student could not benefit educationally if placed full time in a general education classroom. No further analysis is required to determine that District lawfully offered Student a placement outside of a regular education class. (*Rachel H.*, *supra*, 14. F.3d 1398 at p. 1403.)

18. Here, Student does not genuinely contend that he can participate full time in the regular education setting. In such case, the educational agency must mainstream the child "to the maximum extent appropriate." (*Daniel R.R. v. State Board of Educ.* (5th Cir. 1989) 874 F.2d 1036, 1048.)

19. In deciding how to mainstream to the maximum extent appropriate, an educational agency must consider a continuum of alternative placements which proceed from “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” (34 C.F.R. § 300.115(b)(1); see also Ed. Code, § 56342, subd. (b).) In addition, an educational agency must attempt to make a placement decision that “(I)s as close as possible to the child’s home” and “the school he or she would attend if nondisabled.” (34 C.F.R. § 300.116(a), (c); see also Ed. Code, § 56342, subd. (b).) In this regard, case law recognizes that, in meeting the least restrictive environment preference, there is a presumption in favor of placement in public schools. (*Evans v. District No. 17* (8th Cir. 1988) 841 F.2d 824, 832; *T.F. v. Special School Dist. St. Louis County* (8th Cir. 2006) 449 F.3d 816, 820.)

20. Here, the proposed placement in the moderate-severe autism specific day class at Post was the least restrictive environment for Student. On the continuum of placements, the autism specific special day class was the closest classroom to the regular classroom that could address the areas of disability Student possessed. Student’s disability fell beyond the scope of what could be successfully remediated in a general education classroom or through a mild-moderate special day class. Based on all the information presented by Student and District witnesses, Student required a small, structured environment with a low teacher-to-student ratio, visual schedules, a language enriched environment, and modified academic instruction. Only the autism specific special day class met these requirements. The curriculum and student-to-teacher ratio in the general education and mild-moderate special day classes were too high. These classes utilized an unmodified grade level curriculum, which was too advanced for Student, and each classroom had 25-to-30 students for each teacher. In contrast, the curriculum in the autism specific classroom was modified and permitted specialized instruction individually and in small groups.

21. The October and November 2014 IEP offered Student an opportunity to mainstream with general education pupils during lunch, recess, physical education, breaks, and assemblies. In contrast, the comprehensive home based ABA program, at 25-30 hours per week, was a more restrictive environment than Post.

22. Based upon the foregoing, Student failed to meet his burden of showing that the educational program offered in the October 8, 2014, and November 6, 2014 IEP, was not the least restrictive environment in which to meet his individual needs.

#### APPROPRIATENESS OF THE IEP PLACEMENT

23. The ALJ must determine whether “the individualized education program developed through the Act’s procedures (is) reasonably calculated to enable the child to receive educational benefit.” (*Rowley, supra*, 458 U.S. at pp. 206-207.)

24. District complied with the procedures concerning the assessment of Student and the formation of his IEP and offered to place Student in the least restrictive environment. In addition, District’s FAPE offer in the October and November 2014 IEP was a solid plan

that was reasonably calculated to provide Student with educational benefit. The 16 goals in the IEP served as the foundation for the plan. To a large degree, the goals were consistent with suggestions by the staff at Behavioral Health Works and Creative Behavior Interventions, along with input from Dr. Morris and Ms. Pliha, each of whom knew Student's ability levels and needs. Had District had the opportunity to implement these goals and the services offered in the triennial IEP, Student would have received educational benefit within the *Rowley* standard.

25. The offered placement and related services were reasonably calculated to help Student make this progress. Starting with the classroom, the proposed moderate-severe special day class would have a small number of pupils to permit structured lessons and individual assistance. The class would implement visual schedules, activity stations, repeated instruction, and embedded occupational therapy and speech and language to further help Student progress. The proposed instructor, Ms. Lowrie, had training in teaching children with Student's abilities and needs. Nevertheless, the teacher, her classroom aides, and Student's individual ABA aide would receive additional oversight and instruction from Ms. James, District's intensive behavior intervention supervisor, in research-based behavior strategies for pupils on the autism spectrum. The IEP offered related services designed to enable Student to benefit from special education. Such services included five sessions of speech and language weekly, apart from what was already provided in the classroom; an ABA aide for individual instruction, prompting, and redirection; direct weekly occupational therapy along with collaborative occupational therapy; six hours per month of behavior intervention supervision from District's behavior intervention case manager; monthly clinic meetings with teacher, Mother and the school's behavior staff; direct, clinic based intensive behavior intervention, discrete trial therapy, for 90 minutes daily four days per week; and specialized academic instruction 19 hours per week. The IEP offered Student placement and services during the 2014 extended school year to guard against regression during the summer. These items of placement and related service were sufficient to assist Student in receiving benefit from special education.

26. Student primarily argued that the moderate-severe autism specific special day class was inappropriate because he could not benefit from whole group instruction and required, solely, individual instruction. This argument, if accepted, would negate placement for Student in any classroom. Student's complaint was contradicted by evidence that showed that he had progressed while receiving instruction in the autism specific classroom. In each area assessed, he had shown progress attained when similarly situated in the autism specific classroom at Carrillo. Dr. Morris reported that, at school, Student had progressed in his ability to attend and had grown in his ability to utilize spontaneous language. He finished his work quickly and was able to hold a scissors and pencil independently. Student understood routines and was able to function in a small group setting. Student had progressed 11 months in his verbal and preverbal skills, 18 months in receptive language and 13 months in expressive language. Student showed substantial progress in listening skills, from a one and a half ability level in 2013 to a level five in 2014. Student had progressed in his ability to imitate several phonemes and some whole words. He was able to match pictures to words, was compliant to instruction and responded well to various reinforcers. Based upon his

attendance in the moderate-severe autism specific special day class during the 2013-2014 school year, Student's expert reported that "in the last year, Student is noted to have made progress in many developmental areas." Student also failed to take into account that he would be provided an individual, ABA aide during classroom instruction, which would individualize whole group instruction. For these reasons, the testimony of Student's experts was not as persuasive as District witnesses, including Ms. Lowrie, Mr. Escobar, Ms. Vorwald and Ms. James, who each credibly testified that Student had the ability to progress educationally in the autism specific special day classroom.

27. Mother made clear that her preference for Student was placement at home in a 25-30 hour per week ABA program, provided by a nonpublic agency. However, starting with *Rowley*, courts have held that an educational agency is not held to a standard of parental preference. (*Rowley, supra*, 458 U.S. at p. 197, fn. 21 [the IDEA does not require a potential maximizing education]; see also *Blackmon v. Springfield R-XII School Dist.* (8th Cir. 1999) 198 F.3d 648, 658.) An appropriate education under the IDEA need not be "the *only* appropriate choice, or the choice of certain selected experts, or the child's parents' *first* choice, or even the best choice." (*G.D. v. Westmoreland School Dist.* (1st Cir. 1999) 930 F.2d 942, 948 (italics in text).) In short,

"(T)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals with that program." (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

Here, while a comprehensive at-home ABA program from a nonpublic agency funded by District is undeniably attractive to Parents, the proper focus is on District's offered educational plan, which was reasonably calculated to confer Student with educational benefit.

28. Based upon a preponderance of evidence presented at hearing, Student failed to meet his burden of showing that District failed to offer him a FAPE in the least restrictive environment.

#### *Issue Four: The Behavior Services*

29. Student contends that the behavior services offered in the triennial IEP fell far short of addressing his serious behavioral needs. Student asserts that he required 25-30 hours per week of ABA therapy at home to benefit from special education.<sup>12</sup>

---

<sup>12</sup> Student also argued that District had failed to implement behavior services and goals that were agreed upon in the settlement agreement. However, this claim was not

30. In developing an IEP, a team must “in the case of a child whose behavior impedes the child’s learning. . . consider the use of positive behavioral interventions and supports and other strategies, to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); see also 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) District complied with this standard in developing the October 8 and November 6, 2014 IEP.

31. The parties do not dispute that Student had attention difficulty attendant to sensory modulation and functional communication delays which caused behavioral challenges in and outside of the classroom. Student’s main behavior challenges stemmed from his inability to attend to tasks and to functionally communicate, which frustrated him. These behaviors impeded Student’s ability to learn. District correctly asserts that the behavior services and placement it offered were sufficient to address these behaviors so that he could benefit from special education.

32. The IEP team discussed Student’s special and unique needs. The three nonpublic agency IEP team members, Mr. Sullivan, Ms. To and Ms. Molina, along with the District intensive behavior intervention supervisor Ms. James, had specialized expertise and knowledge about Student’s behaviors, as his direct providers for behavior therapy. District adeptly reviewed Student’s independent reports from Behavior Health Works and Creative Behavior Interventions and used this information to form six behavior related goals in the areas of functional communication, following directions, participating in non-preferred tasks, turn taking, sensory processing, and responding to peers and adults.

33. District considered independent reports from Student’s experts Dr. Eckman and Dr. Morris to help form its offer of behavior services. District offered comprehensive behavior services which included discrete trial training, a form of ABA, in an after school behavior clinic, 90 minutes daily, four days per week; 6 hours per month of behavior supervision by a behavior intervention case manager; 30 minutes per month of clinic meetings with Parents, the regional center, and Districts’ behavior staff; an individual ABA aide for instruction, behavior therapy, prompting and redirection during the entire school day; behavior goals; and a small, structured and therapeutically designed special day class. Ms. Fults, Ms. James, Ms. Lowrie and Mr. Escobar credibly testified that these services, if applied, would have a serious impact on Student’s behavior functioning and permit Student to benefit from special education.

34. Student relied almost entirely upon data collected in behavior logs following Student’s triennial IEP meeting to justify his challenge to District’s behavior services. This evidence was unpersuasive for several reasons. These logs were incomplete, failed to summarize data, and only showed a minor increase in some maladaptive behaviors. The data acquired in these logs arose during a period of time when District recommended behavior services, including goals, intensive clinic behavior services, supervision, and clinic meetings

---

alleged in the present matter. The Decision will therefore not address Student’s claim of District non-compliance. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).)

were not being implemented. There is no dispute that Student required intensive behavior services. It is therefore problematic for Student to point to an increase in maladaptive behaviors during a time when significant behavior services offered by District were not being availed by Student.

35. Student mischaracterized the nature and severity of his behaviors. This mischaracterization formed the basis for his request for the at-home ABA program. Student also challenged the placement offer, or really, any classroom placement, based upon a belief that his behaviors were so severe that he could not benefit from whole group instruction until such a time that his maladaptive behaviors were ameliorated. Student's assertions were not supported by a preponderance of the evidence. For example, neither the independent progress report by Behavioral Health Works, nor the two Behavioral Healthworks representatives who attended the IEP meeting, reported that Student manifested significant maladaptive behaviors. Similarly, Creative Behavior Intervention's 2014 functional behavior assessment failed to report significant maladaptive behavior. In every area assessed by Dr. Eckman, Student had progressed when compared to a 2013 functional behavior assessment. Behaviorally, Student was not disruptive in class and was observed to engage in tantrum-like behaviors very infrequently; once every two hours, for a duration of one minute. Student showed increased compliance and decreased challenging behaviors in the home, community and school settings. During a period of time in which he was attending an autism specific classroom, Student's expert reported that he was compliant to instruction and responded well to various reinforcers. Student was easily motivated by books, toys, and his iPad. Student showed increased compliance and decreased challenging behaviors in the home, community and school settings. Similarly, Dr. Morris's timely assessment found that Student did not exhibit maladaptive behaviors but would sometimes get lost during instruction and required prompting. This report helped form the basis for District's offer of an individual aide. Student required the facilitation of an aide to interact with both his special day class and typically developing peers, and District offered this meaningful service. In the area of behavior, Dr. Morris also found that Student had shown improvement since her 2013 report. Student was compliant in the classroom, could follow routines, and was not disruptive to others. For these reasons, evidence failed to support Student's characterization of his behavior. To the contrary, evidence established that, with supports and services, he could benefit from classroom instruction.

36. The areas of disability attributable to Student, including deficits in receptive and expressive language, poor attention, and a need for redirection, coupled with an ability to progress socially and academically, exceeded the scope of what could be successfully remediated solely through services and some mainstreaming. Student required the assistance of an education specialist and repeated instruction by a teacher in a small group to advance academically. Although Student had behavioral challenges, he could access and benefit from special education if provided the behavior services offered in the October and November 2014 IEP.

37. For the foregoing reasons, Student failed to establish that District's offer of behavior services denied him a FAPE.

*Issue Five: The Speech and Language Services*

38. Student contends that the October 8, 2014, and November 6, 2014 IEP's were inappropriate by not offering a sufficient amount of related services in the area of speech and language therapy. District does not dispute that Student had profound delays in expressive, receptive, and social communication. However, the IEP offered an educational program that was individualized on the basis of assessments and performance, and that contained related services meeting the standard of assisting Student to benefit from special education. Based upon the independent and District speech and language assessments, the IEP team formulated seven goals to improve Student in the areas of functional communication, receptive language, following verbal directions, articulation, exchanges with peers, responding to peers and communicating with staff. The team offered individual and small group therapy services to assist Student in making progress on these goals. Based upon the independent speech and language assessment, District's speech and language assessment, direct observations by Ms. Vorwald and Ms. Lowrie, and research cited by Ms. Pliha, the team offered Student speech and language therapy five times per week, including four individual, 15 minute sessions due to his delayed attention span, and 30 minutes per week of small group therapy, with no more than one other pupil. The team offered speech therapy, specialized academic instruction in a language enriched special day class, with additional speech therapy embedded in the class, a teacher trained to instruct students with autism and speech and language delays, and an individual aide trained to instruct students with autism and language disorders, to assist Student in making progress on his goals. Based upon input from Ms. Pliha, Ms. Vorwald would utilize an instructional methodology for children with apraxia of speech, including both the prompts for restructuring oral muscular phonetic targets and the Kaufman Speech to Language programs. It is quite clear that the IEP team formulated an offer individualized to Student's needs.

39. Evidence also showed that Student had progressed during the prior school year, when he received a similar duration, frequency, and modality of therapy. Dr. Morris reported that Student had progressed in his ability to attend and had grown in his ability to utilize spontaneous language. Testing also showed that Student had progressed 18 months in receptive language and 13 months in expressive language. It is therefore reasonable to believe that Student would have made meaningful progress during the 2014-2015 school year if provided a similar level of speech and language therapy which was offered in the October and November 2014 IEP.

40. Despite the significant level of services offered to Student and the expectation that he would benefit from these services, the IDEA does not require an educational agency to deliver an ideal or perfect plan. (*Lessard v. Wilton-Lyndeborough Cooperative School Dist.* (1st Cir. 2010) 592 F.3d 267, 270.) While Student would likely benefit from doubling the speech and language services offered by District, as recommended by Student's expert, a school district is not required to furnish "every special service necessary to maximize each

handicapped child's potential." (*Rowley, supra*, 458 U.S. at p. 199; *Mamaroneck, supra*, 554 F.3d at p. 254.) Here, the IEP team offered Student individual and group speech and language therapy concomitant with specialized academic instruction in a language enriched special day class with aide assistance. These items of related service were sufficient to assist Student in receiving benefit from special education.

41. Based upon the foregoing, Student failed to show by a preponderance of the evidence that District denied him a FAPE by failing to offer him sufficient speech and language services.

#### ORDER

All relief sought by Student is denied.

#### PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on issues heard and decided. (Ed. Code, § 56507, subd. (d).) Here, District prevailed on each issue presented.

#### RIGHT TO APPEAL

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

Dated: May 5, 2015

\_\_\_\_\_  
/s/  
PAUL H. KAMOROFF  
Administrative Law Judge  
Office of Administrative Hearings