

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Consolidated Matters of:

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2006110614

STUDENT,

Petitioner,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2007020117

DECISION

Administrative Law Judge (ALJ), Stella L. Owens-Murrell, Office of Administrative Hearings, Special Education Division (OAH), heard this matter on June 13, 14 and 15, 2007, in Los Angeles, California.

Los Angeles Unified School District (District) was represented by My T. Huynh, District Counsel. Stephanie M. Bowick, District Counsel, was also present on June 13 and June 14 as an observer. Victoria McKendall, District Representative, was present for the entire hearing on behalf of the District.

Student was represented by Noemi Guitierrez, Advocate. Student and his parents (Parents, Mother, or Father) were present throughout the hearing. Parents were assisted by certified Spanish language interpreters throughout the hearing.

On November 28, 2006, District filed a request for due process hearing, which is identified as OAH Case No. N20060110614.

On February 1, 2007, Student filed a request for due process hearing, which is identified as OAH Case No. N2007020117, and requested consolidation of the cases. An order was issued on February 6, 2007, granting the consolidation. The order provided that the timelines in OAH Case No. N2007020117 would control the consolidated matters.

Following the prehearing conference, District filed a motion on May 31, 2007, to dismiss one of Student's issues which proposed that Mother be permitted to serve as Student's medically trained aide. Student filed opposition to the motion on June 12, 2007. The ALJ denied the motion on the first day of hearing.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of hearing, the record remained open for the parties to file their closing briefs on or before June 22, 2007. The parties timely filed their closing briefs. The record closed and the matter was submitted on June 22, 2007.

ISSUES

1. Did District deny Student a FAPE in the 2005-2006 school year by suspending in May 2006, speech therapy services (LAS) provided in-home by a nonpublic agency (NPA)?
2. Did District offer Student a free appropriate public education (FAPE) for the 2006-2007 school year in Student's Individualized Education Program (IEP) dated October 20, 2006?
3. Did District implement the October 20, 2006, IEP in a timely manner upon receipt of notice of Parents' consent to the IEP?¹
4. Did District deny Student a FAPE in the 2006-2007 school year by failing to provide a properly trained healthcare assistant (HCA)?

¹ The issue in District's Due Process Complaint was "May District implement the October 20, 2006, IEP despite lack of parental consent?" In his Due Process Complaint, Student's parents contend they consented to the IEP on November 1, 2006, and notified District on November 2, 2006. At hearing District conceded parental consent to the IEP, but disputed the date Student's parents notified District of consent. The District withdrew the issue as stated but reserved the question of the timely implementation of the IEP. The only issue remaining for determination is whether District implemented the October 20, 2006, IEP in a timely manner.

CONTENTIONS OF THE PARTIES

District contends that its due process complaint arises from District's attempts to obtain Parents' consent to the IEP dated October 20, 2006, offering Student placement and services at Bret Harte Preparatory Middle School (Bret Harte). According to District, Parents refused to consent to the October 20, 2006, IEP, and because of Parents' refusal to consent, District was prevented from providing Student with the services offered under the IEP that are necessary to meet Student's unique needs and to provide him a FAPE. The services offered to Student included provision of a qualified and medically trained health care assistant (HCA) employed by the District. District further contends that the October 20, 2006, IEP's offer of placement and services was appropriate and offered Student a FAPE.

Student contends that Parents notified District of their consent to the October 20, 2006, IEP on November 2, 2006. Student further contends that, parental consent was given for provision of physical therapy (PT), occupational therapy (OT), LAS services, and adapted physical education (APE) offered in the October 20, 2006, IEP. Parents did not consent to the IEP's offer of a HCA. Student argues that District failed to provide a medically trained and qualified HCA, and that Student's Mother, who has assisted him in the classroom at Bret Harte, is trained and qualified and should be permitted to work as Student's HCA. Student also contends that District inappropriately suspended in-home LAS services, provided by a non public agency (NPA), offered to Student in the January 2005 IEP.²

Student requests compensatory speech and language services to be provided in-home by a NPA, for one hour per week. If District failed to provide Student a properly trained medical aide assistant or HCA in the 2006-2007 school year, Student seeks an order finding Student's mother a qualified medical assistant and requiring District to pay Student's mother to work as his HCA.³

FACTUAL FINDINGS

Jurisdiction

1. Student was born on November 22, 1993. He is 13 years and 7 months old, and he resides with his parents in the District. Student has attended Bret Harte Middle School since September 2004. He is currently in the eighth grade, and in his last year of

² Student presented no evidence that District prepared a January 2005 IEP. Following Mother's testimony at hearing, Student admitted he was mistaken regarding the date of the IEP, but continued to maintain that District had provided in-home LAS services in the 2005-2006 school year.

³ Student attempted to add an issue at hearing requesting reimbursement for his mother's work as his adult aide. Student was barred under California Education Code, section 56502, subdivision (i), which prohibits a petitioner from raising issues at the due process hearing not raised in the due process complaint and request for hearing unless the parties otherwise agree. Student also raised a new issue in his closing brief alleging District denied Student a FAPE by failing to have proper personnel present at the IEP team meeting of October 20, 2007 (sic). This issue was also not raised in the due process complaint and will not be addressed here.

attendance at Bret Harte. Prior to attending Bret Harte, Student attended 95th Street Elementary School (95th Street Elementary).

Background

2. Student was enrolled in the District in the general education program at 95th Street Elementary. Student suffered a cerebro-vascular “accident” (CVA)⁴ in December 2001, while attending 95th Street Elementary. Student suffered respiratory failure and required use of a ventilator. Following the CVA, Student became dependent on and required assistance with feeding, toileting, transferring from wheelchair to chair, and with ambulation. Student also became 100 percent tracheostomy (Trach)⁵ dependent to facilitate his breathing. Student was given a medical order for Trach suctioning as needed for increased Trach secretions, mucus plugs, and respiratory distress. Student was provided a surgically implanted gastrostomy tube (G-Tube) with an order for tube feeding to facilitate his food intake at home. Student currently eats soft food by mouth at school and is only fed through the G-Tube at home after school; however, the G-Tube may be used during the course of the school day to administer medications. He has limited mobility and uses a wheelchair to ambulate for travel and at school. He currently traverses the campus on a motorized scooter. Student wears diapers and requires changing during the school day. Student has at all times during the school day needed medically trained personnel to perform the following protocols: tracheostomy, suctioning/emergency replacement of the tracheostomy tube as needed, and G-tube feeding with gastrostomy button tube replacement, as needed.

3. In October 2002, District prepared an initial IEP for Student. The IEP team determined that Student’s cognitive and academic abilities were unimpaired but that the disability arising from Student’s accident rendered Student eligible for special education services as a child with a severe orthopedic impairment. The IEP team identified Student’s areas of need and established goals and objectives. The team further determined Student was eligible for PT, OT, APE, LAS, transportation, and instructional supports in the least restrictive environment (LRE), assistive technology (AT), District Nursing Services and contracted licensed vocational nursing services (LVN). Student remained in a general education curriculum. Parents requested provision of LAS services in-home to be provided by an NPA. The IEP offer included school-based health care services by a LVN through an NPA, a temporary support assistant (TSA) to assist Student in his transition back to school in the general education classroom, 120 minutes per week of school-based LAS for oral motor skills to support the use of an augmentative alternative communication system, and 60 minutes per week of LAS provided by a NPA. Other services included 30 minutes per week of PT and OT, 20 minutes per week of APE, AT devices, and LRE counseling 15 minutes

⁴ A cerebro-vascular “accident,” CVA or stroke, is a loss of nervous function which can cause partial or complete loss of consciousness, loss of sensation or loss of voluntary muscular movement. It is due to a cerebral vascular accident when either a clot occurs in an artery of the brain and cuts off the oxygen supply to that particular part of the brain, or there is a hemorrhage into the brain tissue from a burst artery.

⁵ A tracheostomy tube is a tube surgically inserted in the trachea to keep an open airway to allow Student to breathe.

per week to facilitate Student's readjustment to the school. The IEP also offered home schooling and DIS services including 14 hours of LAS in-home provided by a NPA.⁶ Parents disagreed with the IEP offer of OT, PT, LAS, and the TSA. Mother questioned the training and qualifications of the TSA. Mother also marked the consent box of the IEP indicating that she consented to certain elements of the IEP, but did not specify those elements. Except for those services disputed by Parents, District proceeded to implement the IEP.

Suspension of in-home LAS services

4. Student contends that, on May 2006, District wrongfully suspended speech services allegedly offered in a January 2005 IEP.

5. Student was hospitalized in his last semester at 95th Street Elementary due to illnesses associated with his disability. Student convalesced at home for several months. As a result, he was unable to start the 2004-2005 school year in September of 2004, at Bret Harte. During the transition from elementary to middle school, District provided Student with a home schooling program, and DIS services, including in-home LAS. The program and services were provided by a NPA on a temporary or interim basis pending Student's return to school.⁷

6. On October 14, 2004, District convened Student's annual IEP. The purpose of the IEP was to determine the appropriateness of Student's placement at Bret Harte and provision of DIS services. The IEP team considered Student's placement and services in the general education environment at Bret Harte. The team reviewed the medical reports from Student's physician, occupational therapist and physical therapist but was unable to make a determination because certain evaluations by District's least restrictive environment (LRE) team were not yet completed. The IEP specifically indicated "during the interim Student will continue to receive home schooling and DIS services he continues to receive."

7. The IEP team meeting reconvened on November 17, 2004. The IEP team reviewed the medical evaluations and District LRE evaluations, and determined Student would be able to attend and receive instruction in the general education classroom at Bret Harte with the support of a HCA. The IEP offered Student placement at Bret Harte, PT, OT, APE, AT, and LAS, provided as a pull out from the general education class by a NPA for 30 minutes per week. The IEP offer did not provide for in-home LAS by a NPA. Student's mother did not request that in-home LAS be provided in addition to the school-based LAS upon Student's return to school. Mother did request that District assign a bilingual female HCA to Student upon his placement at Bret Harte. Mother also requested District's permission to volunteer full-time to assist Student in his classes at Bret Harte. The District IEP team determined that Student's mother could spend a maximum of 20 minutes per class

⁶ Student also received medically-based PT, OT and LAS through California Children's Services.

⁷ Neither Student nor District provided evidence of the identity of the NPA.

period with Student. The District team further determined that where Student had two consecutive classes with the same teacher, there must be at least a 30 minute interval between each 20 minute class visit by mother. The IEP team agreed that Student could begin attending Bret Harte “as soon as all health conditions were met.” Parents did not sign the IEP consent page or note their disagreement with any part of the IEP at that time.

8. At that time of the November 17, 2004, IEP, Student was provided home schooling with related services, while recovering from medical procedures until he was able to start school at Bret Harte. On February 8, 2005, Parents responded in writing to the IEP team offer indicating they did not consent to the IEP. The only matter raised by Parents in their response to the IEP offer was their disagreement with the time limits imposed on their access to Student’s classroom.

9. Student initiated a due process hearing request disputing the IEP. Student’s mother testified at hearing that she understood that pending resolution of the due process request there could be no changes in Student’s program unless the Parents and District agreed. There was no agreement. The due process hearing complaint was not resolved until it was withdrawn on August 19, 2005.

10. It is not clear from the evidence when Student returned to school in the 2004-2005 school year, but Student was again hospitalized in May 2005 at Children’s Hospital of Los Angeles (CHLA) due to illness. District convened the next IEP meeting on May 31, 2005. The IEP was held for the purpose of obtaining a signed release of information form from Student’s parents to enable District to obtain Student’s hospital records from CHLA apparently to make any necessary modifications to Student’s educational program for the 2005-2006 school year. The IEP team recommended placement in a general education curriculum using accommodations and related services in the area of assistive technology devices, and additional supports in the form of an appropriately trained additional adult assistant (AAA) to assist Student in the classroom and in performing medical procedures. The District IEP team also agreed that Student would receive school-based OT twice per month for a total of 60 minutes per month to address his visual motor access. There was no provision in the IEP for in-home LAS by an NPA. Student’s Parents did not consent to the IEP.

11. Student continued to suffer illness and was frequently absent from school, as well, in the 2005-2006 school year. In November 2005, Student was hospitalized for surgical procedures and treatment of a heart condition. District provided home schooling and DIS services while Student convalesced at home.

12. The operative IEP for the 2005-2006 school year was the May 31, 2005, IEP, which did not provide for in-home LAS services. The evidence established that, based upon the home school program initiated during Student’s transition from 95th Street Elementary to Bret Harte, District intended only to provide for in-home speech services, by a NPA, on an interim basis, as needed by Student during periods of convalescence. When Student returned to school in the 2005-2006 school year, District was under no obligation to provide in-home

speech services because the May 31, 2005, IEP did not provide for the service. Student returned to school in the spring semester of 2006. Based upon the evidence, Student was not entitled for the remainder of the 2005-2006 school year to in-home LAS services.

13. Mother testified at hearing that she believed Student received services sometime in 2006. However, mother could not say when, and in connection with which IEP, these services were to be provided. Mother admitted on cross-examination that there was no mention of in-home LAS services in the May 31, 2005, IEP and that she did not request they be provided in addition to Student's school-based LAS services.

14. Student presented no credible evidence that District offered and had provided in-home LAS services, in addition to his school-based LAS in the 2005-2006 school year, and that District incorrectly suspended those services in May 2006. Student failed to prove that District denied him a FAPE in the 2005-2006 school year.

The October 20, 2006, IEP Offer of Placement and Services

15. District contends that the October 20, 2006, IEP addressed Student's specific needs for special education and related services and offered Student a FAPE.

16. The standard for determining whether a district's provision of services substantively 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.

17. The District held an IEP team meeting on October 20, 2006. Student and his parents attended the meeting on his behalf. The District IEP team members included Larry Igleheart, assistant principal, Renee Purcell, general education teacher, and Victoria Myers, R.N., school nurse at Bret Harte. Student's speech and language therapist and occupational therapist were also in attendance. The purpose of the meeting was to reconvene an annual IEP meeting originally held and recessed on September 7, 2006.

Unique Needs

18. The IEP team reviewed the assessments, present levels of performance and goals and objectives in the IEP in the areas of articulation, speech, gross motor skills, motor (PT), motor (OT), health, and LRE Counseling. The IEP noted that in the area of articulation, based upon standardized and informal assessments, Student demonstrated the ability to answer questions appropriately in class and engage in conversation with consistent intelligibility. Student was not able to effectively monitor his speech when engaged in a conversation, which negatively impacted his ability to access his core curriculum with oral language. The IEP team recommended that Student continue to receive LAS services. The IEP noted that Student improved speech intelligibility, attendance to tasks, was medically

stable, and had improved strength in speech production. However, Student needed improvement in the area of monitoring his speaking rate. Regarding Student's gross motor skills, the IEP identified significant delays in his gross motor skills development due to his disability. Student was unable to stand on his own and needed to improve his throwing, catching, and walking skills. Student also required improvement in his fine and visual motor skills. He had difficulty manipulating classroom tools such as pens and pencils, and required the use of assistive technology devices and adult assistance in writing. Academically, Student's grade report for the first semester in the eighth grade revealed Student consistently earned A's, B's and C's in his academic subjects. He was able to perform academically at or above grade level and did not require academic supports or services. However, Student's medical condition substantially affected his motor skills and speech and language. The IEP team determined that Student continued to have unique needs in the areas of speech and language, adapted physical education, and health care assistance to support his mobility and academic needs throughout the school day.⁸

19. Student was often absent from school because of his medical condition, but he received marks of "excellent" in English, math, and APE. He received a mark of "above average" in his computer class and "average" in world history. The IEP identified a recent decline in Student's standardized testing performance in the area of English-language arts, but noted that Student's standardized testing performance in math had improved from "below basic" to "basic." The academic assessment concluded that Student continued to need the supports of a HCA, repeat instruction, designated note-taker, a laptop, extended time, and a scribe during standardized testing in order to access his educational environment.

Placement and Services

20. The October 2006 IEP team concluded that Student continued to need APE, PT, OT and additional classroom supports. The IEP offered the following: (1) attendance at Bret Harte, Student's district school of residence for the remainder of the 2006-2007 school year, and attendance at Washington High School, Student's district school of residence for the beginning of the 2007-2008 school year; (2) placement in age/grade appropriate general education classrooms; (3) supports that included a HCA to perform procedures for the tracheostomy, suctioning as needed, emergency trach tube replacement, and other medical procedures as needed; (4) additional assistance from the HCA to assist Student with note-taking and acting as a scribe during testing, if necessary; (5) provision of AT devices such as a laptop classroom computer, word prediction, math software, talking dictionary, and slant board; (6) instructional and standardized testing accommodations including extended time, repeated instructions and a scribe; and (7) transportation services. The IEP offer included related services to be provided by qualified staff in the areas of APE five times per week for a total of 265 minutes; LAS once per week for 30 minutes; LRE counseling twice per month for 30 minutes; OT twice per month for 60 minutes; and PT one to five times per month for 30 minutes. Parents requested and the IEP team agreed to offer in-home LAS services, in addition to school-based LAS, to be provided to Student by a NPA once per week for 60

⁸ Student did not dispute the IEP goals.

minutes. The IEP also arranged for Student to attend his high school orientation at Bret Harte because Student would be matriculating from middle school to high school in the fall of 2008.

21. The IEP addressed Student's unique needs in speech, articulation, language and communication, motor skills development, health, and related services. The IEP was reasonably calculated to provide Student with educational benefit, and offered Student the appropriate placement in the least restrictive environment. The IEP offered Student a FAPE.

Parental Consent to the October 20, 2006, IEP

22. District and Parents dispute the date when Parents consented to portions of the October 20, 2006, IEP. Parents contend they consented to the IEP on November 1, 2006, and notified District on November 2, 2006. District contends that Parents did not give proper notice of consent until May 25, 2007. District asserts the IEP was fully implemented in a timely manner in June 2007, and any failure to implement portions of the IEP prior to that date was not material and did not result in a denial of FAPE.

23. If the parent of a child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the IEP, those components of the program to which a parent has consented shall be implemented so as not to delay providing instruction and services to the child. A failure to implement a Student's IEP will constitute a violation of the Student's right to a FAPE if the failure was material. A material failure to implement an IEP occurs when the services a school district provides to a disabled student fall significantly short of the services required by the student's IEP. De minimus failures to implement an IEP do not amount to a denial of FAPE. Rather, the law is violated when a school fails to implement substantial or significant IEP provisions.

24. Parents did not agree with all of the recommendations of the District IEP team and did not consent to the IEP at the IEP team meeting on October 20, 2006. Parents also elected not to specify in writing the basis of their disagreement or concerns in the IEP because Parents wanted an opportunity to review the IEP offer and consult with their advocate, who did not attend the IEP team meeting.

25. Parents signed the consent page of the October 20, 2006, IEP on November 1, 2006. The consent page contained a section entitled "Consent/No Consent/Requests for Due Process Alternatives." In that section, Parents checked the circle indicating disagreement with the IEP offer of specific instruction and services. Parents stated two reasons for their disagreement. First, Parents wrote that "speech therapy through an NPA was suspended without notice on May 26, 2006." Parents requested immediate reinstatement of speech therapy and compensatory time. Second, Parents wrote that they disagreed with the District's offer of a HCA. Instead, Parents wanted the full responsibility of providing health care aide to Student through Mother for the entire school day. Parents also checked the circle indicating their consent to the IEP offer of OT, speech therapy, APE, AT and Student's placement in the general education class. By checking this section, Parents consented to the

implementation of these elements of the IEP. Parents did not write on this form or check the sections specifying the method by which they wished to resolve the areas of disagreement with the IEP offer.

26. On November 2, 2006, Student's father personally delivered the signed consent form along with a cover letter dated November 1, 2006, to Augustine Herrera, interim principal at Bret Harte. The letter had attached to it the consent page of the IEP and a parent survey. The letter was signed by Parents and included a request that Mr. Herrera contact Parents' advocate for further clarification. Father also delivered a completed Request for Informal Dispute Resolution Form, dated and signed by Mother on November 1, 2006. The letter with attachments was received and signed by Gloria Lennares, an employee at Bret Harte, on November 2, 2006. The Request for Informal Dispute Resolution Form was signed by Augustine Herrera on November 2, 2006.

27. Student's father testified credibly that he delivered the letter and attachments to Ms. Lennares and to Mr. Herrera on November 2, 2006. Mr. Herrera was the interim principal during the relevant period from October 2006 to December 2006. District's attempt in its closing argument to discredit Father's testimony and to credit the testimony of its witness, Larry Igleheart, Assistant Principal at Bret Harte, is not supported by the evidence. Mr. Igleheart was a member of the IEP team. He verified the signatures of both Ms. Lennares and Mr. Herrera. Mr. Igleheart testified that Mr. Herrera gave him the consent form on November 2, 2006, and he took the form to the special education office; that he was informed the consent form was incomplete because Parents did not specify what portions of the IEP they did not consent to and the form did not specify Parents' choice for dispute resolution;⁹ and that the school made several attempts to contact Parents for clarification and this was done by letter. Mr. Igleheart further testified that he never saw the cover letter or the informal dispute resolution request form submitted by Parents until the due process hearing; and he did not personally contact Parents for clarification. Mr. Igleheart's testimony was unpersuasive. District produced no documentary evidence of its efforts to contact Parents or their advocate for clarification of the consent form and/or the attachments. District did not produce Mr. Herrera or Ms. Lennares to testify about the contents of what they signed for receipt of on November 2, 2006. Even more telling is that Mr. Igleheart did not deny that Parents had consented to portions of the IEP. This establishes that a substantially completed consent form and attachments were delivered to Bret Harte on November 2, 2006.

28. The evidence established that Parents consented, in part, to the October 20, 2006, IEP on November 1, 2006, and gave District notice of consent on November 2, 2006.

⁹ District argued in its closing brief that District's obligation to implement the IEP or take any further action does not arise until parents serve a "completed" consent page. District provided no authority to support this assertion.

The signed consent form was sufficient and served as effective notice to District of those portions of the IEP offer with which Parents were in agreement.

Timely implementation of the October 20, 2006, IEP

29. One of the factors in determining whether a school district provided a FAPE to a student is whether the services provided to the student conformed to his or her IEP as it was written. A failure to implement any provision of the IEP may amount to a FAPE violation only where the failure has been determined to be material; a material failure to implement an IEP occurs when the services provided to the student fall significantly short of the services required by his or her IEP. Measuring educational progress, or lack thereof, can play an important part in determining materiality.

30. Even though District maintained Parents had not properly consented to the October 20, 2006, IEP, District appeared to proceed with implementation of Student's general education instruction, OT, PT, AT, APE, school-based LAS and a HCA. District did not provide Student in-home LAS services by an NPA until June 6, 2007, after District received what it deemed to be proper consent to the IEP. By letter dated June 6, 2007, District notified Parents that service was authorized during the regular school and extended school year calendar.¹⁰ Contrary to District's contentions, the District failed to implement a significant provision of the IEP.¹¹

31. Donald Williams, a District speech therapist, testified on behalf of District regarding Student's school-based speech therapy services. Mr. Williams testified that Student had a significant speech deficit in articulation and pronunciation of particular words, letters and sounds. He believed Student had sufficiently improved in these areas because Student had learned to "self-monitor" his speaking rate which in turn improved his intelligibility. Mr. Williams further testified that an additional 60 minutes per week of LAS by a NPA would not make a difference. Mr. Williams offered no basis for this opinion. District offered no substantial or credible evidence that Student had made significant progress toward improvement in his speech, articulation and pronunciation skills. Student's speech assessment conducted prior to the October 20, 2006, IEP, indicated he had a

¹⁰ In the letter, District identified Andrea Trow, Speech and Language Pathologist, as the NPA provider.

¹¹ District cites to *Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 481 F.3d 770 in support of its argument that any failure to implement the IEP was de minimus and does not support a finding District violated the IDEA. *Van Duyn, supra*, is a case of first impression for the Ninth Circuit in that the Court was presented with a challenge to the implementation of an IEP as opposed to challenging the content of an IEP. In that case, Student challenged a judgment of the U.S. District Court of Oregon, denying student attorneys fees, and which affirmed a decision of the ALJ that de minimus or minor failures to implement the IEP do not violate the IDEA. The Ninth Circuit reversed and remanded the District Court's judgment to the extent it denied the attorneys fees and affirmed the remainder of Court's judgment. The Court held de minimus failures to implement an IEP do not violate the IDEA. The statute is violated only when there is a material failure to implement a significant portion of the IEP. The Court defined material failure to be one where the services provided fall significantly short of those required by the IEP. District's reliance on this ruling is misplaced. In the present case, District's implementation failure was material and denied Student a FAPE.

significant inability to monitor his speech when engaged in conversation, and Student's inability to monitor his speech negatively impacted his ability to access his core curriculum with oral language. The assessment recommended that Student continue to receive LAS services. The IEP team relied on the assessment in its recommendation for provision of both school-based and in-home LAS. Contrary to Mr. Williams's opinion that "more is not necessarily better," the IEP team recognized that more LAS services, particularly in-home LAS, were in fact necessary for Student to receive educational benefit. District delayed providing the additional 60 minutes of LAS services for approximately seven months. District's delay constitutes a material failure to fully implement Student's speech services to comport with the IEP. Student was only able to access 30 minutes per week of school-based LAS, which fell substantially short of the services required in the IEP. Based upon the evidence, Student still requires the additional speech services to enable him to access his core curriculum with oral language.

32. District failed to timely implement Student's in-home LAS services, which amounted to a denial of FAPE. District is required to provide compensatory LAS for its failure to implement Student's in-home LAS services in November 2006.

Compensatory Education

33. A school district may be ordered to provide compensatory education to a pupil who has been denied a FAPE. Compensatory education is an equitable remedy that courts may employ to craft appropriate relief for an aggrieved party. Compensatory education may be granted for denial of appropriate special education services to help overcome lost educational opportunity.

34. The IEP prescribed in-home LAS of 60 minutes per week. Student lost approximately seven months of additional LAS services. Compensatory relief of approximately one-half of the hours that would have been provided is appropriate because compensatory education need not be awarded hour-for-hour. District delayed services from November 2006 to June 6, 2007, the date District requested the service. But for the delay Student may have received more than 1600 minutes of in-home services. Student was not completely without speech therapy services during the delay, and received school-based LAS of 30 minutes per week. Based upon the record, an award of one-half of the compensatory time to which Student may be entitled, or 800 minutes, is an appropriate remedy.

35. District is required to provide Student 800 minutes of LAS services to be provided in-home by NPA Andrea Trow, Speech and Language Pathologist, in accordance with the Order below.

Provision of a properly trained healthcare assistant

36. Parents dispute District's offer of a HCA to administer the daily medical procedures required to allow Student to access his educational curriculum. Parents insist that Mother is more highly qualified to support Student daily in the classroom. Student's

contention that District has not provided an adequately trained, qualified adult assistance in the classroom is not supported by the evidence.

37. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services to enable the student to benefit fully from instruction. The term “related services” includes developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education.

38. As discussed in Findings 2 and 3, Student required the support of a medically trained HCA to apply medical procedures as needed. The IEP offered a trained qualified HCA to provide classroom support and services. Parents did not consent to the IEP offers of a medically trained HCA. Victoria Myers, R.N., school nurse at Bret Harte, testified that she was a member of the IEP team and was fully knowledgeable of Student’s unique health care needs. Larry Igleheart testified that he, too, was a member of the IEP team. Mr. Igleheart testified that District hired Maribel Roman as a HCA specifically for Student in an effort to build Parents’ confidence and trust in District. Ms. Myers, who was responsible for overseeing the administration of health care matters at the school, also supervised Ms. Roman and provided additional training and orientation to Ms. Roman regarding Student’s health care needs in the classroom. Ms. Myers believed Ms. Roman was a qualified HCA.

39. Ms. Roman was employed by District for more than five years and has worked for District as Student’s HCA since February 2006. She earned an Associates Degree in Child Development and has credentials and training which include working two years as a special education assistant. In addition to her degree and employment experience, Ms. Roman has taken a 72-hour training course offered by the Special Education Division in medical protocols and procedures in Trach tube feeding, suctioning and other medical procedures specific to Student. She had to pass an examination, which covered Student’s medical protocols. Ms. Roman was also required to maintain her credentials by attending annual training classes. Her job duties as HCA included administering Student’s medical protocols and assisting him in the classroom, including serving as Student’s scribe.

40. Ms. Purcell observed Student in her science class along with Mother and Ms. Roman. Ms. Purcell believed the situation to be awkward because Mother always positioned herself beside Student, forcing Ms. Roman to sit behind Student; thus, making it difficult for Ms. Roman to perform her classroom support duties. Ms. Roman testified that Mother did not allow her to perform her HCA or scribe duties. Both Ms. Roman and Ms. Purcell believed that Mother was capable of providing HCA support to Student in the classroom; nonetheless, the evidence established that Ms. Roman was a qualified and trained HCA and was capable of performing Student’s medical protocols as well as meeting his scribe needs.

41. Parents applied as volunteers to District’s Volunteer Program at Student’s school. District issued volunteer identification cards to Parents. Mother was assigned to the health office and was instructed that she would be permitted to provide back up assistance to Student’s HCA. Instead, Mother assisted Student in the classroom daily. Although Mother

was accepted at Bret Harte in the role of a volunteer, Mother insisted on performing all of Student's medical protocols to the exclusion of the HCA, during Student's classes for the entire day. Larry Igleheart, assistant principal at Bret Harte, testified that school policy limited Mother's classroom visits to 20 minutes per class per day. Mother attended Student's classes for the entire day. The school elected not to restrict Mother in order to avoid a confrontation and any situation that might adversely impact Student. Thus, District permitted Mother to provide for Student's health care needs in the classroom.

42. In January 31, 2007, Mother obtained a nurse assistant certification. In November 2006, she obtained a healthcare provider's certificate from the American Heart Association. Mother also had certificates of completion for a Nursing Assistant training program and Home Health Aide training program in December 2006 and February 2007, respectively. Mother was not employed by District and has not applied for employment with District. Mother did not participate in the District's training programs, was not a service provider certified under the Education Code, and has not contracted with the District to provide services as a NPA. The evidence established that Mother had options open to her to obtain a more permanent status with District as a healthcare provider for Student. Unfortunately mother chose not to avail herself of the opportunity to apply for employment or to contract for employment with District as a service provider. Mother was not employed by District nor did she meet the criteria for State certification as a NPA. Mother has not met certification requirements as an HCA to perform HCA services on behalf of the District, even though District has allowed Mother to perform these services to Student in the past in an unofficial capacity.-

43. District proved that it provided a trained qualified HCA to support Student's needs in the classroom, thus did not deny Student a FAPE by failing to provide HCA services to Student in the October 2006 IEP.

LEGAL CONCLUSIONS

Applicable Law

1. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA), and, effective July 1, 2005, the Individuals with Disabilities in Education Improvement Act (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) Similarly, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive

services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

2. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, [102 S.Ct. 3034] (hereafter, *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 requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

3. To determine whether a school district substantively offered FAPE to a student, the adequacy of the school district's proposed program must be determined. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services 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.

4. School districts receiving federal funds under IDEA are required under title 20 of the United States Code, section 1414, subd. (d)(1)(A)(i) to establish an IEP for each child with a disability that includes: (1) a statement regarding the child's then-present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) a statement of the program modifications or supports that will be provided; (6) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; and (7) other required information, including the anticipated frequency, location, and duration of the services. (See also, Ed. Code, § 56345, subd. (a).)

5. If the parent of a child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, those components of the program to which a parent has consented shall be implemented so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (e).) If the local educational agency determines that the proposed special education program component to which the parent does not consent is

necessary to provide a free appropriate public education to the child, a due process hearing shall be initiated in accordance with subsection (f) of subsection 1415 of title 20 of the United States Code. If a due process hearing is held, the hearing decision shall be the final administrative determination and shall be binding upon the parties. (Ed. Code, § 56346, subd. (f).)

6. A failure to implement a student's IEP will constitute a violation of the student's right to a FAPE if the failure was material. There is no statutory requirement that a district must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services a school district provides to a disabled student fall significantly short of the services required by the Student's IEP. A party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and instead, must demonstrate that the school board or other authorities failed to implement substantial and significant provisions of the IEP. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 481 F.3d 770 (hereafter, *Van Duyn*).)

7. When an LEA fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Comm. of the Town of Burlington v. Dept. of Educ.* (1996) 471 U.S. 359, 374 (*Burlington*); 20 U.S.C. § 1415 (i)(C)(iii).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief which may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (See, e.g., *Parents of Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. (*Id.* at p. 1497.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." (*Ibid.*)

8. California Law requires that the provision of related services by a non public agency must meet the criteria for state certification. A judge may not render a decision resulting in the placement of an individual with exceptional needs in a non public, nonsectarian school, or resulting in a service for an individual with exceptional needs provided by a nonpublic, nonsectarian agency, if the school or agency has not been certified pursuant to Education Code section 56366.1. (Ed. Code, § 56505.2.)

9. The burden of proof in an administrative hearing challenging an IEP is on the party seeking relief, whether it is the disabled child or the school district. (*Schaeffer v. Weast, Superintendent, Montgomery County Public Schools, et al., Weast* (2005) 546 U.S. 126 S.Ct. 528, 163 L.Ed.2d 387.) Student had the burden on proof on issues 1 and 4. District had the burden of proof on issues 2 and 3.

Determination of Issues

Based on the factual findings and applicable law, it is determined as follows:

Issue I: Did District deny Student a FAPE in the 2005-2006 school year by suspending on May 2006, speech therapy services (LAS) provided in-home, by a NPA?

10. As set forth in Factual Findings 4 to 14 and Legal Conclusions 1, 2 and 9, the evidence supports a finding that no provision was made for in-home speech services to be provided in addition to Student's school-based LAS in either the November 17, 2004, or the May 31, 2005, IEP. District had no obligation under the operative IEP of May 31, 2005, to provide in-home LAS services to Student and there is no evidence District suspended these services in May 2006. Student failed to meet his burden of proof on this claim. District did not deny Student a FAPE in the 2005-2006 school year.

Issue II: Did District offer Student a FAPE for the 2006-2007 school year in the Individualized Education Program (IEP) dated October 20, 2006?

11. Relying upon Factual Findings 1 to 3, and 15 to 21, and Legal Conclusions 1 to 4, and 9, the October, 20, 2006, IEP offered Student a FAPE.

Issue III: Did District timely implement the IEP upon receipt of notice of Parents' consent to the October 20, 2006, IEP?

12. Relying on Factual Findings 22 to 35, and legal conclusions 6, 7 and 9, District did not implement the IEP in a timely manner. The seven-month delay in the implementation of those services fell significantly short of the speech and language therapy services required and did not comport with the IEP.

13. District's failure to timely implement the in-home LAS services offered in the IEP, resulted in a denial of FAPE. District is required to provide compensatory education of LAS services in-home by Andrea Trow, Speech and Language Pathologist, in the amount of 800 minutes as set forth in the Order below.

Issue IV: Did District deny Student a FAPE in the 2006-2007 school year by failing to provide a properly trained healthcare assistant (HCA)?

14. Relying on Factual Findings 36 to 43, and Legal Conclusions 1 to 4, 8, and 9, District provided a properly trained HCA and therefore provided a FAPE. Even if Mother was found more qualified there is no legal authority permitting an order requiring District to hire and/or pay Student's Mother to provide HCA service.

ORDER

1. District shall begin providing Student compensatory education in the amount of 800 minutes of LAS services to be provided in-home by NPA Andrea Trow, Speech and Language Pathologist. Services are to be provided starting within 30 days of the date of this order at the rate of 60 minutes per week during the regular school year and the extended school year calendar until exhausted.

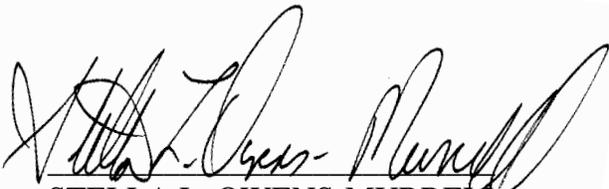
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that the Student prevailed on issue 3, and District prevailed on issues 1, 2, and 4.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: August 2, 2007



STELLA L. OWENS-MURRELL
Administrative Law Judge
Office of Administrative Hearings
Special Education Division