

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

GLENDALE UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2010020598

DECISION

Administrative Law Judge (ALJ) Adrienne L. Krikorian, Office of Administrative Hearings, State of California, heard this matter on May 10 and 11, 2010, in Glendale, California.

Student was represented by her Father on the first day of hearing until the lunch recess. Student was unrepresented for the remainder of the hearing.

Jennifer Rowe, Attorney at Law, of Fagen Friedman and Fulfrost, LLP, represented Glendale Unified School District (District). Dr. Amy Lambert, Assistant Superintendent for Special Education, and William Gifford, Coordinator of Special Education, were present on behalf of District on both hearing days.

On February 17, 2010, District filed a request for due process hearing (complaint). A continuance of the due process hearing was granted on March 8, 2010. At hearing, sworn testimony and documentary evidence were received. At the end of the hearing, a continuance was granted until June 1, 2010, to allow parties time to file closing briefs. District submitted its closing brief within the time allowed, and the record was closed on June 1, 2010.

ISSUE

Did District offer Student a free appropriate public education (FAPE) for the 2009-2010 school year, and, if so, may District implement Student's May 22, 2009 and June 5, 2009 IEP, as clarified by District's October 26, 2009 letter?

FACTUAL FINDINGS

Background and Jurisdictional Matters

1. Student is six years and 10 months old and resides with her mother and father within the District. Student is eligible for special education services under the classification of autistic-like behavior. Student attends Colonial House Preschool at the expense of Student's parents (Parents). She currently receives behavioral support, speech and language (SL) services, and occupational therapy (OT) from private providers not funded by District.

Preschool Assessment and Educational History

2. On May 26, 2006, District conducted a preschool assessment of Student in preparation for her transition to the District at the age of three years. District found Student eligible for related services in SL and OT. For school year 2007-2008, Student attended a special day class (SDC) at District's Cloud Preschool for one month. District and Parents then agreed to place Student at a non-public school (NPS), Young Learners Preschool at The Help Group, where Student remained for approximately one year and three months.

3. For school year 2008-2009, Student, who was then 4 years old, attended Colonial House Preschool, a general education preschool. District offered Student behavioral intervention services (BII), OT, and SL through District providers. Parents voluntarily retained private providers to provide OT and SL for Student.

2009-2010 Assessments

4. In May 2009, when Student was nearly 5 years old, District assembled a "Transdisciplinary Preschool Assessment Team" to conduct an initial special education assessment. The assessment team consisted of a school psychologist, a general education teacher, a special education teacher, a speech and language specialist, and a school nurse. The assessment team conducted a comprehensive set of assessments of Student, including assessments in the areas of health and development, intellectual/cognitive ability, pre-academic achievement, occupational therapy, pre-vocational skills, psychomotor/perceptual skills, self-help skills, social/emotional development, and speech/language skills. The District used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. The assessments and procedures included Student observations, records review, parent interviews, the Battelle Developmental Inventory (BDI-2), and the Vineland Adaptive Behavior Scales, Second Edition (Vineland-II). The assessment team reviewed a report from Sabrina Tooma-Rostamo (Tooma-Rostamo), case supervisor at Centers for Autism Related Disorders, Inc. (CARD). The assessment team also reviewed a progress report on Student for the period of April 27, 2008, to May 8, 2009, from Student's private SL provider Amy Johnson (Johnson). District did not use any single measure or assessment as the sole criterion for the determination of whether Student was a child with a disability. The assessments used technically sound instruments designed to assess the relative contribution of cognitive and behavioral factors,

in addition to physical or developmental factors. The assessment procedures were selected so as not to discriminate on the basis of gender, culture, language, ethnicity, or disability. The assessments were provided in the language and form most likely to yield accurate information on what Student knew and could do academically, developmentally and functionally. The assessments were used for valid and reliable purposes. The assessments were administered by trained and knowledgeable personnel in accordance with instructions provided by the producer of the assessments. The assessment team prepared a written report compiling the findings, recommendations and conclusions of the assessors.

5. District occupational therapist Julie Driscoll performed an OT assessment of Student on May 8, 2009. Driscoll administered the Peabody Developmental Motor Scales, Second Edition (PDMS-2), interviewed parents, reviewed the Sensory Profile Caregiver Questionnaire completed by Parents, and conducted a clinical observation of Student's sensory motor function and behavioral organization. Driscoll prepared a written report which she provided to Parents. She did not testify at the hearing.

6. Driscoll tested Student in the areas of fine motor, postural stability/gross motor coordination, self-care skills, self-organization, sensory processing, and visual motor skills. Driscoll concluded that Student had unique needs in the areas of fine motor skills, visual motor skills, sensory perception and self-organization, postural stability and gross motor coordination. Driscoll recommended that Student would benefit from OT services. Driscoll also concluded that Student's OT needs were significant enough that her needs could not be met in a general education program. Driscoll's findings were integrated into the assessment team's report. Driscoll did not testify at hearing. No evidence was offered to refute Driscoll's reported findings, her qualifications to administer assessments, or her assessment methodology.

7. Occupational therapist Susan Spitzer, PhD, OTR/L (Spitzer), a private provider, provided weekly OT services to Student from June 20, 2007, to August 28, 2007, and from October 1, 2007, to March 2008. Spitzer was providing bi-weekly OT services to Student at the time of the May 2009 assessments. Spitzer provided a report dated May 8, 2009, to the District's assessment team.

8. Spitzer reported that Student achieved the goal of initiating sensory-motor activities by consistently selecting an item or activity. Spitzer observed that Student initiated an activity if it was set-up for her, but she needed assistance to set up an activity. Student partially achieved the goal of set-up sensory-motor activities with minimal assistance, demonstrating the need for moderate guidance to set up a familiar sensory-motor activity. Student partially achieved the goal of clean-up materials with minimal assistance three of four times. Student partially achieved the goal of maintaining participation in challenging or focused sensory-motor activities for five to 10 minutes without leaving more than one time and with no more than one verbal prompt. Student's goal of participating in structured school activities with less engagement in self-stimulatory behaviors was emerging. Student still exhibited self-stimulatory behaviors frequently, limiting her ability to participate in school activities. In the area of fine motor and visual motor skills, Student achieved her

goals of color and drawing with mature static grasp, cutting on a straight line with scissors while stabilizing the paper with the other hand, and drawing a circle, cross, and square by copying from a picture or imitating from a demonstration. The latter goal was achieved and exceeded. Student was still having difficulty turning paper to cut within lines and boundaries.

9. Spitzer reported that Student had made very good progress in the past year, and that she continued to demonstrate significant deficits in sensory processing, motor planning, postural stability, fine motor and visual-motor skill development that impair her ability to initiate and sustain participation with daily activities. Spitzer also reported that Student demonstrated a continued need for a well-trained one-to-one assistant to support her ability to participate in a regular classroom as well as to support building skills in order to fade dependence on the assistant.

10. Spitzer did not testify at the due process hearing. Her report did not describe her resume or background. The content of her report was not corroborated by any evidence.

11. District Speech and Language Specialist Janice Goulmassian (Goulmassian) was part of the District's May 8, 2009 assessment team. Goulmassian assessed Student in the area of speech and language, including administering the speech and language portions of the BDI-2. The BDI-2 results showed that Student's receptive language was equivalent to that of a typical child aged 20 months, which was 49 months below her chronological age. Student's expressive language skills were 43 months below her chronological age. Student demonstrated varied and fleeting eye contact during the assessment, did not consistently respond to her name being called, and was observed to use some jargon speech. She did best with requests when given repetitions by a familiar person. Student was not assessed in formal articulation because of her limited language. Goulmassian's findings were incorporated into the assessment team's May 8, 2009 report. Goulmassian did not testify at hearing. No evidence was offered to refute Goulmassian's reported findings, her qualifications to administer assessments, or her assessment methodology.

12. School Psychologist Tara Leufroy (Leufroy) has a doctoral degree in school psychology and a credential in Pupil Personnel Services from National University. She provided professional services to the District on a contract basis from 1999 through 2003, and became a full-time employee in 2004. Based on her practice and experience in both the public and private sectors in the field of psychology, Dr. Leufroy credibly demonstrated the expertise necessary to render opinions relating to Student's unique school-based and non-school-based psychological needs.

13. Dr. Leufroy, who was part of the assessment team, assessed Student in the areas of social/emotional development, and self-help skills. Dr. Leufroy administered the Vineland-II and portions of the BDI-2 to Student. Dr. Leufroy's findings were that Student's scores on the BDI-2 showed relative strength in the areas of gross and perceptual motor skills. However, Student's scores in adaptive, personal social, communication, fine motor and cognitive skills ranged from a differential of minus 10 months to minus 49 months in

relation to age appropriateness, indicating that Student had unique needs in those areas. Student's scores on the Vineland-II demonstrated that Student's adaptive behaviors were low or moderately low in communication, daily living skills, socialization, and fine motor skills. Student's differential between her chronological age and the age equivalent in all areas assessed ranged from minus 10 to minus 53 months, demonstrating that she had unique needs in each of those areas. In Dr. Leufroy's opinion, Student's overall assessment scores reflected minimal progress in the areas tested, since her 2006 preschool assessment, despite a high level of support at Student's current placement at Colonial House.

14. In Dr. Leufroy's opinion, placing Student on a general education campus, even with one-to-one support, posed a safety risk to Student. Student's behaviors necessitated constant attention by any adult working with her to insure Student was not hurt. No evidence was offered to refute Dr. Leufroy's credentials, her assessment methodology, or her opinions and findings.

15. CARD case supervisor Tooma-Rostamo prepared an Annual Review Summary for 2009-2010 in April 2009, which was considered by the assessment team. Tooma-Rostamo reported that most of Student's language was limited to requests with utilization of prompting. She was able to express many of her basic needs by utilizing "I want." She continued to make progress in play skills, which were delayed. She had not yet developed functional pretend or imaginary play, did not independently join the play of peers or engage in cooperative play with peers, and her eye contact and response to her name were inconsistent. Student exhibited several inappropriate behaviors at Colonial House Preschool, including vocal stereotypy, tantrums, and difficulty with sitting during structured activities. Student still required prompts for Student to attend and complete activities, interact with peers, and follow instructions. Tooma-Rostamo reported that Student showed the most improvement during circle time, where Student, with prompts, was able to sit for a longer period of time, and was able to participate in classroom activities as well as play appropriately during recess.

16. Tooma-Rostamo did not testify at the due process hearing. Her report did not describe her resume or professional background. No evidence was offered to corroborate the content of her report.

May 22, 2009/June 5, 2009 Individualized Education Program (IEP) Offer as clarified by October 26, 2009 District Letter

17. On May 18, 2009, District provided to Parents and members of Student's IEP team copies of the assessment team report, occupational therapist Driscoll's report, and reports from Student's private providers, upon which the assessment team relied during its assessment.

18. District convened an IEP meeting on May 22, 2009, to discuss the assessment team's findings. The IEP team included Parents, CARD case supervisor Tooma-Rostamo, District school psychologist Dr. Leufroy, private occupational therapist Spitzer, District

general education teacher Susan Surridge, District special education specialist Nina Martinez, District speech and language specialist Goulmassian, preschool teacher Sarah Miller, and District occupational therapist Driscoll, who attended by telephone.

19. At the May 22, 2009 IEP team meeting, the assessment team reported that Student had unique needs in the areas of SL, OT, and that she required BII. The IEP team reviewed and discussed the findings and recommendations in the assessment team's report, and the written reports of occupational therapist Spitzer and CARD case supervisor Tooma-Rostamo. Parents, Tooma-Rostamo, and Spitzer actively participated at the IEP team meeting. The IEP team discussed and recommended proposed goals and related services for Student. District's offer of a FAPE included placement in a SDC, with mainstreaming opportunities in general education kindergarten at Glenoaks Elementary. District also offered support services in OT, speech, and behavior. District offered 20 days of extended school year (ESY) at District school RD White, for three hours per day, four days per week. District also offered full-time BII and three hours of behavior support supervision (BID) for the 20-day program. District offered Student transportation for ESY, and for the 2009-2010 school year.

20. The IEP team considered Parents' request for full inclusion in a general education classroom. The District members of the IEP team determined that, based on Student's unique needs, the amount of modifications to the general education curriculum needed for Student to access the curriculum would be disruptive to the curriculum for the rest of the classroom. The District members of the IEP team concluded that modifying the curriculum to such an extent would put Student in an isolated environment that was not appropriate for her. They further concluded that a SDC placement was more appropriate, notwithstanding that the cost of a SDC was higher than a general education class.

21. The IEP team agreed to continue the IEP to June 5, 2009, to consider private SL provider Johnson's progress report and her recommendations relating to Student's SL. The IEP team reconvened on June 5, 2009. The reconvened IEP team included Father, District's Coordinator of Special Education William Gifford (Gifford), Johnson, District speech pathologist Cathy McKently (McKently) and a representative of the Lanterman Regional Center.

22. Speech therapist Johnson provided SL services to Student through Cornerstone Speech and Language for more than one year. In her progress report, Johnson noted that Student partially met the goal of expanding her ability to sustain 10 reciprocal circles of communication with differing verbal and non-verbal communicative acts, by sustaining, on average, six circles of communication. Her ability to sustain engagement and consistent flow of communication remained vulnerable and diminished when Student was confronted with background noise, changing inputs and unfamiliar expectations. Student had not yet met the goal of continuing to improve receptive abilities to support Student's ability to follow single-step directions without repetition across multiple settings. Student met the goal of stabilizing use of yes/no for answering simple questions about her wants and needs. She met and exceeded the goal of increased expressive vocabulary and simple phrase/sentence use around

the functions of commenting, exclaiming, and establishing attention. She met the goal of using picture supports as augmented input of spoken language to provide visual models of language. Johnson also reported that Student's regulation and pleasurable effect in the general education preschool had increased as compared to her previous special needs classroom placement. Student had slowly begun to engage in social interactions with a peer when supported by adults, including child-to-child tickling, beeping noses, and water play.

23. Johnson did not testify at the due process hearing. Her report did not describe her resume or background. The content of her report was not corroborated by any evidence.

24. The June 5, 2009 IEP team discussed Johnson's report, including her proposed goals and objectives. The IEP compared Johnson's goals and objectives to the SL goals established at the May 22, 2009 IEP.

25. Student's final IEP included 16 measurable goals addressing all of Student's needs in the areas of academics, adaptive behavior, language/communication, perceptual motor skills, self-care, sensory/motor coordination, and social emotional skills. The goals incorporated Parents' input and some of Johnson's recommendations in the area of SL.

26. District's final offer of placement and services¹, inclusive of the Extended School Year (ESY), included 44 weeks of services and instruction. District's offer consisted of placement in a SDC at Glenoaks Elementary² for 300 minutes a day. The offer included a maximum of 30 minutes of mainstreaming in a general education kindergarten classroom for the diagnostic period of Student's first 30 days in the District's program.³ District also offered one 60-minute session per week of clinic-based SL through a non-public agency (NPA), and one 30-minute session per week of individual SL and one 30-minute session per week of group SL through a District provider. District also offered one 60-minute session per week of individual, clinic-based OT through an NPA and one 30-minute session per week of school-based OT. District also offered 300 minutes of daily school-based BII through an NPA and one hour a week of BID. District offered Student transportation between home and school.

27. On or about July 1, 2009, Parents consented to the goals and objectives, and to the offer of services. Parents' consent to services was, however, conditioned on using Parents' choice of providers. Parents did not agree to placement at Glenoaks or in a SDC, or to the percentage of mainstreaming proposed by District.

28. On October 26, 2009, Special Education Coordinator Gifford sent a letter to Parents' attorney Shannyn Riba providing prior written notice, a Notice of Parental Rights

¹ District's final offer of a FAPE was clarified by Gifford in a letter to Parents' counsel on October 26, 2009, as discussed in Factual Finding 28.

² The IEP team concluded that Student's home school within the District does not have an educational program to meet Student's unique needs.

³ The IEP, as clarified in the October 26, 2009 Gifford letter, did not offer mainstreaming beyond the 30-day transition period.

and Procedural Safeguards, and clarification of District's offer of placement and services, as outlined in the May 22, 2009 and June 5, 2009 IEP. Gifford also offered Parents the opportunity for a private evaluator to observe the proposed placement at Glenoaks for 90 minutes. District followed up and repeated this offer in a letter dated December 11, 2009, to Father. Parents did not consent to the IEP.

District's Expert Testimony

29. District occupational therapist Grace Lopez (Lopez) is a graduate of the University of Southern California (USC) with a bachelor of science degree in exercise science and a minor in occupational science. She received a master of arts in OT from USC in 2002. She has been employed by District as an occupational therapist since January 2007. Lopez provided OT services to Student at the Center for Developing Kids when Student was three years old. Lopez reviewed District occupational therapist Driscoll's May 8, 2009 OT report, the consolidated May 8, 2009 assessment report, Spitzer's May 8, 2009 occupational therapy report, and Student's IEP dated May 9, 2009, and June 5, 2009, as clarified by District's October 26, 2009 letter. Lopez demonstrated sufficient familiarity with Student and her records, including OT reports, to render qualified and credible opinions.

30. In Lopez's opinion, at the time of Student's May 22, 2009 IEP, Student had sensory needs which require implementing a sensory diet of services that would help to increase Student's attention and behavior at school. Based on Student's unique needs at the time of her May 2009 IEP, those services were best delivered in a special day class (SDC), because a school-based occupational therapist would be regularly available to set up the program for implementation by the classroom staff, and modify it as needed when the therapist was on campus. In Lopez's opinion, District's offer of one hour of clinic-based OT and 30 minutes of push-in school-based OT services in a SDC was more appropriate than a general education class because the classroom teacher and aides, along with Student's one-to-one aide, would work together in a collaborative approach on Student's OT goals, including generalization of skills. No evidence was offered to refute Lopez's opinions.

31. District speech pathologist McKently has been employed by District as a speech pathologist since 1978. She holds bachelor of arts and master of science degrees in speech pathology. McKently acquired a certificate of clinical competence in 1987. She has worked on the District's kindergarten readiness panel since 2005. McKently assessed Student as part of the District's preschool assessment in 2006 and she participated in Student's 2006 IEP. She reviewed and was familiar with the assessment team's May 22, 2009 assessment report relating to Student's SL deficits, including the methodology used and findings of the BDI-2. McKently demonstrated sufficient familiarity with Student, and background and experience to render credible and persuasive opinions.

32. In McKently's opinion, Student's skills in following directions were not generalized, and Student was significantly delayed in receptive language for her age as compared to typically developing peers. Student's score on the BDI-2 in expressive language skills placed her 43 months below her chronological age, indicating a significant

delay. In McKently's opinion, Student had unique needs in achieving generalization in the area of expressive language.

33. McKently opined that 44 weeks of instruction and services offered by District in Student's May 22, 2009 and June 5, 2009 IEP was appropriate. Student could benefit, particularly in the area of generalization, from parent interaction and other opportunities during the eight weeks she was not receiving District-provided instruction and services. McKently also opined that placement in a SDC was appropriate. The structured SDC environment would provide opportunities for faster integration and generalization throughout the day. In the SDC, Student's teacher and support staff would receive regular input from the school-based SL therapist, and Student would experience interaction with peers of the same or a similar age with deficits that varied from Student's deficits. In McKently's opinion, changing Student's private service providers to District personnel would benefit Student, particularly given her reported lack of significant progress at the time of the IEP meetings in May and June 2009. No evidence was offered to refute McKently's opinions and conclusions, which were credible and persuasive.

34. District's school psychologist Christine Karg (Karg) holds bachelor and master degrees in psychology. She is a board-certified behavior analyst, is certified in non-violent crisis intervention, and is certified to teach students with autism. Karg has been employed by District as a school psychologist since August 2001. Karg reviewed Student's records and reports related to the May 22, 2009 and June 5, 2009 IEP, including the IEP. She was on the 2006 assessment team that conducted Student's preschool assessment. She observed Student when she was at Young Learners Center at the HELP group in preparation for Student's 2006 IEP. Karg's education and experience demonstrated her qualification to render credible and persuasive opinions in this matter.

35. In Karg's opinion, given Student's unique needs, Student could not be successfully educated in a general education setting, even with a one-to-one aide and supplementary services. From the time Karg observed Student during her preschool assessment to the May and June 2009 IEP team meetings, Student appeared to have regressed to a level of great concern. In Karg's opinion, placing Student in a general education class with the services of a one-to-one aide would be disruptive to the classroom, particularly when Student's aide was addressing Student's problematic behaviors. Student's anxiety level and maladaptive behaviors would increase in a general education class, resulting in a less positive and productive environment. The general education curriculum could not be modified sufficiently to meet Student's unique needs, particularly given her need for repeated redirecting. Student would require being placed in a separate location of the classroom in order to work on her goals, which would result in Student having less interaction with peers than if Student were in a SDC. Although Student could acquire social skills in a general education setting, such as on the playground, the general education curriculum did not offer much time to help develop social skills at the level of Student's unique needs. In Karg's opinion, the level and intensity of services needed by Student at the time of Student's May 22, 2009 and June 5, 2009 IEP required placement in a SDC, particularly given the 16 goals identified by the IEP team.

36. In Karg's opinion, the District's offer of a full-time NPA one-to-one aide was appropriate. The NPA had the expertise to serve Student's needs, and the transition to a new provider would be smooth for Student because, based upon Student's profile, Student demonstrated a lack of ability to connect with specific individuals except Parents.

37. In Karg's opinion, which was based upon her familiarity with the SDC classroom at Glenoaks Elementary, the class size and number of students in the District's proposed SDC were more appropriate for Student. The teacher and staff were trained to work with children with deficits similar to Student's, and with Student's unique needs. The predictable structure of a SDC would be beneficial to Student as an autistic child. The curriculum would be individualized to Student's 16 IEP goals. Student would benefit from the increased opportunities for exchanges with children of similar needs. During structured activities, such as snack time, Student would have the benefit of an adult to facilitate Student's independent functioning.

LEGAL CONCLUSIONS

1. The sole issue in this matter is whether the District offered Student a FAPE for the 2009-2010 school year, and, if so, whether District may implement Student's May 22, 2009 and June 5, 2009 IEP, as clarified by District's October 26, 2009 letter. District contends that its May 22, 2009 and June 5, 2009 offer of placement and services to Student, as supplemented by District's October 26, 2009 and December 11, 2009 letters to Parents' attorney and Parents, constituted an offer of a FAPE in the least restrictive environment. Student did not present a defense to District's case.

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

3. A child with a disability has the right to a FAPE under the Individuals with Disability Education Act (IDEA). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) A FAPE means special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) The term "related services" (in California, "designated instruction and services"), includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*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, 207; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.)

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

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

7. For purposes of evaluating a child for special education eligibility, the district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

8. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable that will be provided to the student.

(20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4)(2006)⁴; Ed. Code, § 56345, subd. (a)(4).) The IEP must include: a projected start date for services and modifications; and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

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

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

11. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of a FAPE to the child. (34 C.F.R. § 300.501(a) (2006); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child’s problems, attends the IEP meetings, expresses disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

12. In determining the educational placement of a child with a disability, a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment (LRE); 2) placement is determined annually, is

⁴ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

13. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular 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); Ed. Code, § 56031.) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following 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] had on the teacher and children in the regular class;" and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].)

14. If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.*, supra, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication in the home or instruction in hospitals or institutions. (Ed. Code, § 56361.)

15. An IEP providing for over 50 percent of the child's day to be spent outside of general education for academic instruction was held not to violate the child's right to be educated in the LRE where the evidence showed that the benefits of separate academic instruction outweighed the benefit of full inclusion. (See *Friedman v. Board of Educ. West Bloomfield* (E.D. Mich. 2006) 427 F.Supp.2d 768, 782-783 [cognitively impaired student contended that program should have been in general education 100 percent of the time].)

16. Here, District has met its burden of demonstrating that its offer of placement and services in the May 22, 2009 and June 5, 2009 IEP for the 2009-2010 school year was a FAPE in the LRE.

17. District has credibly demonstrated that the assessment team thoroughly and properly assessed Student in all areas of suspected disability, including SL, OT and behavior. The District used a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. The assessment tools included the BDI-2, Vineland-II, student observations, Parents' input, and interviews with and review of reports from Student's private providers in OT, SL and behavior. District did not use any single measure or assessment as the sole criterion for the determination of whether Student was a child with a disability. The assessments used technically sound instruments designed to assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessment team selected and administered the assessments in a non-discriminatory manner. The assessments were provided in the language and form most likely to yield accurate information on what Student knew and could do academically, developmentally and functionally. The assessments were used for valid and reliable purposes. The assessments were administered by trained and knowledgeable personnel in accordance with instructions provided by the producer of the assessments.

18. District's assessors identified that Student, who is autistic, had unique needs in the areas of SL, OT, and behavior. District's IEP contained a statement of 16 measurable annual goals designed to address Student's unique needs in SL, OT and behavior. Student's stated goals were based on Student's present levels of performance at the time of the assessment. District demonstrated a direct relationship between Student's present levels of performance, her stated goals and the educational services to be provided.

19. District's offer of related services in the areas of OT, SL, and a one-to-one NPA aide with supervision, was reasonably calculated to confer some educational benefit to Student.

20. In the area of OT, the May 22, 2009 IEP team considered the reports and recommendations of occupational therapists Driscoll and Spitzer, both of whom participated in the IEP team meeting on May 22, 2009. District credibly demonstrated that its offer to Student of 30 minutes per week of individual OT with a district occupational therapist and 60 minutes per week of clinic-based OT through an NPA was designed to meet Student's unique needs and to confer some educational benefit on Student.

21. The IEP team met twice to consider Student's unique needs in SL, on May 22, 2009, and June 5, 2009. The IEP team discussed and considered reports and recommendations from NPA speech therapist Johnson, District speech and language specialist Goulmassian and speech pathologist McKently. District credibly demonstrated that its offer of 30 minutes a week of individual SL services with a District provider, 30 minutes a week of small-group SL by a District SL pathologist, and 60 minutes per week of individual, clinic-based SL with a District-contracted NPA SL pathologist was designed to meet Student's unique needs and to confer some educational benefit to Student.

22. Finally, in the area of behavior, the May 22, 2009 and June 5, 2009 IEP team considered the reports and recommendations of CARD case supervisor Tooma-Rostano and

psychotherapist Dr. Leufroy. District credibly demonstrated that its offer to Student of 300 minutes daily of one-to-one BII through a District-contracted NPA, and one hour a week of BID, was reasonably calculated to confer some educational benefit to Student and was designed to meet Student's unique needs.

23. District provided Parents with timely notice of the IEP team meeting, with copies of the assessment team's report, and with copies of the reports and other data upon which the assessment team relied in conducting its assessment. The IEP team consisted of Parents, Student's private service providers, and District representatives as required by 34 C.F.R. §300.321(a). Parents meaningfully participated in Student's May 22, 2009 and June 5, 2009 IEP team meetings. Parents and Student's private service providers provided input to the IEP team, expressed disagreement with some IEP team members' conclusions, and requested revisions to the IEP. The IEP team, which met twice, considered Parents' concerns and modified the IEP to include goals recommended by Student's private service providers and requested by Parents.

24. District met its burden of proving that its offer of a SDC at Glenoaks Elementary was the LRE. District demonstrated convincingly that a SDC was required based on the nature and severity of Student's disability and deficits. District demonstrated that it could not address Student's unique needs on a full-time basis in a general education classroom, even with the use of supplementary aides and services. Student would not receive educational benefits if she were placed in a general education class full-time. District demonstrated that placing Student in a general education class would be a more restrictive environment than a SDC.

25. District persuasively demonstrated that District's proposed SDC would place Student in an environment with other children her age with similar needs, and with teachers and staff that were trained to address Student's unique needs. District offered credible evidence that Student was performing at substantially less than her age level in most areas assessed, and that she required full-time one-to-one assistance and a substantially modified curriculum. District demonstrated that placing Student in a general education class would result in Student being isolated for most of the classroom time without peer interaction, thus depriving Student of non-educational benefits that she could experience in a SDC. Additionally, Student's IEP contained an extraordinary number of goals that could not be accommodated in a general education classroom, where meeting Student's unique needs would have a negative effect on the teachers and students in a general education classroom. Finally, District demonstrated that the cost of mainstreaming Student would be less than the District's proposed placement in a SDC, and that cost to the District was not a factor that influenced District's offer of a FAPE.

26. District has met its burden of proof by establishing that District's IEP offer of May 22, 2009, and June 5, 2009, as clarified by District's October 26, 2009 letter, was reasonably calculated to provide Student with some educational benefit in the least restrictive environment and, therefore, offered Student a FAPE for the 2009-2010 school year. District was not required under the IDEA to comply with Parents' request for specific service

