

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

In the Matter of:

SYLVAN UNION SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH No. N 2006030058

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, State of California Office of Administrative Hearings, Special Education Division (OAHSED), heard this matter on June 12, 13, and 14, 2006, in Modesto, California.

On March 1, 2006, Petitioner Sylvan Union School District (Sylvan USD or District) filed a request for a due process hearing (complaint)¹ regarding Respondent (Student).

District was represented at hearing by Sarah Daniel, an attorney with Miller Brown & Dannis. Present for Sylvan USD were Bonnie Santos, District's Director of Special Education, and Regina Hedin, Director of the Stanislaus County Special Education Local Plan Area (SELPA). Appearing on behalf of Student were his Parents (Parents, Mother, or Father), in pro per. Parents' former advocate Marilyn Maggio was present during some of the hearing.

District presented witness testimony and documentary evidence. Student, through Parents, declined to participate in most of the hearing, as found, *infra*. District made oral closing argument, the record was closed, and the matter was submitted on June 14, 2006.

¹ A request for a due process hearing under California Education Code section 56502 is the due process complaint notice required under 20 United States Code (U.S.C.) section 1415(b)(7)(A).

ISSUES

1. Whether District has the right to assess Student in the following areas pursuant to a January 2006 triennial assessment plan:

- (a) Occupational therapy;
- (b) Assistive technology; and
- (c) Adaptive physical education.

2. Whether the District's offer of special education, placement, and related services contained in the individualized education plan (IEP) of January 31, 2006, provide Student with a free and appropriate public education (FAPE), as follows:

- (a) Learning handicapped special day class at Stockard Coffee Elementary School;
- (b) Three thirty-minute sessions of speech and language services per week;
- (c) One thirty-minute session of occupational therapy per week;
- (d) A one-to-one District aide up to six hours per day at school;
- (e) Autism inclusion specialist support services; and
- (f) A transition plan to "fade" Student's nonpublic agency (NPA) home and school behavior intervention services while bringing in District's school based aide and autism inclusion services.

FACTUAL FINDINGS

Parents' Participation in the Hearing

1. Prior to the hearing, Student's former attorney, Elizabeth Aaronson, made two motions for a continuance of the hearing set for June 12, 13, 14, and 15, 2006. With one exception, the motions were denied verbally during telephonic conferences with the attorneys for both parties on June 6, and June 9, 2006. The Order of June 9, 2006, granted Student an extension or continuance for part of his case, as to one expert witness, to July 10, 2006. The orders were reduced to writing and signed by ALJ Johnson on June 8 (Order Following Prehearing Conference and Denying Motion for Continuance), June 13 (Order Re Respondent's Second Motion for Continuance), and June 15, 2006 (Amended Order Re Respondent's Second Motion for Continuance).²

² The Amended Order corrected the recited procedural history of both District's and Student's prior motions for continuance, and the name of Student's private behavioral evaluation company.

2. On June 12, 2006, at the beginning of the hearing, Parents presented executed substitutions of attorney, placing themselves in pro per in lieu of their former attorney, Ms. Aaronson. Parents again moved for a continuance of the hearing based on their expressed need for legal representation. The motion was denied on the ground that the withdrawal of Student's attorney prior to the hearing did not constitute good cause for a continuance. (Ed. Code § 56505, subd. (f)). As found in connection with the prior Orders of June 6, and June 9, 2006, Ms. Aaronson never agreed to represent Student and Parents at the scheduled hearing, but only agreed to represent them if the hearing were continued. In addition, Student and Parents have had since at least March 1, 2006, to retain counsel. The evidence admitted during the hearing shows that Parents have been in a dispute with the District regarding Student's placement since about June of 2005, and that at the IEP meeting of January 31, 2006, at issue in this case, Parents were represented by attorney Richard Ruderman, who represented them before and during that meeting. In addition, Parents were represented by Advocate Marilyn Maggio for many months.

3. The Order of June 6, 2006, found Student in violation of Presiding ALJ Karl Engeman's prehearing order of May 8, 2006, for failure to timely disclose the names of his witnesses, including expert witnesses, and the documents intended to be used at hearing, at least three business days prior to the Prehearing Conference of June 6, 2006. Student was ordered on June 6, 2006, to produce the witness names and documents prior to the start of the hearing on June 12, 2006. Student was reminded of Education Code section 56505.1(f), which gives the hearing officer discretion to exclude witnesses or documents not duly disclosed to the other party. Student's second motion for a continuance claimed he was being precluded from the opportunity to present evidence and witnesses. The Order of June 9, 2006, again ordered Student to produce witness names and documents by the start of the hearing.

4. On June 12, 2006, at the outset of the hearing, Parents failed to produce witness names or any documents they intended to use on Student's behalf during the hearing, other than the substitutions of attorney. Parents stated that they intended to remain present during the hearing, but were not going to participate in it. Mother made an opening statement. Subsequent to swearing in the District's first witness, Mother became ill and Father took her to a doctor. The hearing was continued to Tuesday, June 13, 2006. Mother was medically cleared for normal activity, and on June 13, 2006, Parents both appeared at the hearing. Mother cross-examined District's first witness, Student's general education teacher Melanie Sluggett. Parents thereafter declined to ask questions of any other witnesses during the hearing, although afforded the opportunity. The ALJ provided Parents the opportunity to object or ask questions regarding each of District's documentary exhibits, and Parents declined to do so throughout the hearing, insisting that they did not understand what was going on in the absence of legal counsel, and could not represent themselves.

5. The Order of June 9, 2006, granted Student the right to continue part of his case to July 10, 2006, to present testimony and a report from a company that observed and evaluated Student in the fall of 2005, Behavioral Educational Consultants for Children with Autism (BECCA). On June 14, 2006, after District presented its case, Parents declined to

produce witnesses or exhibits regarding the issues in the case, declined to testify, and declined to make a closing argument. Although both June 15, and July 10, 2006, were made available to Parents to present evidence for the ALJ's consideration, Parents declined both dates, and stated that they believed they could not retain counsel by July 10, 2006.

District's January 31, 2006 Individualized Education Program (IEP) Offer

6. Student is seven years old, and lives with his family within the boundaries of the District. Student is eligible for special education and related services with a disability of autism. He is currently in his second, repeated year of kindergarten, in a general education kindergarten class at Freedom Elementary School (Freedom) with modifications, accommodations, supports and related services.

7. On January 31, 2006, Student's annual IEP team met to develop his educational program and related services for the ensuing year, including the rest of the 2005-2006 school year, and the 2006-2007 school year until the next annual January 2007 IEP. Present were (1) Ms. Santos, District's Director of Special Education); (2) Laura Wharff, the Principal of Freedom Elementary; (3) Helen Katotakis, District's resource specialist; (4) Sarah Daniel, attorney for the District; (5) Melanie Sluggett, Student's general education teacher; (6) Jon Brooks from Stanislaus County Valley Mountain Regional Center (VMRC); (7) Ms. Hedin, SELPA Director; (8) Jennifer Posta, attorney for the District; (9) Irene Patry, speech and language therapist; (10) Miriam Bermann, District's occupational therapist; (11) Richard Ruderman, attorney for Student and Parents; (12) Donovan Chapa, Senior Behavior Consultant with Applied Behavior Consultants, Inc. (ABC); (13) Father; (14) Mother; and (15) Marilyn Maggio, advocate for Student and Parents.

8. Mother acknowledged in the January 2006 IEP that she had received and been given an opportunity for a full explanation of the procedural safeguards. The IEP meeting minutes reported that Parents accepted the legal rights disclosure and waived their review. Parents were represented throughout the IEP meeting by attorney Ruderman. The January 2006 IEP meeting was the culmination of over a year and half of repeated IEP meetings to adjust Student's educational program and related services since his IEP of May/July 2004, prior to Student's entry into Ms. Sluggett's general education kindergarten class at Freedom for the 2004-2005 school year. District personnel worked with Parents to mainstream Student in the general education kindergarten class.

Due to the continual need to adjust his program, the consensus of all District members of the January 2006 IEP team was that a learning handicapped (LH) special day class (SDC) would be the appropriate placement to meet his unique needs. The LH/SDC class had been offered to Student before, but in light of Parents' prior refusals, District continued to keep Student in the general education classroom. Parents disagreed with the proposal of Student's transfer to an LH/SDC class, and other IEP program changes, and refused to consent to the January 2006 IEP. On March 1, 2006, District requested a due process hearing. District's January 2006 offer is itemized in Issues Paragraph 2 above. The offer does not contain any new proposed annual goals. It contains both District's and ABC's 2005 goals. Parents

disagreed with the other IEP team members because they believed that the general education classroom was the least restrictive environment (LRE) for their son, and that an SDC class would be too restrictive and inappropriate.

The Unique Needs of Student and His Educational Progress

9. Student's prior history of educational services is relevant to evaluate the appropriateness of District's IEP offer of January 2006, his educational progress, and his current unique needs. Student initially received autism intervention services through VMRC in an early intensive behavioral treatment (EIBT) program, through a certified nonpublic agency (NPA) service provider, ABC. ABC had been providing services to Student's sibling, who was three years older and also has a disability on the autism spectrum.³ In December of 2001, ABC assessed Student, and began providing EIBT services to him in February of 2002, first at home and then also in a preschool setting. The services consisted of about 40 hours per week of intensive applied behavioral analysis (ABA) intervention, co-funded by VMRC and the SELPA.

10. As of May 2004, Student's continued eligibility for EIBT was questioned as VMRC and District evaluated his transition to kindergarten. Student was progressing very slowly, not generalizing or initiating communication, and ABC's goals and benchmarks were written with minimal benchmark increases in order to give Student a greater opportunity to show benefit from the services.

11. In May of 2004, an IEP review meeting was held for the purpose of planning Student's transition into kindergarten for the 2004-2005 school year. The meeting was continued to July, and Parents agreed to look at two possible SDC classes and one general education kindergarten class. On July 16, 2004, the IEP team reconvened and Parents requested a full inclusion, general education kindergarten class at Freedom. "Inclusion" is often defined as a "mainstreaming" setting, where a disabled child is placed in a classroom with regular general education students, regardless of the amount of time the child actually spends directly involved in the same activities as the other children in that class.

ABC recommended that the team consider a separate question: whether the child is actually able to be fully included with the other pupils in the class, in most if not all of their instruction and activities. Mr. Chapa of ABC had reservations about Parents' request to put Student into a general education kindergarten class because of the level of separate services needed for him to succeed. ABC recommended that Student needed an environment where he could be "fully included" in the class activities and lessons, with a "denser" level of instruction and intervention,⁴ and a full time aide.

³ The involvement of Parents in special education over many years tends to undermine their assertion that they do not understand what is going on in this case.

⁴ ABC's reports use the word "denser" to describe a higher proportion of teacher-time per student.

The IEP team agreed to support Parents' request and placed Student in the general education kindergarten class, with continued ABA support services for 35 to 40 hours per week with an aide (tutor) from ABC. The IEP also provided for continued occupational therapy one to four times per week, and continued speech and language services three times per week for 20 to 30 minutes each. The team consensus was that this placement was the LRE for Student, and Parents consented to the IEP. However, because of the team's concerns that the placement might be inappropriate, and might not be the LRE for Student, the IEP provided that there would be an IEP review meeting after the first few months.

12. For the 2004-2005 school year, Student was enrolled in Ms. Sluggett's general education kindergarten class at Freedom in August of 2004. Student was accompanied by an ABC tutor every day. Ms. Sluggett has been a teacher for twenty-one years and has been teaching kindergarten for over nine years. She has not had any training in special education or autism. Student had significant problems in the general education kindergarten class, that resulted in many IEP team meetings throughout the school year to try to adjust his program.

13. A follow-up IEP meeting was held on October 25, 2004. In an ABC update report, Mr. Chapa, an experienced autism behavior specialist, described significant concerns. Whereas Student's behavioral problems in preschool had been at a minimal level that did not interfere with his learning, after several months in the full inclusion, general education kindergarten environment Student manifested behavioral excesses that significantly interfered with his ability to participate in classroom routines, such as circle and center time with the whole class. The behaviors included self-stimulatory and non-responsive behaviors such as avoiding eye contact, vocal self-stimulation, inappropriate attention seeking, staring off into the classroom, peripheral viewing, and non-responsiveness to instructions.

In addition, Student had difficulty participating in the kindergarten curriculum. Student used three word requests to meet the majority of his needs and wants. He had a difficult time participating in whole group instruction. Mr. Chapa testified that the pace of instruction was too fast for Student, who rapidly fell behind. While the rest of class mastered a skill or task, Student required extensive repetition. By the time he acquired something, the rest of class had already moved on to something else. Student did not initiate going to the bathroom, wore training pants, and was receiving toilet skills training from ABC. Student worked better on a one to one basis, and had a special token reward system with the ABC tutor. As is common among autistic children, Student had a very short attention span and had problems focusing and attending to the teacher. Student had difficulty with transitions. Student could trace his name, knew nine out of ten colors, 24 out of 26 upper case letters of the alphabet, and 15 out of 26 lower case letters. Student could do a few things independently such as lining up to enter the classroom and putting away his backpack. He required constant prompting and redirecting from his tutor for most activities. Student did not appear to be interested in the curriculum in the class, and the lack of interest was identified as a cause of his behavioral excesses. While the other children in the class accepted Student, he did not interact with them much or play with them.

It was clear to the team that the general education class curriculum had to be adjusted to meet Student's skill levels and reduce his frustrations. The team agreed to add a District resource specialist, for 30 minutes once a week, to consult with ABC and the classroom teacher to develop a "parallel curriculum" of academic goals and objectives for Student. From this point on, Student's IEP was continually modified to restrict and either specially target him or isolate him from the whole class, in order to try to meet his needs. In the fall of 2004, Student was exited from EIBT but ABC continued services with the District, with the goal to fade out its services.

14. Student did not make significant progress. As of the January 28, 2005, annual IEP meeting, Student was performing at levels similar to those found in Factual Findings 13 above. His toileting skills regressed. In addition, behavioral excesses expanded, including covering his ears, or screaming. He had met many of his ABC goals, but they were written with minimal increases to encourage his success. While the whole class would be involved in an activity for ten minutes, Student needed constant attention. After years of intensive ABA intervention and therapy, Student was used to rapid responses, attention, and reinforcers, such as repeated praise, excitement, or tickles, which were inappropriate in the classroom, and Student had difficulty waiting. Mr. Chapa pointed out to the January 2005 IEP team that Student's "pull outs" from the general education classroom for separate services, and "down time" breaks due to Student's behavior problems resulted in Student's frequent isolation from the classroom, and negatively impacted the inclusion placement that was intended.

ABC recommended that Student would better benefit from placement in a class such as a LH/SDC, where the curriculum could be tailored more specifically to his educational and behavioral needs, with a denser level of interaction and intervention. Parents did not agree, and expressed concern that Student would learn inappropriate behaviors from other children with disabilities in a SDC setting. ABC also recommended transferring their after-school home program to the family as Student's home functional skills no longer required their services. The January 2005 IEP team decided to continue modifying Student's services within the inclusion placement. The IEP retained Student in the general education classroom, with new annual District and ABC goals, and added direct resource specialist services. Parents consented to the January 2005 IEP. Subject to two subsequent addendums, this is the last agreed upon IEP. As of the date of the hearing, ABC was still performing services pursuant to the January 2005 IEP goals.

15. At the February 8, 2005 IEP addendum meeting, the resource specialist consultation services were eliminated, and direct resource specialist services with Student were added to the IEP, to occur as an additional pull out from class four times a week for fifteen minutes each. The IEP provided for a review meeting in March. The additional pull outs further isolated Student from his class. ABC tutors did not notice any improvement in Student's progress after the direct resource services were added.

16. At a second IEP addendum meeting on March 16, 2005, the resource specialist consultation services were added back in, to occur once a week for 30 minutes. Parents consented to the March 2005 IEP addendum. The teacher reported that Student knew if he yelled, he would get a break and be taken out of the classroom. The actions necessary to minimize the interruptions to the rest of the class caused by Student's needs and behaviors often reinforced his inappropriate behaviors. ABC reported that Student "continues to prefer gaining other's attention through inappropriate means (such as yelling, laughing, and touching them), and requires prompting to use appropriate skills..." ABC reported that he gained little from the typical large group learning approach, and again recommended an alternate placement. ABC added an annual goal regarding behavioral excesses and noncompliant behavior.

17. Following March 2005, several more IEP meetings were held in 2005, during which the parties attempted to negotiate an agreed-upon placement for Student. ABC developed a procedure to decrease noncompliant behavior, including collection of data, and development of a functionally equivalent alternative response for Student to learn instead of his behavioral excesses. In the absence of an agreed-upon IEP, in August 2005, Student was retained in the general education class for the 2005-2006 school year, to repeat kindergarten with the services agreed upon through March 2005. Ms. Sluggett's kindergarten class for the 2005-2006 school year contains 21 students. There are many whole group activities. For small group activities, the class divides into three rotating "centers," each of which has seven students in it. The teacher has one class-wide aide, and they individually visit each center, providing little opportunity for Student to have one-to-one time with the teacher.

18. As of the January 2006 IEP team meeting at issue, Student had only made limited, minimal progress according to ABC and the District members of the IEP team. By the end of September 2005, ABC had developed a behavior intervention plan (BIP) based on the noncompliant data study. ABC testified that the BIP was designed for what the general education teacher needed if Student remained in her class. ABC did not think it was in Student's best interests, and that the BIP would not be appropriate if he were placed in an LH/SDC class. ABC's third quarter report for the quarter ending September 30, 2005, was attached to the January 2006 IEP offer. Student's progress on ABC's 2005 goals was presented. ABC's final quarterly report for 2005, dated January 31, 2006, was also presented at the IEP meeting. The final report contained proposed annual goals for 2006. For the quarter ending December 31, 2005, Student engaged in an average of eight classroom episodes of behavioral excess per week, ranging in frequency from five to 45 minutes each. Student continued to be able to perform simple classroom routines with a minimum of assistance, such as going to his place on the carpet after putting his backpack away. During small and whole group activities, he required frequent and "often intrusive prompting," at all stages. "In the year and a half he has been exposed to small group training, he has not acquired new skills unless he is given direct attention (1:1) from the teacher/center leader." Mr. Chapa also reported that Student's behavioral excesses:

...continue to be quite varied, ranging from very overt inappropriate attention seeking and escape behaviors (i.e., yelling, crying, touching others, flailing about, labeling objects out of turn, burping, and making raspberries, etc.) to more subtle behaviors such as staring off, gazing sideways, laying back, and placing his head in his hands and curling into a fetal position. While these behaviors occur within all environments, data indicates the greatest number of these excesses occur during circle-time [whole group]. Due to the fact that his behavior serves the dual functions of escape and attention seeking, the excess is reinforced by the out-of-class time outs he is required to take if he yells, shouts, or is otherwise disruptive during lesson time. Other children in the class continue to comment on these behaviors on occasion, often asking [Student] to stop, or commenting that they can't hear classroom instructions. This has also been shown to reinforce the behavior, as he will often yell louder, more frequently, or in closer proximity to the speaker. Preventative measures (i.e., giving him a regimen of breaks, access to reinforcers using a token board, use of a visual schedule, and giving him OT beforehand, etc.) have not decreased the likelihood of these behaviors consistently.

Ms. Sluggett is concerned that Student is not getting much out of her class. After almost two years, Student has yet to acquire phonemic awareness or grasp the concepts of print. The teacher's progress report showed that in his second year of kindergarten, Student achieved only ten out of 21 academic goals in January 2006. Ms. Sluggett testified that all 21 skills are minimal essential State Standards skills for her students to meet. A comparison of the January 2005 progress report with the January 2006 progress report shows that Student, in 2005, did not recognize and name all lowercase letters and still needed to learn four more. In 2006, he achieved that skill. In January 2005, Student knew many but not all consonant sounds, and knew them all a year later. In January 2005, his ability to follow words from left to right was just emerging, and in January 2006 Student achieved that skill. In mathematics, in 2005, Student could name four basic shapes, but in 2006, he could only name two. He could count to 15 in 2005, and in January 2006, he could count to 20. Most of District's 2005 academic goals showed minimal or qualified progress.

Student does not model his peers in the class, still does not interact with them, has not progressed much socially, and has not transferred stimulus control from his aide to the teacher. Student does not verbalize his basic wants and needs, such as water or bathroom, without prompting. Student has also regressed in some skills. He can no longer track words from left to right, or pattern. Student has slowly progressed in his verbal skills. He has not achieved any of the other 11 skill areas in language arts and mathematics that are still deficient, and his class has moved on to learning other material. Student has shown that he needs multiple intensive repetitions in order to retain skills, and there is little opportunity for that approach in the general education kindergarten classroom. Due to Student's chronological age, it would not be appropriate to hold him back in kindergarten for a third year. In order to accommodate Parents' desire for Student to be in a full inclusion class,

Student would be need to be placed in a general education first grade class. Because Student has not progressed very much, he would face further restrictions, pull outs and isolation in that class, resulting in a “program within a program,” defeating the purpose of full inclusion.

19. Following the January 2006 IEP meeting, certain triennial assessments to which Parents consented were performed, including an academic assessment by the resource specialist, and a psychological assessment by the school psychologist.⁵ The assessments show that Student demonstrates below average functioning in cognitive processing, adaptive behavior, and achievement. District’s resource specialist reported in her May 2006 assessment that Student’s attention span for most activities, while Student is disengaged, is only 45 seconds to one minute. Despite District’s intense therapies, Student’s acquisition of learning is slow. Given the demands of Student’s current general education placement, his developmental delays contribute to his frustrations and inappropriate behaviors. ABC’s last report of May 26, 2006, indicates that after Student returned to class from “off track” time in March, the majority of his behaviors have shifted from more overt behaviors to “excesses centered around non-attentiveness.” Mr. Chapa reported: “This is likely due to the replacement of much of his large group activity time with 1:1 pull out time with his aide. He has, however, continued to demonstrate behaviors that resulted in his removal from the classroom.” In addition, he noted that Student has exhibited several episodes of self-injurious behaviors at school, hitting his own head. Student has recently developed significant anxiety behaviors prior to the end of most school days.

20. Parents also consented to the speech and language assessment offered along with District’s January 2006 IEP offer. The assessment test was performed on May 16, 2006, by District’s speech-language pathologist, Irene Patry. The assessment included the Expressive One-Word Picture Vocabulary Test (EOWPVT), the Receptive One-Word Picture Vocabulary Test, and the Preschool Language Scale-Fourth Edition test (PLS-4). Student showed significant delays in both expressive and receptive vocabulary, but did show growth from prior years. In the EOWPVT test for expressive language, Student scored in the second percentile with a score of 69. According to District’s assessment, Student can combine three or four words in spontaneous speech, answers some “what” and “where” questions, and uses quantity concepts, among other things. In the PLS-4, Student’s best progress since January 2005 was a six month increase in his developmental age for expressive communication, from 2.2 years of age to 2.8 years of age. District relies on the pathologist’s recommendation that Student is still eligible for individual speech and language services, not less than two times per week for 30 minutes per session, and additionally, in a small-group setting with peers one time per week for 30 minutes.

21. District’s LH/SDC placement, offered to Student in the January 2006 IEP, is located at Stockard Coffee Elementary School, and is taught by John Bettencourt, an experienced, certified special education teacher with training in autism. The class provides

⁵ The educational assessment utilized the CIBS Brigance and six subtests of the Woodcock Johnson Tests of Achievement III. The psychological assessment involved the Stanford-Binet Intelligence Scale, the Vineland Adaptive Behavior Scale, and the Developmental Test of Visual-Motor Integration.

the pupils significant opportunity for one-to-one interaction with the teacher, and direct small group activity in a structured environment. Six of the total 16 children in the class are in kindergarten, and leave the class at 11:40 a.m. If Student attends, he would be in first grade in the class from about 8:10 a.m. to 2:40 p.m., and would share the teacher and classroom aide with only ten students for the second half of the day, along with his District one-to-one aid. With the denser student-teacher ratio, more flexibility, and a class-wide behavioral management system, Student's behaviors could be addressed in the classroom instead of by time outs being taken out of the classroom. Student would be able to have his occupational therapy in the LH/SDC classroom, where his therapist already works with other pupils, instead of being pulled out. Instead of having separate reinforcers, such as his token or break reward systems, in the SDC classroom Student would participate in class-wide rewards and reinforcers. While the general education class emphasizes whole group activities that are primarily verbal and faster paced, the SDC class is primarily based on small group activities, visual cues, and many opportunities for repetition. With the SDC class placement in a mild to moderate LH class, Student would also not need to be pulled out of class for resource services. While District has a dedicated autism class for severely handicapped (SH) pupils, District's offer of an LH class provides Student with higher functioning peer models who are verbal and can independently task. The LH placement would allow Student to participate in the classroom with more independence than the restrictions placed on him in the general education classroom. The LH/SDC class is mainstreamed with general education students for lunch, and recess, and three times per week, into a general education second or third grade class for joint activities.

22. District's January 2006 offer also includes autism specialist services from the SELPA. The autism specialist provides behavior assessments, and would train Student's one-to-one aide that would take the place of ABC's tutor. The goals for the specialist to address include behavior, social skills, and mainstreaming opportunities. The autism specialist would help design Student's transition plan from the NPA's services, including fading Student's home ABA services, fading his separate token reward system, modifying ABC's goals and BIP, and other factors. The transition rate would be flexible and designed to meet Student's individual needs, which could take more or less than a month.

Although Parents want continued home ABA services, Mr. Chapa testified that the family's need for after school help is in the nature of a need for respite services, to relieve Mother and other family members who take care of Student. ABC does not provide respite services and District is not offering non-educational home services to the family. ABC has consistently reported for some time that the home-based ABA for Student is no longer appropriate. Student can perform many of his self-care skills and they should be transitioned to the family.

District's Proposed Triennial Assessment Plan

23. The January 31, 2006 IEP meeting was continued from one scheduled on December 9, 2005, at the request of Student's attorney. In connection with the meeting scheduled for December 9, 2005, District prepared a proposed triennial assessment plan of

the same date, which was provided to Parents. At the continued January 2006 meeting, the Parents and their attorney had the December 2005 assessment plan at the meeting. On January 31, 2006, at the IEP meeting, an amended triennial assessment plan was drafted in connection with negotiations with Parents and their attorney. The amended plan of the same date was provided to Parents at the meeting. The remaining assessments at issue in this case are: (a) occupational therapy (OT), (b) assistive technology (AT), and (c) adaptive physical education (APE). The December 2005 triennial assessment plan did not propose to assess Student in these areas. These three assessment areas were added at the request of Parents at the January 2006 meeting. Many of the other assessments listed in the amended plan have now been completed or removed.⁶

24. District's amended January 2006 assessment plan proposes to provide Student with an OT evaluation by the SELPA, an AT assessment by the Stanislaus County Office of Education (SCOE), and an APE evaluation by the District. Student and Parents did not agree to the amended assessment plan at the meeting. In late February, Parents executed a copy of the December 2005 triennial assessment plan, with additions. Parents added the OT assessment to that form, and requested that it be completed by both the SELPA and an NPA. The signed form did not mention either the AT or the APE assessments Parents had requested at the meeting.

25. District's amended January 2006 assessment plan proposes to assess Student in the area of AT based on District's desire to cooperate with Parents, who asked for an assistive technology assessment. District has no independent reason to suspect that Student needs the assistance of technological supports, devices, or products. Parents first asked for an AT assessment at the June 2005 IEP meeting. There is no direct evidence as to why Parents refused to sign consent for the AT assessment.

26. Student has received occupational therapy services since February of 2002, to facilitate sensorimotor development and address his fine motor needs. District's January 2006 triennial assessment plan proposes to assess Student in the area of OT based on Student's prior history showing that he has benefited from occupational therapy due to his unique needs. District's occupational therapist, Miriam Bermann, has extensive training and experience in autism. Student's fine motor needs include sensory needs for input to set his muscles and joints, and need for vestibular movement input, regarding balance and the inner ear. Student engages in head wagging. He needs a "sensory diet" to redirect or recede Student's sensory behaviors that Ms. Bermann helped design, implemented by the ABC tutors. Student also has difficulty holding a pen or pencil.

District has not conducted an OT assessment of Student since 2004, and Ms. Bermann believes one is needed to update Student's information. For the triennial assessment, District's occupational therapist would review Student's prior tests and goals, and select tests that are appropriate for Student's chronological and developmental age. Standardized tests are generally

⁶ See Factual Findings 19 and 22. At the hearing, District withdrew its proposed assessment plan for social/adaptive behavior. This assessment was also not part of District's original December 2005 triennial plan.

not appropriate for Student because of his complex profile. The tests appropriate for Student are primarily based on observational ratings, and would include the Sensory Profile, the Sensory Integration Inventory, and the Miller Assessment Profile. She would also attempt a standardized visual motor test if appropriate. Ms. Bermann testified that she does not know if Student has any gross motor needs because that is not her field. Gross motor skills are evaluated in an APE assessment, which she would not conduct. There is no direct evidence as to why Parents refused to sign consent for either the OT or APE assessment.

LEGAL CONCLUSIONS

Applicable Law

1. District, as the Petitioner, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) ___ U.S. ___ [126 S. Ct. 528, 163 L. Ed.2d 387].)

2. Before any action is taken with respect to the initial placement of a child with special needs, an assessment of the pupil's educational needs shall be conducted. (California Education Code [Ed. Code] § 56320.) Thereafter, special education students must be reassessed not more frequently than once a year, and shall be reassessed at least once every three years, unless the parent and the local educational agency (LEA) agree otherwise. A reassessment shall be conducted if the LEA determines "that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment." (20 U.S.C. § 1414(a)(2)(A); Ed. Code § 56381, subd. (a).) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code § 56320, subd. (e), (f).)

3. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producers of the tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code § 56320, subd. (a), (b).) Assessments must be conducted by individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area." (20 U.S.C. § 1414(b)(3)(B)(ii); Ed. Code §§ 56320, subd. (g), 56322.)

4. While the law provides that an LEA has the right and obligation to conduct assessments, parental consent is required before a school district may conduct assessments. (20 U.S.C. § 1414(a)(1)(C)(i); Ed. Code § 56321, subd. (c).) An LEA can override a lack of parental consent if the LEA establishes at a due process hearing that assessment is needed. (20 U.S.C. § 1414(a)(1)(C)(ii); Ed. Code §§ 56321, 56329, subd. (c), 56506, subd. (e).) The LEA must demonstrate at hearing that it has taken reasonable measures to obtain the consent of the parent, and that the child's parent has failed to respond. (Ed. Code §§ 56381, subd. (f), 56506, subd. (e).)

5. A child with a disability has the right to a free appropriate public education (FAPE) under the reauthorized Individuals with Disabilities Education Act (IDEA 2004). (20 U.S.C. 1412(a)(1)(A).) FAPE is defined as special education, and related services, that are available to the student at no cost to the Parent, that meet the State educational standards, and that conform to the student’s “individualized education programs” (IEP). (20 U.S.C. § 1401(9); Ed. Code § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o).) The term “related services” (designated instructional services (DIS) in California) 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).)

6. School districts receiving federal funds under IDEA 2004 are required under 20 U.S.C. § 1414(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.

7. According to the United States Supreme Court, a FAPE must meet a threshold “basic floor of opportunity” in public education that “consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.” (*Board of Education of the Hendrick Hudson Cent. School Dist. v. Rowley* (1982) 458 U.S. 176, at 178-89.) The *Rowley* court rejected the argument that school districts are required to provide services “sufficient to maximize each child’s potential commensurate with the opportunity provided other children.” (*Ibid*, at 198.) The court determined that the IEP must be reasonably calculated to provide the student with some educational benefit.

8. The *Rowley* opinion established that as long as a school district provides an appropriate education, the methodology employed in so doing is left up to the district’s discretion. (*Rowley*, 458 U.S. at 208.) A hearing officer must give “appropriate deference to the decisions of professional educators.” (*MM v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 533.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d at 84 (citing *Roland M.*, 910 F.2d at 992-93).)

9. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” It must be evaluated in

terms of what was objectively reasonable when the IEP was developed. (*Id.* at 1149). (See also *Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212; and *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Or. 2001) 155 F. Supp.2d 1213, 1236.) The focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the Parent. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307 at 1314.)

10. 20 U.S.C. § 1414 (d)(3)(B)(i) provides that the IEP team shall: “in the case of a child whose behavior impedes the child’s learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.” (See also 34 Code of Federal Regulations (CFR) § 300.346(a)(2).) 34 CFR § 300.346(c) requires that if the IEP team considers behavioral factors, and if the team determines that a child needs a particular service, “including an intervention, accommodation, or other program modification in order for the child to receive FAPE,” the team must include a statement to that effect in the IEP.

11. To the maximum extent appropriate, children with disabilities should be educated with children who are not disabled, unless due to either the nature of the disability, or its severity, education in a regular class cannot be achieved satisfactorily even with the use of supplementary aids and services. (14 U.S.C. § 1412(a)(5)A.) When determining whether a placement is the least restrictive environment (LRE), four factors must be evaluated and balanced: (1) the academic benefits of placement in a mainstream setting, with any supplementary aides and services that might be appropriate; (2) the non-academic benefits of mainstream placement, such as language and behavior models provided by non-disabled students; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost of educating the student in a mainstream environment. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115; *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

12. IDEA’s procedural mandates require that the parent be allowed to meaningfully participate in the development of the IEP. (*Rowley*, 458 U.S. at 207-208.) Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child’s right to a free appropriate public education; (b) significantly impeded the Parent’s opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) and (ii); Education Code section 56505, subdivision (j)/) (See also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F. 2d 1479, 1483-1484.)

Determination of Issues

Does District have the right to assess Student in the areas of OT, AT, and APE pursuant to a January 2006 triennial assessment plan?

13. Pursuant to Factual Findings 23, 24, and 25, the uncontested evidence shows that District provided adequate notice to Parents of the triennial assessment plan. Parents had the opportunity to review the December 2005 triennial assessment plan with their attorney prior to the IEP meeting on January 31, 2006. That plan did not contain proposals for the above three assessments. Parents negotiated an amended plan at the meeting to add the above three assessment areas. They thereafter failed to sign consent for the AT and APE assessments, and added a new demand to the OT assessment plan, for its conduct by an unspecified NPA in addition to the SELPA.

14. Pursuant to Factual Findings 23, 24, and 26, District's January 2006 proposed triennial OT assessment plan is based on the facts that Student has been receiving OT services since 2002, and has not been assessed in the area of OT since 2004. The law requires District to reassess Student in the area of OT every three years at a minimum, unless it is determined that he no longer requires such services. Under Education Code section 56321, District has taken reasonable measures to obtain Parents' consent to the triennial OT assessment plan. District has the right to assess Student based on the triennial OT assessment plan in the absence of parental consent.

15. As found in Factual Findings 23, 24, and 25, District's January 2006 proposed AT assessment plan is based on District's desire to cooperate with Parents, who requested it. District did not establish that it has any independent basis to determine that an AT assessment is warranted because there is no evidence that Student has needs that may be addressed with assistive technology. District does not have the right to assess Student in the area of AT in the absence of information that Student's needs, including academic achievement or functional performance, warrant an AT assessment, in the absence of parental consent.

16. As found in Factual Findings 23, 24, and 26, District's January 2006 proposed APE assessment plan is based on District's desire to cooperate with Parents, who requested it. District did not establish that it has any independent basis to determine that an APE assessment is warranted because there is no evidence that Student has gross motor needs. District does not have the right to assess Student in the area of APE in the absence of information that Student's needs, including academic achievement or functional performance, warrant an APE assessment, in the absence of parental consent.

Does the District's offer of special education, placement, and related services contained in the individualized education plan (IEP) of January 31, 2006, provide Student with a free and appropriate public education (FAPE)?

17. Pursuant to Factual Findings 6, 7, 8, 18, 23, and 24, District provided Parents with a comprehensive written offer of placement at the January 2006 IEP meeting, along with advisement of their legal rights. Parents were represented by counsel, and meaningfully participated in the IEP meeting. Parents' concerns and requests were expressed and considered. The uncontested evidence establishes that no procedural violation impeded

Student's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded Parents' opportunity to participate in the decision making process. An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.C. 2002) 238 F.Supp.2d 127, 139 (stating that the IDEA does not provided for an "education designed according to the parent's desires," citing *Rowley*, 458 U.S. 176, 207.) A parent who has an opportunity to discuss the proposed IEP with the team, and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Education* (3rd. Cir. 1993) 993 F.2d 1031, 1036.)

18. Pursuant to Factual Findings 6, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22, the January 2006 IEP offers Student a FAPE in that it is designed to meet his unique needs, and is reasonably calculated to provide him with some educational benefit. The uncontested evidence is that District's proposed placement in a LH/SDC setting is appropriate because Student needs a structured environment with a dense student-teacher ration, small group instruction, opportunities to practice skills by multiple repetitions without worrying about falling behind the pace of the class, frequent reinforcement and opportunities for reinforcers, without being segregated from other pupils, and a flexible academic and functional education program to address his deficits. It is appropriate to meet his behavioral needs as well, as the LH/SDC class at Freedom has a class-wide behavior management system that Student can be part of, without being pulled out of class or specially targeted.

19. As found in Factual Findings 6, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, and 22, the LH/SDC class in District's IEP offers Student a FAPE as well because it is the LRE for Student at this time. The least restrictive educational environment for a child would always be the general education classroom if the phrase were read literally. However, the IDEA provides that the appropriate placement is in the least restrictive environment *in which* educational benefit can satisfactorily be achieved with the use of supplementary aids and services. Evaluating the Ninth Circuit's four LRE factors,⁷ it is determined that Student has not received much academic benefit placed in a general education class, even with all of the related services and supports he receives. The testimony of Student's general education teacher, the school psychologist Jim Merchant, and the ABC Senior Behavioral Consultant who has overseen Student's services for many years, are entitled to great weight. Student's limited progress with letters and numbers is found to be minimal progress in view of his significant lack of progress in core areas of communication, social skills, and behavior. Student's absence from the classroom for segregated services or behavioral pull outs, and his separate education plan and token reward system isolate him from the class, as does his delayed rate of acquisition. As to the nonacademic benefits of the inclusion setting, Student does not imitate or model peers in the general education class, and, for the most part, he is not engaged in the class curriculum. He uses behavioral excesses to either escape the class or to gain negative attention. The LH/SDC class has mainstreaming opportunities that Student may benefit from. The teacher, students, and activities of the general education classroom are negatively impacted by Student's behavior excesses, as well as his need for

⁷ See Legal Conclusions, Applicable Law paragraph 11, *supra*.

constant attention and reinforcement. There was no evidence that District's offer is based on any comparison of the cost to educate Student in either the general education or SDC class.

20. Pursuant to Factual Findings 7, 8, 11, 18, and 20, District's IEP offer for individual speech and language services three times per week for 30 minutes, and small group services once a week for 30 minutes, is appropriate. Student has been receiving speech and language services since at least 2004. The uncontested evidence is that Student benefits from the speech and language services due to his expressive and receptive language deficits. Student has made some verbal progress. Student is eligible to continue receiving individual and group speech and language services.

21. Pursuant to Factual Findings 7, 8, 11, 18, and 26, District's IEP offer for occupational therapy services once a week for 30 minutes is appropriate. Student has been receiving OT services since at least 2002. The uncontested evidence is that Student benefits from OT services due to his fine motor skills deficits, including the need for sensorimotor development, vestibular movement, and sensory diet. Student is eligible to continue receiving OT services.

22. As found in Factual Findings 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 19, 21, and 22, District's IEP offer for a District one-to-one aide is appropriate. Student has had a one-to-one aide since 2002, provided through an NPA. The uncontested evidence is that while NPA services are no longer necessary for Student to obtain educational benefit, Student still needs an individual full time aide to access the class curriculum. District's aide will be trained by the SELPA's autism inclusion specialist, and the NPA's intensive behavior intervention services will be faded out over a period of approximately a month or so, according to Student's needs. District's school based aide will be faded in to replace the ABC tutor.

23. As found in Factual Findings 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 19, 21, and 22, District's IEP offer to fade out Student's home based NPA services is appropriate. The uncontested evidence is that ABC's services to Student in the home are no longer necessary. Student has received the benefit of home ABA services for a long time, and Student has achieved most home skills to the point where they can and should be transferred to the family.

24. As found in Factual Findings 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 19, 21, and 22, District's IEP offer for autism inclusion services is appropriate. The uncontested evidence is that the SELPA autism inclusion specialist will help ABC design a fade plan to transition Student from ABC's services to a District school based aide and program. The inclusion specialist will address Student's behavior management needs, and may recommend modifications to ABC's goals and behavior intervention plan. In view of Student's difficulties with transition, a transition plan from the general education class to the LH/SDC class should also be addressed. District's January 2006 IEP also contains District's 2005 annual academic goals. Since Student made minimal progress, the transition plan for the new educational setting should address whether modifications of those goals would be appropriate.

ORDER

1. District may conduct an occupational therapy reassessment of Student pursuant to the triennial assessment plan of January 2006.
2. The Parents of Student shall make him reasonably available for the occupational therapy reassessment.
3. District shall not conduct an assistive technology or an adaptive physical education assessment of Student pursuant to the triennial assessment plan of January 2006, without Parents' consent.
4. District's January 2006 individualized education program (IEP) offers Student a free appropriate public education in the least restrictive environment and is upheld. The District may implement its January 2006 IEP over the objections of Student and Parents and without their consent if Student remains enrolled in the district. District's transition plan shall include a transition plan from the general education classroom to the learning handicapped special day class and appropriate annual academic, functioning, and behavior goals.

PREVAILING PARTY

District prevailed on all issues for hearing in this case except the issues of conducting an assistive technology or adaptive physical education assessment of Student. (Ed. Code § 56507, subd. (d).)

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code § 56505, subd. (k).)

DATED: June 29, 2006



DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings
Special Education Division