

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

In the Matter of:

STUDENT,

Petitioner,

v.

CUPERTINO UNION SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2006090422

DECISION

Charles Marson, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on November 15 and 17, 2006, in Cupertino, California.

Student's father (Father) represented Petitioner (Student). Eliza J. McArthur, Attorney at Law, represented Respondent Cupertino Union School District (District).

Father was present throughout the hearing. Patricia Vidmar, the District's Director for Pupil Services, was present throughout the hearing.

The request for due process hearing was filed on September 13, 2006. A request for a one-day continuance, from November 16 to November 17, was granted. Oral and documentary evidence were received. Closing arguments were made on November 17 and the matter was submitted.

PROCEDURAL MATTER

At the beginning of the hearing, Student moved for judgment in his favor on the ground that the District had improperly delayed in producing, and had withheld from him, certain documents essential to the presentation of his case. The parties introduced evidence on the motion.

A parent is entitled to inspect and copy all of the educational records of his child, with some exceptions. Weeks before the hearing, Father demanded from the District all of Student's records. While the parties were trying to arrange a convenient time for delivery of the records, an ambiguous electronic mail message from Father caused the District to assume, wrongly, that Father had reduced the scope of his request to a single document, which was provided. Later, Father restated his demand for all of Student's records. This conflict was not resolved until the day before the hearing, when the rest of Student's records were delivered to Father. Father stated at hearing that he had read the documents, and he introduced some of them in evidence. Student was not prejudiced by any delay in the District's production of records.

The District withheld from production one document written and possessed by Montclair Elementary School Principal Gail Moberg on the ground that it contains informal notes that remain in her sole possession and are not accessible or revealed to any other person except a substitute. (See, 20 U.S.C. § 1232g(4)(B); Cal. Ed. Code § 49061, subd. (b); see also, 34 C.F.R. § 300.611.) Testimony on behalf of the District proved that the document was properly withheld. Accordingly, Student's motion was denied.

ISSUES

Did the District fail to offer or provide a free appropriate public education (FAPE) to Student in the 2006-2007 school year (SY) by:

1. Placing him in a multi-teacher classroom;
2. Failing to provide him an opportunity to make meaningful educational progress, or
3. Failing timely to convene a social service group as specified in his Individualized Education Program (IEP)?

CONTENTIONS OF THE PARTIES

Student contends that the District denied him a FAPE at the beginning of third grade by placing him in a core classroom that had multiple teachers rather than one. He also contends that the District failed to timely implement a provision of his IEP that called for the convening of a social service group to assist in developing his social skills. These errors, Student asserts, caused his severe behavioral problems in school, which in turn caused his frequent removal from the classroom, and thereby deprived him of an opportunity to make meaningful educational progress.

The District contends that its placement of Student in the multi-teacher classroom was appropriate, and that it timely convened a social service group in conformance with Student's

IEP. It argues that neither the multi-teacher classroom nor the timing of the beginning of the social service group had anything to do with Student's behavioral difficulties. Rather, the District asserts, Student's misbehavior was the result of his rejection (orchestrated by Father) of his placement in the multi-teacher classroom, the effect on Student of his parents' ongoing child custody conflict, and the nature of his disability. The District also contends that it responded as well as it could to the challenges posed by Student's behavior, and that Student made meaningful educational progress while attending its school.

FACTUAL FINDINGS

Background

1. Student is a nine-year-old male who resides within the District and attended its Montclair Elementary School (Montclair) until October 6, 2006. He is eligible for and since 2001 has received special education as a child who exhibits autistic-like behaviors.

2. This dispute concerns the 25 school days between August 24, 2006, the start of Student's third grade school year at Montclair, and October 6, 2006, the day Father withdrew Student from Montclair in order to enroll him in a private school.¹

3. In order to provide a FAPE for a student eligible for special education, a district must design an IEP that addresses all of his unique needs, and is reasonably calculated to afford him an opportunity to realize educational benefit. (See Legal Conclusions 1-2, 5-9.)

Student's Unique Needs

4. Student suffers from Asperger's syndrome, an autism spectrum disorder sometimes called high functioning autism. He has difficulties with sequencing, reading comprehension, answering how and why questions, vocabulary, and social skills behavior. He has difficulty in making transitions. He is, however, proficient in academic subjects such as mathematics that are presented in a structured manner.

5. Starting in March 2006, Student had increasing difficulty controlling his behavior at school.

The District's response to student's unique needs

6. The District convened an IEP meeting on June 6, 2006, and produced an IEP (the June 6 IEP). The IEP provided that Student would have a one-to-one aide throughout the school day, in class and out, and that he would receive academic and speech support from the resource specialist four times a week for 30 minutes. The speech and language (S/L)

¹ Some evidence showed that Student was withdrawn on October 4, 2006. The weight of evidence showed that he was withdrawn on October 6. The latter date is used here.

therapist was to provide services to Student in a social skills group once a week for 30 minutes, observe his social interactions for 20 minutes a week, and have a weekly ten-minute feedback session with Student. The IEP set forth goals and objectives that are not in dispute here. The IEP also contained a detailed behavior support plan setting forth a program of observation, recording on daily behavior sheets, and suggested actions to prevent or redirect troublesome behavior by Student. The IEP did not address the selection of a core classroom. Father signed the IEP.

7. In response to Student's worsening behavior, the District called IEP meetings on September 6 and 26, 2006. On the 26th it offered Student a new placement in a smaller, more structured class, but Father declined to agree to it, so the June 6 IEP remained in effect. The adequacy of the September 26 IEP offer is not at issue here.

Student's assignment to the multi-teacher class

8. The June 6 IEP required the District to place Student in a mainstream classroom from which he could derive educational benefit.

9. The SY 2006-2007 began at Montclair on August 24, 2006, a Thursday. Shortly before that time, the District assigned third grade students to one of four available academic mainstream classrooms. Three of the classrooms were taught by one teacher, whose teaching was supplemented by an art teacher who came into the classroom, by a music teacher who taught in a separate facility, and, once a week, by a physical education teacher. The fourth classroom, to which Student was assigned, was designed to be taught by two teachers, one teaching Monday, Tuesday, and Wednesday, and the other Thursday and Friday. One of the two original teachers began maternity leave after the second day of class, and a substitute replaced her on the third day of class.²

10. The District's decision to place Student in the multiple-teacher class was carefully made by second and third grade teachers, the principal, a former principal, the behaviorist who was Student's case manager, Student's resource specialist, and the school psychologist. They unanimously chose to place Student in the multi-teacher class because its teachers worked closely together; one had a master's degree in special education; the class best fit his special needs; and the other 19 children in the class were good role models for Student, and were able to empathize with him. Student had not previously had difficulty in transitions among teachers for music, art, and computers. Student's older sister had been successful in the multi-teacher classroom, and her parents had been pleased with the teachers.

11. The District did not involve Father in the selection of the multi-teacher class, and he only learned of it shortly before the school year began. He knew that Student and

² The District describes the class as a two-teacher class. Since one of the two teachers taught for two days and then took maternity leave and was replaced, Student describes it as a class with at least three teachers. The parties agreed to call it a multiple-teacher class.

other autistic children have difficulty with transitions, and realized that the multi-teacher class would involve two additional teacher transitions a week, one between Wednesday and Thursday, and another between Friday and Monday. For those reasons, Father disagreed vehemently with the class selection. He testified at hearing that he believed the multi-teacher class was largely responsible for Student's behavioral difficulties (see below).

12. The District presented substantial credible evidence that the multi-teacher class was well staffed, and was carefully planned to minimize any difficulties students might have with transitions between teachers. The Monday-Wednesday and lead teacher was Kristi Erpenbeck, who graduated from Chico State University in 1991 and then went to San Jose State University, where she earned a multiple subject (K-8) credential, a special education credential, and a master's degree in special education. She had 11 years of experience in the District, and another three years in Milpitas, teaching regular education classes with special education students in them. She had taught with her "share contract" partner, Shelley Walker, for six years. When Walker took maternity leave, she was replaced by Debbie Thomas, who had seven years' experience at Montclair. Student did not criticize the skill, training, or experience of any of these teachers. Father testified that he did not believe the teachers were bad teachers.

13. Erpenbeck testified credibly that although the class had multiple teachers, she and the other teachers were careful to ensure that it had only one continuous, consistent curriculum. She created the curriculum, and she and the other teachers implemented it. To show that they were a unit, Erpenbeck and Walker taught the first two days of class together. On the second day, Thomas appeared for 15 minutes, introduced herself as Walker's replacement, and explained that Walker would take maternity leave starting the following day.

14. Erpenbeck and Thomas planned for smooth transitions between teachers. Over the summer, Erpenbeck and Thomas met to plan for Walker's departure by reviewing curriculum, schedules, expectations, and procedures for behavior management. Every Wednesday after class, Erpenbeck briefed Thomas on the progress of the class, to ensure consistency when Thomas taught on Thursday and Friday.

15. Erpenbeck was asked at hearing whether, if given the choice, she would assign Student to a single- or multi-teacher class. She said it would depend on the teacher. Erpenbeck credibly testified that, in her opinion, the multi-teacher class was a proper placement for Student, and was not a cause of his behavioral difficulties. She identified several other causes that are discussed below.

16. Stacy Ljepava, who provides behavioral case management services to the District under contract, testified that Student received additional assistance with transitions among teachers. Ljepava has a master's degree in social work with an emphasis on school social work, and is working toward a Pupil Personnel Services credential. She is certified in crisis response under the Professional Assault Response Training Program. She is also a member of the California Association of Applied Behavioral Analysts, from whom she has

received training in the application of Applied Behavioral Analysis (ABA) to autistic children. She has been a behavioral consultant for seven years. She got her early experience through the Children's Health Council, and as supervisor of a behavioral specialist outreach program that serves the Special Education Local Planning Area (SELPA) to which the District and nearby districts belong. For the last four years, Ljepava has provided extensive case management services to the District for more than 80 autistic students, and has trained District staff.

17. In Ljepava's opinion, Student could be successful in the multi-teacher class with proper foreshadowing of transitions, and, through Student's one-to-one aide, Mrs. Kava, the District was providing it to him. Mrs. Kava was with Student on all the relevant school days except one, on which she was absent.

18. Student also received help in making transitions from his resource specialist, Sherrie Tanner-Durston. Tanner-Durston, who is also an intervention specialist, has multiple subject and learning handicapped credentials, and resource specialist and second language certificates, as well as a supplement in social studies. She was a resource specialist for the Morgan Hill School District for seven years, and has been employed by the District for five years. She has known Student since before he entered kindergarten, and has been his case manager, as well as his resource specialist, since he entered the District in 2001.

19. In Tanner-Durston's opinion, Student's placement in the multi-teacher class was appropriate, and was not a cause of his behavioral difficulties. Like Erpenbeck, Tanner-Durston identified several other causes of Student's behavior that are discussed below.

20. Gail Moberg became Montclair's Principal on August 4, 2006. Moberg has both a bachelor's and a master's degree in special education. She taught special education for nine or ten years in the District before acquiring her administrative credential and becoming Principal of Montclair. Moberg testified that she was involved in the selection of the multi-teacher class for Student, and that, in her opinion, it was an appropriate placement. She has received two letters that praised the class and the teachers from parents of students who were in the class last year.

21. The weight of evidence showed that Student's assignment to the multi-teacher class was appropriate because it met his unique needs and provided educational benefit. Student offered no evidence to the contrary except Father's unsupported opinion, and did not prove either that the placement was inappropriate or that it caused his behavioral difficulties.

Student's misbehavior and its causes

22. In March, 2006, while in second grade, Student began to engage in significant undesirable behavior. In May, Ljepava observed him kicking and hitting other students. Ljepava drafted a behavior support plan that was adopted as part of the June 6 IEP. That plan lists, as behaviors to be targeted, Student's lack of problem-solving skills, his impulsive responses in arguing with peers and adults, his misinterpretation of social situations, and his

hitting or kicking others. At hearing, Father testified that he generally agreed with the description of Student's behavior, except that he did not believe Student hit or kicked anyone. That, he testified, was a reference to a fight started by another student. Father noted that Student had been briefly suspended that spring, but that the record of the suspension was erased at Father's request. Father approved the behavior support plan, including its description of target behaviors, as part of the IEP. Ljepava began implementing the plan by training Student's one-on-one aides.

23. Principal Moberg testified that on August 24, 2006, the first day of the school year, school was to start at 8:30 a.m. She arrived at school at 7:30 a.m. and started to work at her desk. At about 8:00 a.m., she looked up to find Father standing in front of her desk, repeatedly saying, "It's not going to work. It's not going to work." Student was circling his father, imitating him, saying repeatedly, "It's not going to work. It's not going to work." Father told Moberg that the multi-teacher classroom was inappropriate for Student, and that Student should be moved to another class. Moberg told him that the other classes were full. Father requested that a student in one of the other classes be removed to make room for Student. After some discussion, Moberg declined to move Student. During that discussion, Student continued to repeat his father's earlier remarks, such as, "It's not going to work." Father did not dispute Moberg's description of this event; he testified only that he could not remember the details or whether Student was present.

24. With the cognitive rigidity and perseveration typical of autistic children, Student then became fixed on the subject of his placement. He resisted the placement for the rest of his days at Montclair. He repeatedly told school staff that his placement was not going to work, that it was the wrong class, that he should not have two teachers, and that his dad was going to get him out of the class.

25. Student's resistance to his placement began on the morning of the first day of school. Tanner-Durstun testified that she encountered Student that morning outside the classroom. He refused to enter it, saying that it was not the right placement. When she could not persuade him to enter, she took him to her own classroom, where he did some work. After lunch, she persuaded him to go to class.

26. Erpenbeck testified that when Student entered her classroom on the first day of school, he said it was not the right placement for him. From then on he was consistently disrespectful to her, telling her that when she died, people would laugh; that she was lying; and that he intended to destroy her classroom. Student frequently offended other students deliberately, telling them that they were ugly, their feet smelled, and their hair was too long.

27. Student also engaged in numerous activities disruptive of the class. During the 25 days at issue, Student was sent to the principal's office twice, and twice the principal came to get him. On several other occasions, Erpenbeck telephoned Father and persuaded him to speak to Student on the telephone. During one of these disruptions, Ljepava heard Student threaten to hurt someone. When the teacher attempted to deter him, he responded by asking whether he would be transferred to another classroom if he carried out his threat.

28. In late September, Moberg testified, Student's classroom teacher called at noon to warn her that Student had had a bad morning and had said numerous insulting and disrespectful things. At about 12:15 p.m., two children ran screaming into Moberg's front office, then into her inner office, demanding protection from Student, who they said wanted to hit them and hurt them. Student then arrived behind them, poised to strike them. Student's one-to-one aide followed him into the office. Moberg let the two children out the back door and attempted to speak to Student, who was more agitated than she had ever seen him. But Student ran out the front door, chased by his aide, who lost him.

29. Moberg was concerned for the safety of Student and other students, and feared Student would leave the campus in his agitated state. She knew that by herself she could not restrain Student, who is large for his age. She called the police. When two officers arrived, she searched the campus with them, only to find Student back at his desk in the classroom, apparently having calmed down.

30. On another occasion, Moberg testified, she received a call from a teacher in the library, who reported that she needed help because she could not control Student, who was poking and provoking the other students. Upon her arrival, Moberg found the other students seated, in a group, with Student just behind them, his back to the group. Moberg, the teacher, and Student's aide tried to lift him off the floor, but he went limp and nearly tilted the group of adults into the circle of students. Student then ran around the library yelling and making threats. Moberg called Father, who told her it was her problem because Student was in the multi-teacher class, and she would have to solve it. She then instructed the teacher to evacuate the library, take the children back to the main classroom, and lock the door. Student apparently called Father on his cellphone, and eventually, with some help from Father, Student calmed down. Moberg put Student with his aide in her conference room. The aide tried to assist Student with work, but Student kept repeating that the classroom was not going to work and that his dad was going to get him moved.

31. The incidences of Student's misbehavior were numerous, and increased in frequency toward the end of the period at issue. He was briefly suspended. Tanner-Durston testified that she was called to the classroom three times to help with Student's behavior. He squirted people with an eyedropper, put his hands in her face, and got on top of a table. She was able successfully to redirect him on those occasions. During the last week Student was at Montclair, he refused to come to Tanner-Durston's resource room, although he did attend his classroom.

32. District staff attempted to control Student's behavior in numerous ways. District staff implemented the behavior support plan in the June 6 IEP. Moberg met regularly with Ljepava, Tanner-Durston, Erpenbeck, Thomas, and the S/L therapist to discuss strategies for dealing with Student's behavior. They frequently called Father for assistance (see below). Sometimes their interventions succeeded; sometimes they did not.

33. On September 6, 2006, the District convened an IEP meeting to respond to Father's objections to the multi-teacher class. During September, the District began to explore alternative placements that Father might support, including placements in other classes and at other schools. On September 26, 2006, at an IEP meeting, the District offered Student a new placement in a smaller, more structured social cognitive class, but Father did not agree to that placement.³

34. Father did not dispute the descriptions by District witnesses of Student's misbehavior. Father drove Student to and from school, but was generally at work while Student was in school. Six or seven times he left work to help with Student's behavior. Nothing in the record suggests that Father had any personal knowledge of the nature of Student's behavior at school.

35. The District argues that a contributing factor to Student's misbehavior was Father's refusal to intervene and assist in preventing it. Evidence of this claim was mixed. Moberg testified that she called Father for help six or seven times, but that he usually told her it was her problem because she insisted on keeping Student in the multi-teacher class, and that she would have to fix it. Erpenbeck, however, testified that she called Father for assistance several times, and that on those occasions Father was supportive and helpful. She and Student's one-to-one aide found that if they called Father, Student would settle down. Erpenbeck and the aide found his intervention useful and appreciated his support. Tanner-Durston also believed that Student was greatly influenced by Father, and would obey him. She called him for help between five and ten times, and found Father supportive and helpful on those occasions. Father's cell phone records show that he was called from the school 26 times between the beginning of school and September 28, although some of those calls may not have concerned Student's behavior. The sheer volume of these calls suggests that District staff found Father's interventions useful.

36. The weight of evidence did not show that Father was unhelpful in controlling Student. It showed that he was usually cooperative when called by Erpenbeck, Tanner-Durston, or Student's one-to-one aide, but not when called by Moberg.

37. District witnesses unanimously believed that Student's hostility to his placement derived from Father's hostility to it. Ljepava testified that Student's attitude was set on the first morning of school when he witnessed the discussion between Father and Moberg in Moberg's office. Vidmar believed that Father caused Student's attitude. Moberg testified that Father and son were working in lock step, and that Father was coaching Student to resist the placement so that the District would remove him from the multi-teacher class.⁴

³ Student argues that the District, by investigating other placements, has by its conduct admitted that his placement in the multi-teacher classroom was inappropriate. However, a District is not required to furnish the best possible placement, only a placement that provides a FAPE. (See Legal Conclusion 4.) It follows that there can be several appropriate placements for a student. Moberg testified that the District hoped to find a placement that Father would support.

⁴ District witnesses did not claim that Father caused or endorsed Student's physical disruptions.

38. Father testified that he made numerous efforts to have Student removed from the multi-teacher class, but that he never discussed the inappropriateness of the placement with Student. He urged Student to adjust to his placement in the multi-teacher class, arguing that the teachers of the class were good teachers and that Student had to get an education.

39. The degree to which Father influenced Student in his hostility to his placement was not clear from the evidence. It is unlikely that a disabled third-grader would use a word like placement, but Student may have absorbed the term by listening to Father in Moberg's office. The evidence showed that Student was strongly influenced by Father, for good or ill, and that at least some of his hostility to the placement derived from Father. It did not persuasively show that Father coached Student in his resistance in order to sabotage the placement.

40. However, the extent to which Father may have instigated Student's resistance and misbehavior need not be decided here. The principal cause of Student's behavioral difficulties in the period in issue was his own hostility to his placement in the multi-teacher class, whatever its source. As Erpenbeck testified, Student did everything he could to make sure his placement did not work. As Ljepava put it, Student's certainty that his placement would not work became a self-fulfilling prophecy. Student's misbehavior was beyond the ability of the District to control, though the District made many efforts to do so. Student's hostility to his placement, however acquired, was more important than any other cause of his misbehavior.

41. A secondary cause of Student's misbehavior was the stress caused by his parents' divorce and ongoing child custody dispute. Student's father and mother were recently divorced, and are engaged in an ongoing legal dispute over custody of Student and his older sister. Mother attended some IEP meetings and told staff of the conflict. When both parents attended, staff observed the conflict. When Father arrived on the campus, mother would leave. If Student saw mother on campus, he would flee from her. Student would not read the word "mom" aloud in a story. Ample evidence showed that the conflict between Student's father and mother is heated, and that it has had severe effects on Student's well-being and peace of mind.

42. On January 3, 2006, as part of the custody proceeding, the Santa Clara County Superior Court issued an interim order granting joint custody to the parents but physical custody to Father except for certain weeknights and weekends. The court attached to its usual form a five-page, single-spaced document drafted specifically for these parents that governs every aspect of their relations with the children, including the appointment of parenting coaches, the regulation of visitation, limitations on the number and expense of gifts, and the content of the statements each parent may make to the children about the other. The order supports the inference that the relationship between the parties concerning their children was dysfunctional. In September, the court ruled on a contested motion to alter the conditions of custody. In October, after Father unilaterally placed Student in a private school, mother charged that he had done so in violation of the orders of the court.

43. In his testimony, Father did not deny that the custody proceedings had some impact on Student's behavior, though he did not attempt to quantify it.

44. Another cause of Student's misbehavior was the nature of his disability. He was successful in school with subjects that were presented in a highly structured manner. In mathematics, for example, he focused on the lessons and did well. In less structured exercises such as writing, he did less well, and became frustrated. He had particular difficulty manipulating objects in science class and instruments in music class, and was upset by the noise and unstructured nature of music class. The frustration he felt as a consequence of these difficulties was manifested in his behavior. He became angry, for example, whenever he lost a game to another student. Throughout the relevant time, Student's misbehavior closely correlated with his inability to succeed at the activities in which he was then engaged.

45. Student made no attempt to criticize the content or formulation of the June 6 IEP. He did not contend that it was not calculated to allow him to receive educational benefit. Nor did he contend that the services promised in the IEP were not delivered in conformity with the IEP, except for the alleged nonexistence or late start of the social skills group. He made no effort to argue that he should not have been removed from class on any of the occasions on which he was removed, or that there was any failing in the District's response to the disciplinary problems he posed.

46. Father testified that he believed the multi-teacher class caused Student's difficulties and bad attitude because nothing else in Student's educational program had changed since the second grade. That claim, however, is refuted by the record. Student changed and grew. The curriculum he had to master became harder; Ljepava testified without contradiction that Student had difficulty making the transition to more challenging third grade academic requirements. Student's parents' custody dispute was evolving. Most importantly, Father's attitude toward Student's class had changed.

47. Student did not prove that there was any causal relationship between his assignment to the multi-teacher class and his misbehavior. Before school started on the first day, he observed his Father protesting his placement to the Principal. He refused to enter the multi-teacher class on the first morning it met. When he entered the classroom, he denounced it as the wrong class for him, and began a sustained campaign of insults and misbehavior apparently calculated to force the District to reassign him. His rejection of the multi-teacher class preceded his arrival in it, and was unrelated to anything that occurred in it.

Student's progress

48. Student argues that in the 25 school days at issue, he made no meaningful academic progress. However, he failed to prove that claim.

49. The record concerning Student's progress, or lack of it, is sparse. Neither party introduced any grades or other direct measurement of Student's performance during the relevant period. The parties agree that Student did well in second grade. In spring 2006 he took the state's annual STAR (Standardized Testing and Reporting) test, on which his performance was measured against that of other second graders. He was found to be proficient in english language arts, scoring 366 on a scale of 600, and proficient in mathematics, scoring 386.

50. Ljepava, Erpenbeck, and Tanner-Durston agreed that during more structured lessons like mathematics, Student focused well on the materials and performed well. During less structured lessons he was frequently disengaged. Erpenbeck estimated that Student was engaged 80 percent of the time, and disengaged 20 percent of the time. The District's witnesses agreed that Student benefited from his lessons when he was engaged in them, but did not benefit when he was not engaged.

51. Erpenbeck was asked at hearing whether Student's experience in her class benefited him, and responded that his experience was a "failure" because of his attitude toward the class. Moberg testified that Student benefited at some times and not others. Tanner-Durston testified that Student made meaningful progress on academic subjects during the relevant time, because he did the academic work, but made no progress on behavior. Asked to comment on Erpenbeck's observation that Student's experience in her class was a failure, Tanner-Durston testified that it would be characteristic of Erpenbeck to consider the experience a failure unless everything was exactly as it should be. Erpenbeck's own testimony suggests that her assessment may have been overstated; she also testified that Student benefited when he was engaged in his work, and that he was engaged 80 percent of the time.

52. In an attempt to prove that Student would succeed if given the chance, Father testified that on October 24, 2006, Student was given a computer-based test of his skills. The results showed that Student had risen to the level of a fifth grader in mathematics, reading, problem-solving, and concept skills. The District stipulated that Father's description of Student's scores on the test were correct. The scores undermine Student's argument that he did not progress in school, because, if accurate, they show that Student advanced from being proficient at second-grade work in spring, 2006, to doing fifth-grade level work in October, 2006.

53. Assuming Father's description of Student's progress to be accurate, it is not possible to allocate credit for Student's remarkable progress among any of his three placements between the STAR test and the October 24 test. Student attended four weeks of summer school without incident. He spent 25 school days at Montclair. On October 6 he was removed to Garden Gate, a private school. It is logical to assume that each of these placements contributed to his progress, and Student produced no evidence to the contrary. Student's own evidence thus shows that he made meaningful progress while at Montclair.

54. Father testified that, in his opinion, Student could not have made meaningful progress at Montclair because he was removed from class on 15 school days out of 25. Father offered no proof of that assertion, and the record does not support it. Moberg and Erpenbeck testified that Student was removed from class on only three or four occasions. Moberg stated that these removals lasted from one to three hours. No evidence contradicted that testimony.

55. Student did not prove that he failed to make meaningful progress in the third grade at Montclair, or that the June 6 IEP was not reasonably calculated to afford him the opportunity to make such progress. The evidence showed that any failure of Student to make more progress in Montclair was the result of his hostility to his placement, not any fault of the District.

Social skills group

56. The District was required to provide services to Student in conformance with his IEP. The June 6 IEP set forth a plan for improvement of Student's social skills, partly by exposing him to a "social skills group." Student argues that the social skills group, properly defined, was never created; that if it did exist, it was not begun until at least the third week of school; and that its late start contributed to his behavioral problems.

57. The parties dispute the meaning of the term "social skills group." Father testified that he believes the term has a narrow and well-understood meaning that does not include the group that the District labeled a social skills group, and does not involve participation by a S/L therapist, who in his view was to provide separate services.

58. Behaviorist Ljepava testified that the S/L therapist implemented the social skills curriculum and the social skills group. Ljepava defined a social skills group as a group put together by the S/L therapist to work on various social skills topics that relate to Asberger's syndrome and autism.

59. Resource specialist Tanner-Durston defined a social skills group more broadly, as a group in which someone who is qualified to teach social skills works with multiple students on how to relate to each other. Among those who may be qualified to lead such a group are a S/L therapist, a behavior specialist, a core teacher, a resource specialist, or a properly trained classroom aide. Tanner-Durston attended Student's June 6, 2006 IEP meeting, and understood that his social skills group would be led by the S/L therapist.

60. Patricia Vidmar has been the District's Director for Pupil Services since July 2006. She and the Director for Special Education oversee the District's special education program. Vidmar hires, sets up classes, and monitors compliance. She has a bachelor's degree in psychology from the University of California at Berkeley, and a master's degree in educational psychology from California State University. She has credentials in multiple subjects, pupil personnel, school psychology, and educational administration. She is a licensed educational psychologist, and a licensed marriage, family, and child counselor. She

was an elementary school principal for 11 years, an assistant principal at a middle school for four years, and a guidance supervisor and school psychologist for 10 years.

61. Vidmar testified that there are several kinds of social skills groups. The group that included student is one example. Another social skills group exists in the District's comprehensive autism program, and is led by staff trained in ABA rather than by a S/L therapist.

62. The weight of evidence showed that the definitions of "social skills group" by the District's witnesses were more accurate than Father's definition. The June 6 IEP refutes the argument that speech therapy is a separate service. The first reference to the group in the IEP is to a "social skills group in speech," a term which is shortened to "social skills group" in the following paragraphs. The IEP later lists the group under the heading "speech delivery in the 06/07 school year." This language contemplates use of the social skills group as part of S/L therapy. Student offered no evidence to support Father's narrow definition of the term. District witnesses uniformly offered a definition of "social skills group" broader than Father's, and were more qualified to say what the term meant. Ljepava, Moberg, and Vidmar all testified that they regarded the group put together at recess by the S/L therapist as a social skills group within the meaning of Student's June 6 IEP. The weight of evidence showed that the social skills group promised in Student's June 6 IEP was provided at recess by the S/L therapist.

63. It is not clear from the evidence when the social skills group was first convened. The IEP itself is ambiguous, since the social skills plan is on a page separate from the usual form that calls for a specific starting date. The plan states that the behaviorist would help Student at the beginning of the school year to feel positive about attending the group, and that the time when Student would attend social skills group "will be addressed" in order to minimize the pressure of being pulled out of class. A later paragraph in the social skills plan provides that the group would meet for 30 minutes a week, but specifies no starting date.

64. Student introduced a document written by the S/L therapist entitled "Speech-Language Progress Notes," which, according to Vidmar, showed that the first day Student received speech therapy from the S/L therapist was September 6, 2006. Student asserts that the social skills group, if convened at all, was not convened until that day. Ljepava and Vidmar, testified that they did not know when the social skills group started, but the S/L therapist would know. Neither party called the S/L therapist as a witness.

65. Some preparation was required before the first social skills group could be convened. Tanner-Durston testified that delivery of special education services at Montclair did not usually start until the second week of school, because teachers used the first week to get to know each other, to get their rules established, and to do their initial evaluations of students. Ljepava testified that the first two weeks were used to identify students who would be appropriate members of the group. Principal Moberg testified that there was some implementation of the group by the S/L therapist, who was in the process of putting together

a social skills group, and was beginning implementation by interacting with Student on the playground during recess. She did not say when this occurred.

66. The weight of evidence showed that the District was not substantially late in convening Student's social skills group, if it was late at all. Since the group was to meet only once a week, the District could not have been late until a week had gone by. Thursday, August 31, 2006, was the first day on which the District could have been late. The first social skills group met on Wednesday, September 6, four school days later,⁵ and some preparation for the group occurred before that.

67. Student did not prove that there was any causal relationship between the alleged failure of the District to start a social skills group, or to start it on time, and his misbehavior. The District did convene such a group at the appropriate time. Even if it had not, there was no evidence that such a failing would have had anything to do with Student's misbehavior.

CONCLUSIONS OF LAW

1. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Cal. Ed. Code § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code § 56363, subd. (a).)

2. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07.) Second, the tribunal must decide whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

3. In determining whether a district offered a student a FAPE, the proper focus is on the adequacy of the District's placement, not on any alternative proposal. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) As long as a school district provides a FAPE, methodology is left to the district's discretion. (*Rowley, supra*, 458 U.S. at 208.)

⁵ Monday, September 4, 2006, was Labor Day.

4. In *Rowley*, the Supreme Court held that the IDEA does not require school districts to provide to special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at 201.)

5. The relevance of a student's subsequent performance to the adequacy of his IEP is limited. In *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, parents who had supplemented their child's education with private tutoring challenged the adequacy of an Individual Family Service Plan (IFSP) (the equivalent of an IEP for infants and toddlers) on the ground that the child's subsequent lack of progress in school demonstrated the inadequacy of the IFSP. The Ninth Circuit rejected that approach:

We do not judge an IFSP in hindsight; rather, we look to the IFSP's goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [student] with a meaningful benefit...

(*Adams, supra*, 195 F.3d at 1149.) Quoting *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041, the *Adams* court observed:

'An [IEP] is a snapshot, not a retrospective.... [A]n IEP must take into account what was, and was not objectively reasonable when the snapshot was taken...'

(*Adams, supra*, 195 F.3d at 1149; see also, *Carlisle Area School v. Scott P.* (3d Cir. 1995) 62 F.3d 520, 530 ["Any lack of progress under a particular IEP ... does not render that IEP inappropriate."].)

6. In *Rowley*, the Court found that some educational benefit had been conferred on the student since she achieved passing marks and advanced from grade to grade. (*Rowley, supra*, 458 U.S. at 202-03.) However, the Court cautioned that it was not establishing any one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at 202, 203 n.25.)

7. The Ninth Circuit refers to *Rowley*'s "some educational benefit" requirement simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way Sch. Dist.* (2004) 394 F.3d 634, 645; *Ash v. Lake Oswego School Dist., No. 7J* (1992) 980 F.2d 585, 587-88.) Other circuits have interpreted "some educational benefit" to mean more than trivial or *de minimis* benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341, 349.) The Third and Sixth circuits have required that the benefit be "meaningful." (See, e.g., *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384, 395; *Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 862.)

8. The factual showing required to establish that a student has received some educational benefit under *Rowley* is not demanding. For a student in a mainstream class, “the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress.” (*Walczak v. Florida Union Free Sch. Dist.* (2d Cir. 1998) 142 F.3d 119, 130.) A district need not guarantee that a student will make a month’s academic progress in a month’s instruction. A student may benefit even though his progress is far less than one grade level in one school year. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.*, *supra*, 200 F.3d at 349 n.3.) A two-month gain in reading in 10 instructional months has been held an adequate showing. (*Delaware Valley Sch. Dist. v. Daniel G.* (Pa. Cmwlth. 2002) 800 A.2d 989, 993-94.)

9. A student derives benefit when he improves in some areas even though he fails to improve in others. (See, e.g., *Fort Zumwalt Sch. Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area School v. Scott P.*, *supra*, 62 F.3d at 530.) He may derive benefit while passing in four courses and flunking in two. (*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.* (S.D.Tex. 1995) 931 F.Supp. 474, 481.)

10. If a child’s behavior impedes his learning or that of others, an IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i); Ed. Code § 56341.1, subd. (b)(1).) One such intervention is with a behavioral support plan. Another involves a behavior intervention plan, a document that is developed when the student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of her IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f).) A serious behavior problem is behavior that is self-injurious or assaultive, causes serious property damage, or is pervasive and maladaptive and not effectively controlled by the instructional and behavioral approaches specified in the student's IEP. (*Id.*, subd. 3001(aa).)

11. Petitioner has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. ____ [126 S.Ct. 528, 163 L.Ed.2d 387].)

Determination of issues

12. Based on Factual Findings 1 and 4-55, and Legal Conclusions 1-9 and 11, the District did not deny Student a FAPE in the SY 2006-2007 by placing him in a multi-teacher classroom. The placement was designed to meet his unique needs, was appropriate, and did not cause any of his behavioral difficulties.

13. Based on Factual Findings 1, 4-45, and 48-67, and Legal Conclusions 1-9 and 11, the District did not deny Student a FAPE by failing to convene a social service group, or by convening it late. The group was timely convened and its presence or absence was unrelated to Student’s behavioral difficulties.

14. Based on Factual Findings 1, 4-45, and 48-55, and Legal Conclusions 1-9 and 11, the District did not deny Student a FAPE by depriving him of an opportunity to receive

meaningful educational benefit. The June 6 IEP was reasonably calculated to afford student meaningful educational benefit, and did so.

ORDER

For the foregoing reasons, Petitioner's requests are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d) requires this decision to indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code § 56505, subd. (k).)

Dated: November 29, 2006



CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings
Special Education Division