

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAKLAND UNIFIED SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2013040377

DECISION

The Oakland Unified School District (District) filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California (OAH) on April 8, 2013. The District filed an amended complaint (amended complaint) on July 16, 2013. The District's amended complaint was deemed filed by OAH on July 31, 2013. The District named Student as the respondent.

Administrative Law Judge Margaret M. Broussard, heard this matter in Oakland, California, on August 29 and 30 and September 4 and 5, 2013.

Lenore Silverman, Attorney at Law, represented the District. Alejandra Leon, Attorney at Law was present during portions of the hearing. Kara Oettinger attended all days of the hearing on behalf of District.

Anthony Mason, friend of Mother, represented Student. Student attended the hearing on August 29, 2013. Student's mother (Mother) attended the hearing at some points in person, at other times by speakerphone and sometimes waived her right to be present.

On the last day of hearing, September 5, 2013, the parties were granted a continuance to file written closing arguments by the close of business on September 25, 2013. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted.¹

¹ The District's Closing Brief has been marked for identification as District's Exhibit 53, and the Student's Closing Brief has been marked for identification as Student's Exhibit 1.

ISSUES²

1. Did the District offer Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2013-2014 school year, as specified in the June 4, 2013 individualized education program (IEP)?
2. In order to provide Student a FAPE, must the District speak with Student's neurologist and physician to obtain current information regarding the status of a seizure disorder and treatment plan and to discuss other health concerns raised by Mother?

SUMMARY OF DECISION

The District contends that the IEP offer of June 4, 2013, will provide Student a FAPE. Mother consented in part to the June 4, 2013 IEP. The District seeks a determination that the June 4, 2013 IEP, offers Student a FAPE, and an order that will allow it to implement the entire June 4, 2013 IEP offer, over Mother's objections.

Mother generally withheld consent for the June 4, 2013 IEP, stating her disagreements as follows: service level changes in occupational therapy (OT); some language in the behavior intervention plan (BIP); some language in the emergency plan; the failure of the District to instruct Student in American Sign Language (ASL); three of the annual goals; the use of District aides with Student instead of non-public agency (NPA) aides; the elimination of instruction in Student's home; and requiring Student to attend school for the 2013-2014 school year at a middle school campus.

The District also contends that in order to provide Student a FAPE, the District must be able to speak with Student's neurologist and physician. Mother does not agree that the District needs unfettered access to Student's medical providers and argues that this access is not required for the District to provide Student a FAPE.

The District generally met its burden to show that the IEP offer from June 4, 2013, offers Student a FAPE in the LRE. The IEP addresses Student's needs that stem from his disability. The District may implement the June 4, 2013 IEP, as amended by this decision and discussed below, over Mother's objections. However, the District did not meet its burden to show that it be allowed to speak to Student's medical providers. As detailed below, there is no statutory support for this position, and the District can obtain the same information through the assessment process.

² The issues have been rephrased and re-ordered by the ALJ for clarity.

FACTUAL FINDINGS

Background and Jurisdiction

1. Student is a 15 year-old boy who currently resides with Mother within the geographical boundaries of the District. Student is eligible for special education under the category of autistic-like behaviors. Student has autism, low cognitive ability, is non-verbal, has a long standing seizure disorder, and often exhibits behaviors that injure himself or others. Examples of Student's self-injurious behaviors include hitting his head, biting his arms to the extent that his arms have been described as looking like "ground meat," scratching himself, pinching his torso, pinching his cheeks, hitting his head so hard that it makes a "thunk," sound, slapping his stomach causing bruising, and punching himself about the body. Student also reaches out and hits or punches people in his presence, and hits items like windows, doors and televisions. Many of these behaviors occur several times each hour. Student often requires restraint throughout the day and across environments.

2. Student is described as a "great kid" with a willingness to be social. He is a "people pleaser," if he gets the attention he wants. Student likes to ride his bike and he likes music. Student has a special relationship with his pet dog and loves taking his dog for a walk around the lake.

3. Student's parents are involved in a family court matter in front of the Superior Court, County of Alameda. The Superior Court Judge in that matter has issued several orders regarding Student's attendance in school. The latest order in effect states that Student will attend school on Monday, Thursday and Friday for five hours each day. The timing of the five hours shall be set to best accommodate [Student's] current classes and needs.

Student's Educational and Medical History

4. Student has been eligible for Special Education since the age of three. Although Student has been enrolled in a variety of settings since that time, he has mostly been educated in the home environment for the last 10 years. Student is non-verbal. His program for the last few years has primarily been in home services with two Applied Behavior Analysis (ABA)³ "skills trainers," supervised by behavior analysts. Student has had limited school attendance of two partial days per week in a severely handicapped special day class (SH-SDC), accompanied by the two skills

³ Applied behavioral analysis (ABA) is a type of therapy that uses a system of rewards and consequences to teach new skills and replace undesirable behaviors with desirable behaviors.

trainers.⁴ These skills trainers currently work for Trumpet Behavioral Health (TBH), formerly known as Quality Behavioral Outcomes (QBO), and these agencies have been contracted by the District to provide services to Student.

5. Student has been diagnosed with a seizure disorder. Student has partial- complex seizures which manifest as short staring spells when Student stares or slumps over and is unable to respond to communication. Currently, Student has one to two seizures per week and is often quite sleepy after he has a seizure. Student tends to have seizures when he is upset or under stress and there is an increased risk of seizure when Student hits himself in the head.

6. Student had surgery in 2004 to restructure his skull. As a part of that procedure, the surgeon opened Student's skull and, after the surgery, Student had to be protected from slipping and falling. At this time, there is no indication or any report that Student's skull did not fully heal. There are no medical restrictions in place from any physician regarding Student's head.

7. Although he has been prescribed medications to address both his behavior and seizure disorder, Student is not currently taking these medications. Mother testified that many medications have side effects and because Student cannot communicate well, she would not be able to know whether Student was suffering from the side effects of a medication, which, she described as more severe than the conditions they were prescribed to ameliorate.

Mother's August 2013 Letter Regarding Agreement/Disagreement with the June 4, 2013 IEP

8. The District held an IEP team meeting for Student on June 4, 2013. At the time of the IEP team meeting, Mother did not consent to the IEP. Mother wrote to the District three times regarding her specific disagreements with the June 4, 2013 IEP. The serially written documents were sent in July and August 2013 and were inconsistent in parts. Mother testified that a letter dated August 13, 2013, accurately reflects her disagreement with the District's June 4, 2013 IEP offer and therefore the disagreements outlined in this letter will be referenced in this decision.⁵

⁴ In this decision, the term "skills trainers" will be used interchangeably with the term "aide." Both terms describe the one-to-one assistants employed by the District to work with Student.

⁵ Because the District has filed this case in response to Mother's partial lack of consent to the June 4, 2013 IEP, in order to override Mother's partial lack of consent, this Decision will not analyze in-depth the portions of the IEP document with which Mother has consented.

9. Mother's August 13, 2013 letter is approximately five and a one-half pages of single spaced detailed responses to the June 4, 2013 IEP, some of which are relevant in this matter. The letter sets out which services Mother consents to, which services she does not consent to, and a section with general concerns. Mother did not write the letter herself; the letter was written by Student's former attorney. Mother had no part in the drafting of the August 13, 2013 letter, but stated she was aware of the content of the letter. However, Mother seemed unfamiliar at times with the content of the letter and while her testimony was generally consistent with the specific terms of the letter, she did not testify specifically about all aspects of her disagreement or agreement with the June 4, 2013 IEP, as outlined in her letter. Mother's concerns, as expressed in her testimony, were generally regarding her desire to have Student continue to receive instruction in the home, her concerns about Student's safety, and her desire to have Student receive formal instruction in ASL. The August 13, 2013 letter, also details concerns regarding a proposed assessment for Student, which is not the subject of this proceeding and will not be addressed in this Decision. Mother testified that as of the time of the hearing in this matter, she was not completely aware of the content of the June 4, 2013 IEP.

The Appropriateness of the June 14, 2013 IEP

June 4, 2013 IEP Present Levels of Performance

10. Student's present levels of performance were reported at the time of the June 4, 2013 IEP team meeting. The progress on previous goals, as reported at the June 4, 2013 IEP team meeting, reflect goals that were not current. Mother had not provided consent to goals since 2011, therefore, the District was still working on goals developed about two years earlier. The June 4, 2013 IEP, details clear, measureable information and data for Student in his goal areas of: getting adult attention; participation in gross motor turn-taking activities; completion of seatwork activities; use of an "I see" sentence strip; following two-step directions; independently returning a greeting/farewell; and use of the Picture Exchange Communication (PEC) to answer the question "What is your name."

11. The June 4, 2013 IEP delivers, in narrative form, a detailed, clear description of Student's abilities and observations of Student in Band, P.E., Language Arts (including reading, writing, listening and speaking), Math (including number sense, measurement and geometry), and Science (body parts). In the area of Community, Student was not permitted by Mother to engage in outings in the community during that school year, so his levels from a previous year were reported.

12. The IEP lists Student's present levels of performance in the areas of speech and language and occupational therapy. The IEP lists specific, data-driven information regarding Student's language development and communication, gross and fine motor development, self-care, sensory processing and behavior. The section describing Student's present levels of performance also describes observed behavioral

issues, health, vocational, adaptive/daily living skills (including bathroom, clothing, hand washing and mealtime), and his use of assistive technology. Student's present levels of performance are sufficiently detailed and comprehensive and are appropriate.

Student's Educational Needs

13. Student has a substantial disability which impacts him in many areas. The IEP lists the following areas of need for Student:

- Receptive Language
- Math
- Community
- Social Skills
- Self-Help
- Behavior
- Vocational
- Expressive Language

14. Based on the evidence presented at hearing, including all information regarding Student's present levels of performance, the areas of need on the June 4, 2013 IEP, are comprehensive and appropriate for Student. Student did not contend or demonstrate that he had any additional areas of need or that any identified areas of need were not applicable to him.

June 4, 2013 IEP Goals

15. The IEP document has 11 goals embedded in it. The first page of Mother's August 13, 2013 letter indicates that she has consented to goals one through seven, nine and eleven. Mother has not consented to goals eight and ten from the IEP document. However, the letter is contradictory in part and states on the fourth page of the August 13, 2013 letter that Mother withdraws consent to goal number one. Therefore, it is assumed that Mother disagreed with and withheld consent for goals one, eight and ten.

16. Goal number one reads "By 5/23/14, [Student] will expand his functional vocabulary (currently at approximately 25 words) and use of expressive language to 35 words using multiple modalities (sign, PECS) to complete daily schedule daily given minimal verbal prompting to include the following: request ("more music, please"), choice making and completing phrases."⁶ This goal has

⁶ PECS stands for Picture Exchange Communication System.

three attendant objectives which, over the course of the year, fade the level of prompting and increase the number of vocabulary words.

17. Mother contends in her August 13, 2013, letter that goal one is not appropriate because Student should be specifically taught ASL and that Student's lack of communication skills drive his behavioral excesses. Parent does not address the PECS part of the goal as inappropriate specifically, but argues that ASL should be his primary method of communication. Mother's concerns regarding ASL are methodology, placement and service concerns and are addressed below in the placement section of this decision.

18. Based upon Student's age and his current functional vocabulary of 25 words, the goal to learn 10 new words is appropriate for Student. Mother provided no evidence that Student was capable of learning more than 10 new words in a year. This goal, and the attendant objectives, are specific and measurable and address a critical area of need for Student, expressive communication. Goal one is appropriate for Student.

19. Goal number eight reads, "By 5/23/2014, After reviewing his destination prior to departure (verbally and with pictures), [Student] will lead the correct route to said destination, stopping at every curb independently, for 2 different destinations in the community in 3 consecutive trial days for each route as measured by teacher and/or staff charting." The attendant objectives increase the number of destinations and consecutive days.

20. Mother contends, in her August 13, 2013 letter, that goal eight is not appropriate because "as written, this goal has student stopping at the curb independently." Mother is concerned that if Student is unable to stop at the curb independently, he may get hit by a car. Mother seems to confuse the services that will be provided to assist Student in meeting the goal with the appropriateness of the goal itself. The goal, as written, does not imply that Student will just be left on his own to navigate curbs and streets himself. As discussed below, Student is accompanied by two trained aides at all times. The goal does not contemplate that Student would not be stopped by his aides, should he fail to stop independently. Mother put on no evidence at the hearing that this goal is not appropriate for Student in any other way. The goal, and attendant objectives, are specific, measurable and address Student's area of need in learning to access and navigate in his local community. This goal is appropriate for Student.

21. Goal number 10 reads: "By 5/23/14, except for bowel movements, [Student]'s diaper will remain unsoiled throughout the entire school day in 9/10 consecutive trial days as measured by teacher and/or staff charting." The three attendant objectives start by requiring an unsoiled diaper 6/10 days, and increase the number of consecutive days Student will have an unsoiled diaper.

22. Mother contends, in her August 13, 2013 letter, that the goal should also include keeping Student from soiling his diaper with bowel movements. Mother contends that Student is 15 years old and that Student should not soil himself at all. However, Mother put forth no evidence that Student could achieve both bowel and bladder control in one year. The goal as written, for bladder control only, is appropriate for Student. This goal is specific and measurable and addresses Student's self-help area of need.

23. The IEP has eight other goals which address the following areas of need: expressive language, receptive language, math, vocational, self-help, social skills and behavior. Mother has provided consent to these goals and did not raise concerns during the hearing regarding these goals. Goals two, three, four, five, six, seven, nine and eleven, and their attendant objectives, are specific and measurable and address Student's needs. All of the goals on the June 4, 2013 IEP are appropriate for Student.

24. The District also contends that four behavior goals located in the "Intensive Behavior Services Assessment Report" dated May 20, 2013, are also part of Student's IEP. The only possible reference to these goals is in the notes section of the June 4, 2013 IEP where it indicates proposed behavior goals were reviewed. At hearing, Mother recalled discussing the behavior goals at the IEP team meeting. The four behavioral goals address: Student increasing flexibility and toleration of novel reinforcers; utilizing coping strategies to decrease behaviors; accepting changes in routine, environment or staff; and independent transition from one location to another. These four goals address Student's behavior area of need. They are specific, measurable and are appropriate for Student.

June 4, 2013 IEP Accommodations and Modifications

25. The June 4, 2013 IEP, offers accommodations and modifications to be regularly used in the classroom related to grading, presentation of material, and regarding the setting in which that Student will be tested. The June 4, 2013 IEP also offers testing accommodations and modifications to be used with Student for California standards tests. However, the IEP document indicates that these accommodations and modifications are only to be used for CA Standardized Test (CST), the California Modified Assessment Test (CMA), and the California High School Exit Exam (CAHSEE). The IEP team determined that Student would take the California Alternate Performance Assessment (CAPA), so the standardized test accommodations and modifications listed on Student's IEP would not apply to Student.

26. The accommodations and modifications listed on Student's IEP are appropriate for Student. They address his areas of need and there was no evidence presented in the hearing that any of the listed accommodations and modifications were not appropriate for Student. There was no evidence presented in hearing that

Student needed any accommodations and modifications that were not listed in his IEP.

June 4, 2013 IEP Services and Placement Offer

Occupational Therapy

27. Student's June 4, 2013 IEP, offered OT consultation one time a month for 45 minutes to be delivered in Student's SDC class. Mother believes that Student should additionally receive 20 minutes a week of individual OT services.

28. Michaelynn Woodrow, Occupational Therapist, testified credibly in the hearing regarding Student's needs and the District's proposed offer of OT services for Student on the June 4, 2013 IEP.⁷ She testified that Student has sensory needs and that he needs sensory input throughout his school day. Sensory input throughout Student's day helps lessen his self-injurious behaviors by providing safer alternatives for him to receive sensory input than hurting himself. Student needs sensory intervention all day and every day in school and this is the level of service that the consultation provides. Ms. Woodrow consults with the SDC staff to ensure that they make sure Student's sensory needs are met throughout his school day. The consultation services include her collaboration with school staff, Student, and Mother. Ms. Woodrow helps them understand how to intervene and modify Student's environment, if necessary.

29. Ms. Woodrow originally started seeing Student when he was seven years of age and continued until Student was nine years of age. Recently, she was reassigned to Student. Ms. Woodrow credibly testified that she does not believe that Student requires individual OT services because Student's progress in the area of OT has been unchanged and she was unable to identify any improvement for Student in the past six years, during which time Student received individual OT services. Student's OT needs can be met in the classroom by classroom staff with occupational therapy consultation and guidance. Ms. Woodrow was also concerned about the consequences of removing Student from class given his issues with transitions. Ms. Woodrow testified that all of Student's OT related goals can be met in the classroom with instruction from staff, with consultation from the OT.

30. The following OT interventions have been discussed with Student's teacher for the 2013-2014 school year, will be used with Student, and are appropriate: consistent scheduling; allowing Student to ask for a sensory break; a sensory break area; and meeting his proprioception needs through squeezes and shoulder

⁷ Ms. Michaelynn Woodrow has an undergraduate degree in occupational therapy. She is a registered OT and has been working at the District since 1998.

compressions.⁸ Ms. Woodrow testified that based on her experience and interactions with Student's SDC teacher for the 2013-2014 school year, these interventions can be implemented in the classroom without direct OT support.

31. Student did not put forth any evidence that individual OT for 20 minutes a week was necessary for Student to receive benefit from special education. The District met its burden to show that 45 minutes of OT consultation a week is appropriate for Student.

Speech and Language

32. Student's June 4, 2013 IEP offered speech and language individual services for 30 minutes one time per week and speech and language consultation for 60 minutes one time a month in the community. Parent consented to these services and did not dispute the appropriateness of these services at hearing.

33. Speech and Language Therapist Lindsay Saffold testified credibly regarding Student's speech and language needs and the appropriate services for Student that would meet those needs.⁹ Ms. Saffold has worked with Student since the summer of 2012 and during the 2012-2013 school-year, she saw Student once a week for 30 minutes. Besides this exposure, Ms. Saffold observed Student coming in and out of his SDC class, and she provided consultation to his classroom teacher last year. In addition, Ms. Saffold collaborated with Student's teacher on lessons and went into the classroom once a week and taught a lesson to the entire class. Ms. Saffold has experience with students that are severely disabled and who are non-verbal.

34. Ms. Saffold described the various communication systems for non-verbal students that are embedded in the SDC class offered for Student. These systems include lots of visuals on the wall, enlarged calendar, color coding, and a "Big Mac," which is an electronic button that can be preprogrammed with an answer to a question that a student can press and participate with group choral instruction.

35. Student uses and benefits from use of the "Big Mac," PECS and a visual schedule. The "Big Mac" and PECS are appropriate for Student because people in the community can understand what Student is trying to communicate. Student currently uses signs like tickles, singing, and more to initiate interactions and

⁸ Proprioception: from Latin *proprius*, meaning "one's own," "individual" and perception, is the sense of the relative position of neighboring parts of the body and strength of effort being employed in movement

⁹ Ms. Lindsay Saffold has a bachelor's degree in sociology and a master's degree in speech-language pathology and audiology. She is a licensed speech-language pathologist and has been working at the District since January of 2012.

can respond to questions like “what do we need to do with the door” with a sign approximation for “open.”

36. Student needs to generalize his communication skills and this supports the appropriateness of the speech and language consultation services. The speech and language therapist consults with the teacher and other staff and the communication instruction happens throughout Student’s school day and in the community. Student has a very hard time generalizing skills in an environment other than the one in which he learns and practices the skills. Student’s need to generalize his communication skills in the classroom support the appropriateness of the offer of individual speech and language services to be delivered in the classroom.

37. Based on the evidence presented at hearing, the June 4, 2013 IEP offer of individual and consultation speech and language services are appropriate for Student. The District met its burden to show that the offer of speech and language individual services for 30 minutes one time a week in the community and speech and language consultation for 60 minutes once a month is appropriate for Student.

Health and Nursing

38. Student’s seizure disorder and other medical needs which stem from his self-injurious behaviors require health and nursing services in the school environment. The District has a seizure plan, signed by Student’s physician, which is to be followed by school staff if Student has a seizure at school. The evidence shows that the District can manage Student’s seizures safely in the classroom. Student’s June 4, 2013 IEP offered Health and Nursing Specialized Physical Care one time per month for 15 minutes outside the general education classroom and Health and Nursing Other Services for 15 minutes one time per month outside the general education classroom. The Parent consented to these services specifically and did not dispute the appropriateness of these services. The District has met its burden to show that the Health and Nursing Specialized Physical Care and Health and Nursing Other Services are appropriate for Student.

Aide Support

39. Student’s June 4, 2013 IEP offered two temporary additional adult support (TAAS) aides in class for 30.5 hours per week each in the classroom or community. Parent agrees that Student needs two aides but believes that much of the aide support should be in the home and that the IEP should indicate that the aides will be from a NPA, where she believes the aides have been properly trained for Student.

40. Student’s needs are pervasive and he needs intensive, individualized instruction and behavioral support delivered throughout his day in order to make educational progress. At this time, Student needs to be accompanied by two aides at all times. The evidence demonstrated that the aides assigned to Student must be

restraint-trained. Student needs behavioral interventions, including and up to restraint, many times per hour to keep him safe, and proper restraint for Student often requires two adults.

41. All of the aides working with Student must be restraint-trained and trained regarding seizure protocol. His aides must also be trained to manage the range of behaviors Student exhibits so that restraint is not always necessary. All of the skills trainers working with Student currently have bachelor's degrees and complete 32-40 hours of training after they are hired by TBH, the current NPA working with Student. The skills trainers used with Student, through TBH, are appropriately trained. All aides working with Student should be able to remain calm and have a flat affect when Student has behaviors. All witnesses agreed that Student needs two aides in order to maintain his safety. Much of this requirement is due to the particular need to ameliorate Student's behaviors that injure himself and others.

42. Mother also expressed concern about a school program for Student that used District employees for aides and not the skills trainers from the NPA. The District uses the designation TAAS for Student's aide services on his IEP. It is the policy of the District not to specifically identify on an IEP service page whether the person to provide the TAAS services will be a District employee or the employee of an NPA. Mother was concerned that she had not observed District aides using behavioral techniques and that they were not able to provide for Student's safety. District personnel unequivocally testified that the TAAS aides proposed for Student in the June 4, 2013 IEP were TBH aides already working with Student. Kara Oettinger, District Executive Officer, testified that prior to the District considering changing the aides to District employees, the District would conduct an assessment and hold an IEP team meeting. Therefore, the District's offer in this case is deemed to include the TBH aides as the TAAS aides and not District employees. This decision is not reaching any conclusion as to whether District employees could appropriately be assigned as Student's aide because that is not at issue in this matter. The District's offer of two TAAS aides from TBH, as trained, is appropriate for Student.

Behavior Consultation

43. Student's June 4, 2013 IEP offers Student behavior consultation in class or the community for 1200 minutes per month. Testimony established that this behavior support is from TBH which provides Student's trained aides. This behavior support consists of: the development and support of the skills trainers; continuous program assessment and improvement; development and implementation of behavior strategies to address teaching student alternative and adaptive skills to successfully function across environments; collaboration with and training of the team to ensure that all members have the necessary skills to implement the programs and strategies consistently; and, collaboration with other IEP team members for the purpose of information sharing and coordination of services.

44. The evidence established that this behavioral consultation service is necessary and appropriate for Student. Student's behaviors are challenging and managing Student's behavioral excesses requires an intensive program that is managed by trained professional behavioral staff and not just implemented by the aides assigned to Student.

Assistive Technology

45. Student's June 4, 2013 IEP offers Student assistive technology consultation one time a month for 30 minutes in class. Student uses a multi-modal communication system of signs, gestures and PECS. Student also uses the "Big Mac." A consultation model for assistive technology service for Student is appropriate because Student needs the staff with him during the day to facilitate the use of the assistive technology to assist him with communication all day, every school day. It is unclear whether Mother provided consent to these services; nonetheless, the offer for assistive technology services is appropriate for Student.

Behavior Intervention Plan

46. A BIP is also part of Student's June 4, 2013 IEP. The BIP for Student has been in place and unmodified for several school years. Mother did not consent to a functional analysis assessment to update the BIP until the summer of 2013 and, by the time of the hearing, the assessment had not been completed. The behaviors of concern in the BIP are self-injurious, aggression, and disruptive vocalizations. The BIP defines these behaviors, describes typical episodes of these behaviors, gives antecedent/environmental strategies, replacement and adaptive behaviors to teach, strategies to teach positive behaviors, and also details consequence-based strategies. There is also a schedule for monitoring and evaluating the plan and a plan for fading or terminating the plan.

47. The BIP is specific to Student. It is seven pages long and gives very detailed information in every area. All of the information in the BIP is consistent with the other evidence regarding Student and the testimony at hearing, and, despite the fact that the BIP was developed in prior school years, it remains relevant and addresses Student's current behaviors.

48. Mother consented with all but the last paragraph that says that the BIP would be faded when Student replaces the maladaptive behaviors. This paragraph is appropriate for Student, as there would be no reason to implement the strategies in the BIP if Student was no longer exhibiting the behaviors. The BIP is appropriate for Student.

Emergency Plan

49. An emergency plan has been developed for Student and is part of his June 4, 2013 IEP. This emergency plan, dated June 4, 2013, is to be used any time that Student engages in a significantly disruptive behavior or potentially dangerous behavior that Student's BIP has failed to resolve. The emergency plan consists generally of thirteen steps to keep Student and others safe. It begins with trying to block student and moves through different strategies, up to and including restraint. The plan also requires documentation any time any intervention from the emergency plan is used. The plan requires the documentation to be reviewed by the behavior intervention case manager to determine if changes should be made in the BIP.

50. Mother disagreed with step 12 in the emergency plan which states that the school administration may use District-approved procedures (e.g. sending Student home) as deemed necessary. The District's ability to send Student home after all BIP interventions and all emergency plan interventions have been tried is reasonable and appropriate. The emergency plan, which was developed by TBH in consultation with the District and the IEP team, is appropriate for Student. It is detailed and specific to Student and the behaviors he exhibits.

Classroom Placement

51. Student's June 4, 2013 IEP offers Student placement in a SDC for five periods a day, five days a week, a total of 1,305 minutes. Testimony established that Student would continue to be mainstreamed in Band and P.E. during the remaining hours of his school day. The IEP is not completely clear on this issue on the service page or in the notes. However, on page two of the June 4, 2013 IEP, it states that Student will be in the regular education environment 17% of the time, which is consistent with the testimony regarding Band and P.E. at hearing. Also, there was no disagreement raised about Student remaining in Band and P.E. either in Mother's August 13, 2013 letter or at the hearing itself. Student's mainstreaming opportunities in Band and P.E. are appropriate for Student. Student was reported to enjoy participation in both these classes, during the minimal time he was brought to school. Student loves music and also enjoys physical movement. Student is able to be around typically developing peers during this mainstreaming time. Band and P.E. are appropriate mainstreaming opportunities for Student.

52. The SDC the District offered for Student for the 2013-2014 school year is located at Bret Harte Middle School. Student's IEP identifies Student as a seventh grade Student in the 2012-2013 school year and therefore, Student would typically promote to eighth grade for the 2013-2014 school year. In Mother's August 13, 2013 letter to the District, she contends that placement for Student at Bret Harte Middle School is not appropriate for Student. Mother contends that Student would be appropriately placed in a SDC class on a high school campus for 2013-2014, given that Student will turn sixteen at the end of the 2013-2014 school year. Mother

believes that the age range of students at the middle school is too young for Student and, therefore, the middle school students are not Student's peers. However, given Student's difficulty with transitions, his sporadic attendance and his familiarity with the Bret Harte campus, placement for Student at the middle school is appropriate. Student knows some of the staff and is not particularly large for his age. As discussed below, an appropriate placement for Student will be placement in a school setting for a full school day five days a week. This is enough of a change for Student at this time, without the added burden of changing schools.

53. Neena Bawa, Program Coordinator for the District, testified credibly about the District's SDC placement offer for Student.¹⁰ Ms. Bawa oversees the elementary and middle school autism, severely handicapped and inclusion programs for the District. During the 2012-2013 school year, Ms. Bawa was an Autism program specialist for the District. During the 2012-2013 school year, Ms. Bawa was Student's program specialist. She conducted a home visit, two classroom visits and had communication with Mother. Ms. Bawa also met multiple times with employees of TBH. Ms. Bawa testified credibly regarding the SDC classroom at Bret Harte Middle School and what was appropriate for Student. She was familiar with the facts of the case and she answered questions in a thoughtful and forthright manner. Perhaps, most tellingly, Ms. Bawa attended to Student during Mother's testimony on the first day of hearing for a few hours in the hearing room. The ALJ personally observed Ms. Bawa using a variety of successful techniques to manage Student's behavior and, under very stressful circumstances, helped Student cope with being in an unfamiliar environment watching his mother testify and being questioned. Her kind but firm attention to Student coupled with her skills in dealing with Student leads to her testimony about Student being given very great weight.

54. The SDC at Bret Harte Middle School has students with a range of disabilities. There are 10-12 students enrolled in the class and several paraprofessionals resulting in an adult:student ratio of 2:1 for the 2013-2014 school year. This ratio does not take into account Student's two TAAS aides who would also be in the classroom. The focus of the class is on functional academic skills and the teacher uses a variety of curricula and teaching methods including ABA, touch math, News to You (current events), visuals, visual schedules and assistive technology. Once a week, a speech and language group session is embedded into the classroom. There are a variety of sensory interventions embedded throughout the day. There is a school nurse on site who consults with the classroom teacher often. Student was

¹⁰ Ms. Bawa has a bachelor's degree in education and sociology and a master's degree in special education. She holds credentials as an educational specialist and a moderate to severe clear credential. She has been working at the District since August 2012 and in special education since 2005. Prior to that she had experience as a behavior senior therapist.

placed in this classroom last year and, when he attended, the teacher reported that he was successful.

55. The teacher assigned to the SDC class at Bret Harte for the 2013-2014 school year is Ms. Sayuri Sakamoto. Ms. Sakamoto holds a moderate to severe special education teaching credential and has been a teacher for nine years. Prior to becoming a teacher, Ms. Sakamoto was a paraprofessional in a classroom for five years. Ms. Sakamoto is restraint-trained. The paraprofessionals assigned to Ms. Sakamoto's class (who are in addition to the TAAS aides who will support Student in the classroom) were scheduled to attend restraint training on September 10-11, 2013. Although Ms. Sakamoto is new to Student's SDC class for the 2013-2014 school year, the paraprofessionals in the class have not changed, the classroom is the same and last year's teacher overlapped with Ms. Sakamoto for a short time at the beginning of the 2013-2014 school year. Also, Ms. Wilkinson, the former TBH employee who provided behavior consultation to Student's program since 2010, provides Ms. Sakamoto with behavior support in the classroom under contract with the District. The SDC placement offered by the District is appropriate for Student.

56. Daniel Madden, Board Certified Behavior Analyst (BCBA), is currently assigned as the supervising clinician for Student through TBH.¹¹ Mr. Madden has been working with Student's program since June 2013. As part of his role as supervising clinician, Mr. Madden has observed Student in the home and school environments, and has met with Student's teacher. He also supervises Student's skills trainers. Mr. Madden believes that Student is capable of tolerating school full time and that Student needs the consistency and predictability that full time placement in school would bring. His opinion is that all of Student's behaviors can be managed in the classroom environment. His opinion is that Student should attend school every day with the same mode of transportation. Mr. Madden's opinion is given great weight. He has spent considerable time with Student, and has seen him both at home and in school.

57. The SDC class offers an embedded program that teaches functional skills like phone numbers, addresses, PECS, safety signs and menu math. The program integrates community based instruction which is appropriate for Student. Most importantly, the full day SDC, with mainstreaming in Band and P.E., offers contact with typical and disabled peers throughout Student's day, not just for the few hours he was in school previously.

58. Student also needs to be in school full time to benefit from the speech and language consultation and occupational therapy consultation which provides support for his communication skills and sensory needs so they can be worked on all

¹¹ Mr. Madden has a bachelor's degree in psychology and a master's degree in education in organizational management.

day, every day. Every hour Student is not in school is another hour Student is not getting embedded communication instruction and sensory intervention. Teaching Student to be successful in school requires him to be in school. A full day program five days a week is appropriate for Student.

59. There was no evidence that Student would benefit from a transition period from the home program to attendance full time in school (i.e. increasing Student's time in school while decreasing the time in the home program over a specific time period). The evidence showed that Student, who does not understand the concept of scheduling or have the cognitive ability to anticipate a schedule change, would likely be overwhelmed by all of the little changes in such a transition. So, instead of getting used to one change, he would experience changes every day with no context, and this could undermine the entire proposition of a transition plan. Therefore, an immediate change to a full time, five day a week school program is appropriate for Student.

Transportation

60. The June 4, 2013 IEP offers Student door-to-door transportation accompanied by two aides. Until Student can be safely transported without the need to stop the school bus to restrain Student, the District offered transportation by taxi cab accompanied by two aides.

61. Student needs two aides to accompany him in either the school bus or taxi cab so that if he engages in maladaptive behaviors, the aides can perform proper restraint. Restraint cannot be done in a moving vehicle, so a school bus or a taxi cab would have to pull over, which is why a taxi cab is an appropriate choice until Student can be transported without need for a stop for restraint. The District's offer of transportation is appropriate for Student.

Home vs. School Environment

62. The main area of contention between the parties is whether Student should spend the majority of his week in the home getting instruction by the skills trainers or whether Student should be in the school environment full time.

63. This ALJ is not without empathy and admiration for Mother and her concerns regarding Student's safety. Student's difficulty communicating, injurious behaviors and earlier skull surgery and the concerns during healing certainly would make any parent legitimately very cautious. However, the surgery was many years ago and there is no evidence that there is lingering damage from this issue. Student also has seizures, which can be frightening and could lead to a medical emergency for Student. However, Student's seizure plan is clear and classroom staff have been trained in seizure protocol. There are many students in the District with seizures who are successfully managed in the school environment. The aides who will accompany

Student at school are the same aides from the home program. There was no evidence that Student would be less safe in the school environment than in the home environment.

64. Mother described her opinion regarding the benefits of the home program as compared to the to school placement. She contends that the home program gives Student a chance to bond and have a relationship with the aides. She believes that at home, there are lots of opportunities for Student to use sign language, his communication book and he can ride his three wheeled bike. Although Mother testified that she has no problem with Student attending school full time, this testimony was not credible as her refusal to sign IEP's which would have removed the home program component, and the statements in the letter of August 13, 2013, about the need to continue Student's home program are wholly inconsistent with her testimony. Perhaps most telling is that Mother has violated a Superior Court Order requiring Student to attend school three days per week and instead is only delivering Student to school two days a week.

65. Ms. Bawa's concerns with the home program are that the home program has Student with three adults constantly (the third adult is Mother). Student was observed to be very dependent on the adults for all prompting and the activities were not age appropriate (i.e. singing the song "The Wheels on the Bus"). Ms. Bawa contrasted this with her observation of Student at school where he sits by his peers, takes direction from his teacher and follows directions. Ms. Bawa testified that Student could not reach the goals formulated for the June 4, 2013 IEP if he continued the home program and only attended school eight hours a week.

66. Student's home program in the morning is from 8:30 to 9:30 on the days he goes to school. The program consists of breakfast, a short group meeting, reading a social skills book, two bathroom breaks and helping him dress. There are no goals on Student's IEP and Mother proposed no goals that would require a program that involved breakfast, toileting and dressing in the home environment. While these services in the morning might be helpful to parent, they are not required to provide Student with a FAPE. The absence of a credentialed teacher overseeing the home program is greatly concerning. Student needs a program designed and implemented by a properly credentialed teacher.

67. Ms. Jeanine Wilkinson, BCBA, worked with Student through TBH since October 2010.¹² In October 2010, Ms. Wilkinson was assigned to work to support Student's program of two full days in school and three full days at home. At that time, Student's placement was described as a "stay put" placement as Mother had not consented to the District's then currently offered IEP placement. In January 2011, Ms. Wilkinson became the supervisor to the skills trainers assigned to Student. As

¹² Ms. Wilkinson has a bachelor's degree in human services/management and a master's degree in Psychology. She is a board certified behavior analyst.

part of her responsibilities, she observed Student in school and home about three times per week. The skills trainers tried to emulate school in the home program by having Student line up, having a “morning meeting” and used discrete trial training for Student. Although Mother has set up a dedicated “classroom” in Student’s home and efforts were made to replicate the school experience for Student, there are no peers, there is no curriculum and no teacher designs or oversees the program.

68. By the end of the 2011-2012 school year, Ms. Wilkinson believed Student should be in the classroom environment where Student would be part of a group setting, get more functional life skills, have more community outings and prepare for high school. Ms. Wilkinson was also concerned about the lack of a credentialed teacher working with Student’s home program and she felt that Student would benefit from a credentialed teacher. By October 2012, Ms. Wilkinson believed Student should be in school full time. Ms. Wilkinson testified that if Student were allowed to attend school full time, his rate of acquisition would increase for academics, vocational skills and self-help skills. Ms. Wilkinson’s opinions are given great weight. She worked closely with Student over several years. She had access to Student in both the home and the school and testified openly and without reservation.

69. Student’s acquisition of functional academics has been limited because his school schedule has been so limited. He misses the morning group and almost all other activities. Because Student attends school on such a limited basis, his time in the SDC class is limited almost completely to afternoon circle time. His other time is spent in P.E., Band and related services. Student needs to start his day where he finishes his day to minimize confusion for him and the number of transitions he must endure.

70. Testimony established that Student has a hard time generalizing skills in an environment other than the environment where it is taught. Student has not been successful generalizing skills across environments. Student needs routine and consistent practice. Further, the classroom environment is safer than the home environment for Student as there are no glass doors, and greater availability of more restraint-trained adults in the immediate vicinity.

71. Evidence at the hearing, across witnesses, was consistent regarding Student’s difficulty transitioning to school. Student’s program recently has Student at home with the aide support in the mornings on the two days he attends school. Mid-morning the aides leave the house and drive to school and Mother drives Student to school. When Student gets to school, in the middle of the school day, he has attacked both the aides and his mother and has a very hard time transitioning to the school environment. Student will kick off his shoes and take off his clothes.

72. All witnesses agreed, including Mother, that Student was as likely to need to be restrained at school as he was at home. The evidence showed, and the parties agreed through testimony at the hearing, that Student exhibits the same self-

injurious behaviors in the home environment and in the school environment. There is no difference in the frequency, intensity or pattern of Student's behaviors as manifested in the two environments, and this also supports full time placement in school.

73. The evidence overwhelmingly supports that Student's placement in a full-time, five day-a-week program is appropriate for Student. The home program is not appropriate for Student at this time. The District's determination not to offer a home program for Student is appropriate.

ASL

74. Student claims that ASL instruction should be a part of Student's IEP services and placement. Student currently uses English sign approximations and has a repertoire of about 25 signs. Mother contends that Student only uses functional signs to communicate because he has not been taught ASL.

75. Ms. Wilkinson, testified that she is familiar with ASL and took several college level classes in ASL. She testified that ASL is not simply signing English words and translating them from English. ASL uses different word order and is another language altogether. There is no evidence that Student would be able to take the English language concepts he does understand and translate them into ASL. Further, many of the word signs in ASL have a complex, ordered set of movements and Student would not be able to even approximate these movements in a way that others could understand him. Despite Mother's desire for Student to be instructed in ASL, there was no evidence that Student would be able to cognitively or physically communicate in ASL. Therefore, the absence of ASL instruction in Student's June 4, 2013 IEP does not make the June 4, 2013 IEP inappropriate.

District's Compliance with Procedural Requirements Regarding the June 4, 2013 IEP

76. The District properly noticed the June 4, 2013 IEP team meeting and the proper members were in attendance at the IEP team meeting. For the first time in his closing argument, Student alleges several procedural violations by the District in regard to the June 4, 2013 IEP team meeting. All of Student's allegations regarding procedural violations are not supported by the evidence at the hearing. Student alleges that the June 4, 2013 IEP team meeting was conducted and chaired by an attorney. Student seems to allege that the June 4, 2013 IEP offer was predetermined as the District came with a take it or leave it attitude. Student also alleges that the District committed a procedural violation when it invited the attorney who represents Student in his parents' custody matter to the June 4, 2013 IEP without informing parents.

77. There was no evidence presented that District's counsel conducted and chaired the IEP meeting and, even if this were true, Student provided no authority that this would constitute a procedural violation. There was no evidence that the District predetermined the June 4, 2013 IEP offer. The IEP team carefully considered input from Student's service providers who recommended the cessation of the home program and Student's enrollment in school full time, five days a week. Just because Mother did not agree with the other members of the IEP team, does not make the placement offer predetermined. Finally, the District may invite to the IEP meeting anyone with knowledge of Student. Minor's Counsel was allowed to communicate with educational professionals and, because the issue of school attendance was one of the issues in the Superior Court matter, her attendance at the IEP team meeting to enable her to better understand the IEP offer for Student does not present a procedural error.

78. However, as noted above, the District failed to attach the behavior goals to IEP. They are located on another document which was not appended to the IEP. Although all parties agreed that these goals were also part of the IEP, they were not incorporated in the IEP document. This does constitute a procedural error, however, as analyzed below, the error does not rise to the level of a denial of FAPE.

79. The District also failed to specifically note in the IEP document what general education classes Student would be participating in, failing to name Band and P.E. In this case, Student was participating in these classes to work on peer relationships and other IEP goals. The District should have specifically identified these classes as a part of Student's placement offer somewhere on Student's IEP. This does constitute a procedural error but does not rise to the level of a denial of FAPE to Student.

District Contact with Neurologist and Physician

80. The District contends that it should be able to call Student's neurologist and physician on the telephone and that this communication is required to provide Student a FAPE. During the hearing, the District offered testimony that they want to do this to make sure they have all of the information that they need. The District has a detailed, clear seizure plan signed by Student's physician. The District offered no evidence that it needed any information that it did not already have on that form. Mother, while willing to get written information from the physician to the school, is concerned about maintaining medical privacy by giving the District unfettered access to medical personnel. The District did not show that it was entitled under the law to contact Student's medical personnel nor that such contact was required to provide Student a FAPE.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*¹³

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, and which sets forth the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some

¹³ Unless otherwise indicated, the legal citations in this Introduction are incorporated by reference into the analysis of each issue decided below.

educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “‘meaningful’ educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f), (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C) & (D); Ed. Code, § 56505, sub. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA due process hearings is preponderance of the evidence].)

5. OAH is within the Department of General Services under the direction and control of a director, who appoints and maintains a staff of impartial ALJ’s to conduct administrative hearings for governmental agencies. (Gov. Code, §§ 11370.2, 11370.3) Pursuant to an interagency agreement with the California Department of Education, OAH conducts the impartial due process hearings required by the IDEA. (Ed. Code, § 56504.5.)

Issue One – Did the District offer Student a FAPE in the LRE for the 2013-2014 school year, as specified in the June 4, 2013 IEP?

6. In Issue One, the District contends that the IEP of June 4, 2013 offers Student a FAPE in the LRE for the 2013-2014 school year, and that it should be allowed to implement the IEP over Mother’s objections. Student contends that the June 4, 2013 does not offer FAPE for a variety of reasons including: disagreements with service level changes in OT; some language in the BIP; some language in the emergency plan; the failure of the District to instruct Student in ASL; three of the goals; the use of District aides with Student instead of NPA aides; the elimination of

instruction in Student's home; and requiring Student's attendance for the 2013-2014 school year full time every school day at a middle school campus.

7. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).) The IEP shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

8. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

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

10. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward

attaining his annual goals and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV),(VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

11. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

12. School districts are required to provide each special education student with a program in the LRE. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 § C.F.R. 300.114 (a)(2006); Ed. Code, § 56031.) If a school district determines that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education et al.*, (5th Cir. 1989) 874 F.2d 1036, 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

13. State and federal law requires school districts to address behavior problems that affect the education of the child with a disability or of other students. An IEP team must consider whether a child’s behavior impedes his or her learning or that of others, and if the team determines that it does, the team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subds. (b)(1) & (c).) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student’s right to placement in the least restrictive educational environment. (*Ibid.*) An IEP that does not appropriately address behavior that impedes a child’s learning denies a student a FAPE. (*Neosho R V Sch. Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-1468; *San Rafael Elem. Sch. Dist. v. Cal. Special Educ. Hearing Office* (N.D. Cal. 2007) 482 F.Supp.2d 1152, 1161-1162; *Escambia County Bd. of Educ. v. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265.)

14. Predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. Of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, *supra*, 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child’s programming in advance of an IEP team meeting. (*N.L. v. Knox County Schs.*, *supra*, 315 F.3d at p. 693, fn. 3.)

15. Under the IDEA, in matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child’s right to a FAPE; significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to the parents’ child; or caused a deprivation of educational benefits. (20 U.S.C. 1415(f)(3)(E)(ii).)

16. California has enacted a similar statute that requires in a hearing conducted pursuant to this section, the hearing officer shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the IEP. (Educ. Code section 56505(j).)

17. Procedural inadequacies that result in the loss of educational opportunity or seriously infringe on the parents’ opportunity to participate in the IEP formulation process clearly result in the denial of a FAPE. (*Shapiro v Paradise Valley Unified Sch. Dist.* (9th Cir. 2003) 317 F.3d 1072, 1078. See also *Amanda J. v. Clark Cnty. Sch. Dist.*, (9th Cir. 2001) 267 F.3d 877, 892.) A procedural error results in the denial of educational opportunity where, absent the error, there is a “strong likelihood” that alternative educational possibilities for the student “would have been better considered.” (*M.L. v. Federal Way Sch. Dist.* (9th Cir. 2003) 394 F.3d 634, 657 (Gould, J. concurring in part and concurring in the judgment).) Thus, an IEP team’s failure to properly consider an alternative educational plan can result in a lost educational opportunity even if the student cannot definitively demonstrate that his placement would have been different but for the procedural error. (*Id.*)

18. The June 4, 2013 IEP appropriately identifies Student’s present levels of performance in all areas. The present levels are sufficiently detailed to give the IEP team the necessary information to determine Student’s areas of need. The IEP lists eight areas of need which stem from Student’s present levels of performance. The IEP contains eleven appropriate measurable goals that meet Student’s needs. There are also four behavioral goals that are appropriate and measurable and meet Student’s needs.

19. The June 4, 2013 IEP contains an appropriate statement of the program modifications or supports that will be provided for Student to advance appropriately toward attaining his annual goals, and to be involved in and make progress in the regular education curriculum. It also contains an appropriate statement of individual accommodations that are necessary to measure Student's academic achievement and functional performance.

20. The June 4, 2013 IEP offers Student an appropriate frequency and duration of related services in the areas of OT, speech and language, health and nursing, and assistive technology. These related services are necessary for Student to benefit from special education. The IEP's offer of two TAAS aides, supplied by TBH, is appropriate for Student and necessary for Student to benefit from special education. Student needs the assistance of two aides, full time, who are restraint-trained, throughout his school day. The behavior consultation services are appropriate in frequency and duration, and are required for the Student to benefit from special education.

21. Student does not require instruction in ASL in order to meet his goals or obtain educational benefit. There was no evidence presented that Student is capable of learning or using ASL in a meaningful way.

23. Student has pervasive, severe and long-standing behaviors that interfere with his learning. The June 4, 2013 IEP contains an appropriate BIP and an appropriate emergency plan for Student. These plans are detailed, data-driven, and address Student's behavioral and medical needs.

24. The District's offer of placement in the SDC class currently taught by Ms. Sakamoto with placement in the general education classes of Band and P.E. is appropriate for Student. The placement will allow student access to both disabled and typically developing peers. The placement provides appropriate settings and instruction for Student to work towards mastery of his goals. Placement at home does not afford Student any interaction with peers, and Student's needs are not so severe that they cannot be managed in a classroom environment. Placement at school five days a week for a full school day is also appropriate for Student. Student needs the consistency, routine and increased instructional time to benefit from his education and meet his goals.

25. The District's offer of placement is in the LRE for Student. The combination of special education instruction for Student in core areas with the general education classes of Band and P.E. is appropriate for Student given the severity of his needs. His placement also affords Student interactions with typically developing peers in both Band and P.E. Continued placement in the home instead of the school environment would not constitute the LRE for Student. There is no access to any California state approved curriculum in the home, there is no teacher to deliver

instruction and there is no access to any peers. Therefore, the District's placement as outlined in the June 4, 2013 IEP is LRE for Student.

26. The District's offer of transportation is appropriate for Student. Student will be accompanied by both aides, and the District's use of a taxi cab in the beginning meets Student's behavioral and safety needs.

27. The District generally complied with the procedural requirements of the IDEA. However, the District did fail to include the four behavioral goals within the actual IEP document, and also failed to specifically list Band and P.E. as the general education classes that are part of Student's placement. However, neither of these procedural violations rose to the level of a denial of a FAPE. The evidence showed that Mother understood that the behavioral goals were included in Student's IEP and that she was aware and agreed with Student's mainstreaming in Band and P.E., so there was no deprivation of Mother's right to participate in the decision making process. There was no evidence that either omission from the IEP document caused a deprivation of educational benefit. Therefore, neither the omission of the behavioral goals from the IEP document or the failure to specifically list Band and P.E. on the IEP results in a denial of FAPE for Student.

28. In light of the above, as to Issue One, the District has met its burden of showing that the June 4, 2013 IEP offers Student a FAPE in the LRE for the 2013-2014 school year. The IEP does contain two minor procedural violations which must be remedied in order for the IEP to be considered complete.

Issue Two – In order to provide Student a FAPE, must the District speak with Student's neurologist and physician to obtain current information regarding the status of a seizure disorder and treatment plan to discuss other health concerns raised by Mother?

29. In regards to Issue Two, the District contends that in order to provide a FAPE to Student, it must be able to speak to Student's neurologist and physician. Mother contends that speaking to the medical providers is not necessary and that any information the District needs can be provided in writing.

30. In evaluating a child for special education eligibility, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) In some cases, a district may be able to conduct or obtain its own medical assessment where the parent limits access to the student's medical provider. (*Shelby S. v. Conroe Independent School District*, 454 F.3d 450 (5th Cir. 2006), cert. denied 549 U.S. 1111 (2007).)

31. In *Irvine Unified School District v. Student*, a California district could compel a 17-year-old student with an autoimmune disease to undergo medical assessments, despite his parents' claims that an evaluation would endanger the

student's health. (May 8, 2006) Cal.Ofc.Admin.Hrngs. Case No. 2005090857.) The ALJ determined that the school district's assessment plans were appropriate and necessary in order for the district to provide the student with FAPE, and ordered the student and his parents to comply with the assessment plans unless a medical doctor indicated that the student was unable to participate in the assessments for health reasons.

32. In this case, the District provided no legal support for its position that it should be able to contact Student's medical providers without parental consent. The District's argument fails for at least two reasons. First, Student's medical providers have confidentiality requirements that are not subject to the jurisdiction of OAH, and OAH cannot order a third party to provide information to the District. Second, the District has a statutory way to get the information it desires. The District can present the parents with an assessment plan to have a medical examination done, at District expense, to get the information it needs regarding Student's seizures and other health concerns.

33. In light of the above, regarding Issue Two, the District has not met its burden to show that it should be able to contact Student's medical providers without parental consent.

REMEDIES

Effect of Superior Court Order(s)

34. As of the time of this Decision, there is no order from the Superior Court regarding the appropriateness of Student's educational placement. This Decision determines that the District's IEP offer of June 4, 2013, is appropriate and may be implemented over Parent's objections. Therefore, the District no longer need offer the home program component to Student. However, as long as the Superior Court order is in effect, that controls the hours Student will actually attend. OAH has no jurisdiction to determine the validity of a Superior Court order or to overturn it. OAH's jurisdiction is limited to determining whether Student has been offered a FAPE in the LRE, which this Decision does.

35. As a remedy in Issue One, the District requests to implement the June 4, 2013 IEP, over Mother's objection. The June 4, 2013 IEP, which will be amended to include the behavioral goals and note Student's participation in Band and P.E. may be implemented without parental consent.

ORDER

1. The District will amend the June 4, 2013 IEP by adding the four behavior goals to Student's IEP and by noting in the IEP that Student will participate in Band and P.E. in addition to the SDC class offered by the District.
2. The District may implement its June 4, 2013 IEP over the objections of Student's parent as amended by this order.
3. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the District prevailed on Issue One and Student prevailed on Issue Two.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: October 4, 2013

/s/

MARGARET BROUSSARD
Administrative Law Judge
Office of Administrative Hearings