

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAUGUS UNION SCHOOL DISTRICT.

OAH Case No. 2016060676

DECISION

Student, by and through his Mother, filed a due process hearing request with the Office of Administrative Hearings, State of California, on June 9, 2016, and filed an amended due process hearing request (complaint) on July 14, 2016, naming Saugus Union School District.

Administrative Law Judge Christine Arden heard this matter in Saugus, California, on September 8, 13, 14 and 15, 2016.

Mother represented Student. Student did not attend the hearing. Mother attended the hearing for its entirety, with the exception of the afternoon session on September 14, 2016. Father attended the hearing for part of the morning session on September 13, 2016.

Lauri A. Arrowsmith, Attorney at Law, represented District. Diana D'Elia, Director of Student Services, attended the hearing for its entirety on behalf of District.

A continuance was granted to October 10, 2016, to allow the parties time to file their written closing arguments. Upon timely receipt of the written closing arguments, the record was closed on October 10, 2016, and the matter was submitted for decision.

ISSUES¹

1. Did District deny Student a free appropriate public education by failing to implement Student's Behavior Intervention Plans dated March 25, 2015, and January 19, 2016, by physically restraining Student?
2. Did District deny Student a FAPE since June 9, 2014, by failing to implement academic goals stated in Student's IEPs dated March 31, 2014; January 23, 2015; March 25, 2015; and May 16, 2016?
3. Did District deny Student a FAPE by failing to record grades on his report card for the first reporting period of the 2015-2016 school year?
4. Did District deny Student a FAPE by holding an IEP meeting on May 16, 2016, without a general education teacher in attendance?

SUMMARY OF DECISION

Student failed to prove that District denied him a FAPE by failing to implement Student's behavior intervention plans by physically restraining Student when Student's aggressive behaviors required emergency interventions. Evidence established that District appropriately implemented the plans.

Student failed to prove that District denied him a FAPE by failing to implement the academic goals stated in four IEPs. District materially implemented the goals. Student worked on his academic goals every day he was present in school. Student's excessive absences and serious behavior problems interfered with Student's work on his academic goals. Moreover, assessments of Student indicated it was expected that Student's progress toward reaching his academic goals would be slow.

Student failed to prove that District denied him a FAPE by failing to report grades on his report card for the first reporting period of the 2015-2016 school year. The IDEA does not require that special education students receive report cards or grades on report cards. Student's curriculum was goal driven. His teacher regularly recorded his progress on his academic goals and reported that progress to Parents through Student's goal binder and at IEP meetings. Therefore, the absence of report card grades for one reporting period did not deprive Student of a FAPE.

Student failed to prove that District denied him a FAPE by holding an IEP meeting on May 16, 2016, without a general education teacher present at the meeting. A lack of a

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. ex rel. J.E.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

general education teacher's presence at the IEP meeting did not constitute a procedural error because student was not in a general education curriculum, nor did the IEP team expect that he would be in a general education curriculum in the future. Therefore, the attendance of a general education teacher was not required at the IEP meeting.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is an 11-year-old male who resided with his Parents in the District at all relevant times. Student has been eligible for special education services since he was three years old. His primary qualifying eligibility category is autism. According to two academic assessments discussed below, Student is also intellectually disabled. Student has overall delays associated with his autism, which impact his ability to attend to tasks, follow directions, socialize and make his wants and needs known. He has very limited functional verbal communication. Student progresses slowly when learning new skills.

Student's Placement in the Regional Autism Program

2. During the 2014-2015 and the 2015-2016 school years Student participated in the regional autism program, which was held at Emblem Academy, a comprehensive elementary school within the District. The program is goal-driven in that the curriculum and instruction are individualized for each child based on the goals stated in his/her IEP.

3. District placed Student in a "moderate to severe" special day class at Emblem Academy for both fourth grade, in the 2014-2015 school year, and fifth grade, in the 2015-2016 school year. Student received occupational therapy, language and speech therapy and consultation, and assistive technology consultation services. Student did not verbally communicate with peers at school, except in instances where Student wanted a toy or object, such as an iPad, possessed by another child.

4. District school psychologist, Elizabeth Moran, credibly testified at hearing. Student has exhibited behavior problems at school since he was in first grade. Student has had multiple behavior intervention plans over his time in the District to address his behavioral needs, which changed over time. Ms. Jennifer Minkus, District behavior specialist, and a California Board Certified Behavior Specialist since 1998, also testified very credibly at hearing. Ms. Minkus worked with Student at four different schools within the District. Ms. Moran and Ms. Minkus jointly consulted on Student's behavior intervention plans. Ms. Minkus noted Student had difficulty with changes to his schedule, which is typical of many autistic children.

5. Student preferred certain activities at school, such as using an iPad. Student's negative behaviors at school increased on days when Mother took him out of school for part of the day or when he arrived late to school and when he had not been at school on the

previous day. Student's negative behaviors also escalated when District staff expected him to engage in activities other than his preferred activities and when he was directed to stop engaging in a preferred task.

DISTRICT POLICY ON USING PHYSICAL RESTRAINTS

6. Behavior intervention plans for students in the District never prohibit physical restraint of a student. Physical restraint might become necessary if a student behaves in a physically aggressive manner which creates a physical danger to either himself or others. District policy requires physical restraints should be used only as a last resort for the protection of students and adult staff members. In those instances, staff uses only the minimum amount of physical restraint needed.

7. A Behavior Emergency Report is completed every time a student is physically restrained by District staff. The report, which District promptly provides to parents, describes the events surrounding the incident, the details regarding physical restraints used to neutralize the situation, identifies the parties involved, and injuries, if any, that occurred.

MARCH 31, 2014 IEP

8. Student's triennial individual educational program meeting was held on March 31, 2014, while Student was in third grade. The IEP team reviewed Student's progress. He had met two out of seven of the academic goals stated in his previous IEP. He made significant progress toward his other five academic goals. The IEP team agreed on ten new annual pre-academic and academic goals in the following areas: mathematics, reading fluency, spelling, comprehension, telling time, identifying nouns, writing, communication, stating his name and sorting objects. The IEP team also included a behavior goal and two language and speech goals. The IEP team attached and included a revised behavior intervention plan to the March 31, 2014 IEP.

9. The ten new academic goals adapted at the March 31, 2014 IEP meeting for Student to achieve by March, 2015, were as follows:

- (A.) Student will find the sum or difference of 2 numbers up to three digits long with eighty percent accuracy in 4 out of 5 opportunities.
- (B.) When shown a word card and given a verbal direction to "read," Student will read a list of first, second and third grade words with eighty percent accuracy.
- (C.) Student will independently spell seventy-five 3 and 4-letter grade level appropriate sight words correctly with eighty percent accuracy in 4 out of 5 trials.
- (D.) Student will demonstrate comprehension skills by identifying answers in the text with ninety percent accuracy in 4 out of 5 trials.
- (E.) When shown clocks Student will independently identify the time to the nearest quarter hour with eighty percent accuracy in 4 out of 5 trials.

- (F.) Student will identify 40 nouns with eighty percent accuracy in 4 out of 5 trials.
- (G.) When given a picture Student will write one sentence about the picture made up of 3 words from a word bank without visual prompts in 4 out of 5 trials.
- (H.) When given ten 1-step directions Student will follow and perform the directions with eighty percent accuracy in 4 out of 5 trials.
- (I.) Student will be able to independently state or type his name, age, phone number, address and birthday with eighty percent accuracy in 4 out of 5 trials.
- (J.) Student will be able to independently sort objects and data by common attributes and describe the categories with eighty percent accuracy in 4 out of 5 trials.

Student's Fourth Grade – 2014-2015 School Year

10. In fourth grade Student was placed in Ms. Rala Hodaly's "severe to moderate" special day class. The class included fourth, fifth and sixth graders. Student received occupational therapy, and language and speech therapy services that school year.

11. Ms. Lisa Loscos, assistant principal at Emblem Academy, supported the Regional Autism Program. She oversaw all students' arrivals at school. She also regularly observed all of the special day classes in the Regional Autism Program, including Ms. Hodaly's class.

12. Ms. Loscos testified very credibly at the hearing. She has been the assistant principal at Emblem Academy for three years and also has experience as a program specialist, resource teacher and special day class teacher. She has a master's degree in special education; an educational administrator credential; a teaching credential; a certification in Non-Violent Crisis Intervention (NCI), a method of dealing with aggressive student behaviors, which is discussed below; and significant training in applied behavior analysis.

13. Ms. Loscos saw Student every day he attended school and observed him working on his academic goals in class. She was on Student's IEP team and led, facilitated and took notes at Student's IEP meetings in the 2014-2015 school year.

14. In fourth grade Student was functioning at the preschool to kindergarten level in most academic subject areas. Because Student had some rote skills he was reading words at the first to third grade level. When working on his academic goals Student worked with his goal binder, goal box, tokens and math manipulatives.

15. The goals Student worked on and the related services he received daily were recorded on a one page form contained in Student's goal binder. Student's daily progress on his academic goals was also recorded. A communication log was included in Student's binder to facilitate communication between Parents and Ms. Hodaly. The binder was

completed by Student's teacher near the end of the school day 90 percent of the time and sent home for Parents' review and written communications.

16. During the 2014-2015 school year, communication was strained between Mother and some District staff, including Ms. Hodaly and Ms. Loscos. Mother was unhappy about Student's placement in Ms. Hodaly's class.

17. Student's class engaged in the Community Based Instruction Program three times a month. In that program the class would walk to a nearby shopping center, go to a casual restaurant and order and pay for their food. This exercise gave the children an opportunity to practice practical skills, such as reading, ordering from a restaurant menu, dealing with money, and using functional vocabulary. The Community Based Instruction Program was included in Student's applicable IEP. However, Student did not participate in it because Mother did not give her permission for Student to do so. While Student's class was participating in Community Based Instruction Student went instead to another Regional Autism Program classroom and worked on his academic goals with an adult aide.

STUDENT'S AGGRESSIVE BEHAVIORS

18. Student resisted adult direction and preferred self-directed activities. When an adult directed Student to engage in an activity he did not like, Student occasionally exhibited physically aggressive behaviors, including biting, hitting, kicking, scratching, head-butting, and grabbing or hair-pulling. Student's inability to verbally communicate frustrated him, which also occasionally caused him to act aggressively toward others.

19. Student hit, kicked, bit, scratched, head-butted or grabbed some Emblem Academy staff members when he was in an escalated emotional state. These behaviors also created a physical danger to Student and others around him. Student injured at least five District employees during the 2014-2015 school year. His aggressive behaviors also interfered with his learning and the learning of others. District did not physically restrain Student during the 2014-2015 school year.

DECEMBER 2014 INDEPENDENT EDUCATIONAL EVALUATION

20. Parents requested that District fund an independent educational evaluation of Student in the area of academic achievement in fall 2014. District agreed to Parent's request. Michael Geisser, a California licensed psychologist and educational psychologist, administered an independent academic educational evaluation to Student on November 13, and December 22, 2014. Mr. Geisser has 32 years' experience as a school psychologist. He has been in private practice for the past four years, where he primarily conducts independent educational evaluations of children and training for school professionals, primarily on positive behavioral supports. Mr. Geisser testified credibly, confidently and knowledgeably at the hearing.

21. Mr. Geisser administered the Bracken Basic Concept Scale, Receptive, Third Edition, and the Woodcock-Johnson Tests of Achievement, Form A, Third Edition to Student, who was nine years and six to seven months old, and in the middle of fourth grade, at the time. Mr. Geisser also observed Student at Emblem Academy in occupational therapy, his special day class, and on the playground at recess. Student was working with an adult aide on an academic exercise when Mr. Geisser observed Student in class.

22. Student performed “very considerably below the average/normal or expected range compared to students of his age/grade level” on all the Bracken Basic Concept Scale subtests and concept areas. These results indicated Student had not yet acquired many of the basic readiness concepts necessary for academic learning. Student’s Bracken subtest/concept scores rated Student as “very delayed” in all of the six areas tested.

23. Student also performed “very considerably below the average/normal or expected range compared to students of his age/grade level” on all three Woodcock-Johnson subtests. These results indicated Student was functioning academically at the kindergarten to first grade level. His subtest scores resulted in a rating of “very delayed” in letter-word identification, calculation, and spelling.

24. As a result of the independent educational evaluation, Mr. Geisser recommended that Student’s educational program focus on introductory or primary grade level academic skills mastery. Mr. Geisser very credibly opined at hearing, based on his evaluation, that Student’s progress on his academic goals could be expected to be slow. He further credibly opined that Student learns through rote memorization, rather than comprehension. Consequently, Student requires a tremendous amount of repetition in order to make academic progress, and a general education classroom would not be appropriate for Student.

JANUARY 23, 2015 IEP

25. Student’s IEP team met on January 23, 2015. Mr. Geisser attended the meeting and reported on the results of his independent educational evaluation of Student. Ms. Hodaly reported on Student’s progress on his academic goals. He was making progress on his addition goal. He was making progress on his reading comprehension goal if he first received verbal prompts to the answer choices. He was progressing on his word card reading goal. Student was able to spell some of the words in his spelling goal with a verbal prompt from staff. He was progressing on his time telling goal, but could still not move the hands on a clock to indicate the correct time. On his writing goal Student could verbally form a sentence about a picture, but was still unable to write a sentence. Student progressed on his “following written directions” goal by looking at the card and performing the action depicted on the card. He was having difficulty with the goal which required him to state or write his name, address, phone number and birthday. Student had already met one goal which required him to sort objects by one attribute. Ms. Hodaly usually brought documentation to IEP meetings as the basis for her reports to the team on goal progress.

26. The IEP team made the following changes to Student's IEP: District would conduct an assistive technology assessment; data would be collected for a new baseline in the areas of Student's frustration to be presented at Student's annual IEP meeting; and stories would be used with Student as needed. Student's academic goals and his behavior intervention plan were not revised. Parents requested that District move Student from Ms. Hodaly's class to a different special day class. District refused their request because Student was making progress in Ms. Hodaly's class, and staff members believed Student was appropriately placed in Ms. Hodaly's class with other children who possessed similar skill sets and behaviors.

MARCH 25, 2015 IEP

27. Student's annual IEP meeting was on March 25, 2015. The IEP team discussed Student's academic progress since his last IEP meeting. District staff had collected data regarding Student's academic goal work and progress in the 2014-2015 school year. Student met five out of the ten academic goals in his March 31, 2014 IEP (spelling, telling time, noun identification, following written directions, sorting objects by attribute). He made progress on his other five academic goals (addition/subtraction, reading lists, reading comprehension, sentence writing, write or state personal identification information). Student made significant progress on his reading goal. The IEP team agreed on six new annual goals in mathematics; adaptive living; language arts; reading; independent living; and behavior. The team also added three speech and language goals.

28. The six new academic goals adapted at the March 25, 2015 IEP meeting for Student to achieve by March 25, 2016, were as follows:

- (A.) When given a single digit addition problem Student will use manipulatives to find the sum with 1 to 2 gestural prompts for 8 out of ten math problems for 4 out of 5 trial days.
- (B.) When given ten 2-step written directions Student will read and follow two step directions with eighty percent accuracy in 4 of 5 trials.
- (C.) Student will read a story and answer who, what, when and where questions with 1 to 2 gestural prompts for 8 out of ten questions for 4 out of 5 trial days.
- (D.) Student will read 100 functional words independently with eighty percent accuracy for 4 out of 5 trial days.
- (E.) Student will state or type his personal information (name, phone number, age and birthday) with eighty percent accuracy in 4 out of 5 trials.
- (F.) When Student is asked what he needs or feels he will identify it with eighty percent accuracy in 4 out of 5 trials.

29. The IEP team offered Student placement for the 2015-2016 school year in the Regional Autism Program in a special day class at Emblem Academy and group speech and language therapy; individual and group occupational therapy; language and speech

consultation; and assistive technology consultation. The IEP team offered specialized academic instruction, speech therapy and occupational therapy for the 2015 extended school year.

MARCH 25, 2015 BEHAVIOR INTERVENTION PLAN

30. The IEP team included a behavioral goal and a behavior intervention plan in Student's March 25, 2015 IEP. Over the past year Student had exhibited aggressive behaviors, including biting, hitting, kicking, scratching, head-butting, pulling hair or the closest body part of others close to him. He also sometimes flopped to the floor and screamed. Student's physically aggressive behaviors were usually aimed at adults.

31. Student's March 25, 2015 behavior intervention plan prescribed environmental changes, structure and supports to remove Student's need to use aggressive behaviors. Those generally included areas relating to consistent schedule and routine; varying levels of task difficulty and time; sensory/movement breaks; regulating task completion; preferential and modified seating arrangements based on environmental needs; adjusted academic work according to learning level and interest; social reinforcement and positive feedback; prompts to verbalize needs; proximity to Student during aggressive behaviors and redirection with reinforcement. The behavior intervention plan did not prohibit District staff from physically restraining Student. District implemented the behavior intervention plan and Student was not physically restrained in the 2014-2015 school year.

Student's Fifth Grade – 2015-2016 School Year

32. District initially placed Student in Ms. Hodaly's special day class for fifth grade in the 2015-2016 school year. Mother objected to Student's classroom placement and requested District to move Student to another teacher's class. Ms. Diane D'Elia, District's director of student services, was responsible for overseeing all special education staff and all children in the District with an IEP. She was also on the Student Attendance Review Board. She testified very self-assuredly and credibly at the hearing. Ms. D'Elia initially denied Mother's request because, in her opinion, Ms. Hodaly's class was appropriate for Student.

33. Mother was unhappy with Ms. D'Elia's refusal to change Student's classroom assignment. Student attended school only four days between August 12, 2015, and September 22, 2015, and he was either tardy or left early on each of those days.

34. Near the end of the school day on September 18, 2015, Student behaved aggressively by kicking, biting and head-butting a staff member. He was physically restrained by District staff members, who first blocked Student's aggressive attempts to hit, kick and scratch and then put Student in a safe NCI hold twice. The NCI method is a technique consisting of minimally physical interventions, consisting primarily of non-violent blocks and holds used to safely contain and de-escalate a physically aggressive student. Ms. Hodaly and Ms. Loscos completed a Behavior Emergency Report describing the

incident. The Behavior Emergency Report was promptly provided to Parents. A meeting was set for October 2, 2015, to discuss the incident and Student's Behavior Intervention Plan.

35. Ms. D'Elia revised her earlier decision to deny Mother's request to change Student's classroom teacher. Student moved to Ms. Lois Peters' "severe to moderate" special day class at Emblem Academy about September 26, 2015, six weeks into the 2015-2016 school year.

36. On October 2, 2015, Student's IEP team met to discuss the September 18, 2015 Behavior Emergency Report and proposed revisions to Student's behavior intervention plan. The IEP team proposed that behavior specialist, Ms. Minkus, work with Ms. Peters to develop strategies to revise Student's behavior intervention plan. Mother did not consent to the IEP Amendment/Addendum, which summarized the proposed revisions to Student's IEP. Mother informed the IEP team in fall 2015 that she was against District staff physically restraining Student.

37. The first grading period in the 2015-2016 school year ended on November 20, 2015, and consisted of approximately 60 school days. Student was absent 23 of those days and tardy more than 30 minutes on four days. Student did not receive grades on his progress report for the first grading period during the 2015-2016 school year because of Student's excessive absences and his late start in Ms. Peters' class. Ms. Peters regularly recorded Student's work and progress on his academic goals in Student's goal binder, which was sent home daily with Student. The absence of grades on Student's progress report for the first reporting period did not undermine Student's progress on his academic goals or otherwise deprive Student of the benefit of his individualized educational program because Student's progress on his academic goals during the first grading period was consistently recorded and communicated to Parents.

38. Ms. Peters testified very credibly at the hearing. Ms. Peters has taught special education classes for approximately 18 years. She has a master's degree in special education, as well as a master's degree in educational management. She has taken many graduate courses in applied behavior analysis and completed 1,800 hours of clinical training in applied behavior analysis. Ms. Peters testified very knowledgeably, confidently and candidly. Her demeanor during her testimony revealed her genuine concern for Student's well-being and educational progress.

39. Ms. Peters, Ms. Moran and Ms. Minkus all credibly opined that, due to Student's special needs, structure and strict adherence to a routine schedule every school day was an important component of Student's individualized educational program.

40. Communication was again very strained between Mother and multiple District staff members in the 2015-2016 school year.

41. On October 24, 2015, Mother revoked her consent for Student to participate in speech therapy, adaptive physical education, occupational therapy and the Circle of Friends program, a social enrichment program in which children in special education engaged with general education peers. On October 27, 2015, Mother revoked her consent for Student's participation in special education. As a result of this revocation, Student then enrolled in a general education class at Santa Clarita Elementary School, Student's local public school. Mother acknowledged at hearing that a general education classroom was an inappropriate placement for Student.

42. On October 28, 2015, District's attorney wrote to Mother and offered to set an IEP meeting to discuss Mother's concerns for Student's safety at school and for Student to remain in special education while assessments of Student were pending. Ms. Peters was very concerned for Student when Mother revoked her consent for Student's special education and related services because a general education classroom was not suitable for Student. On or about November 14, 2015, Mother once again consented to Student participating in special education and related services. Student then returned to the Regional Autism Program and Ms. Peters' special day class at Emblem Academy.

43. Student worked on his IEP academic goals every day he was present in school from 9:30 a.m. to 10:45 a.m. Student also worked on his academic goals on certain other days from 11:00 a.m. to 11:30 a.m. Student's daily goal work and progress were recorded in his goal binder.

44. Student exhibited major behavioral problems at school in the 2015-2016 school year. He often had difficulty regulating his emotions, particularly when his regular schedule was not strictly followed, or when he was not permitted to do a preferred task or have an item he wanted. He was particularly prone to behaving aggressively at school when he had: been absent from school the previous day; arrived at school late; or was taken out of school for a portion of the day and later returned to school. The structure Student needed in school was also disrupted by Student's frequent tardy arrivals to school. Student's physically aggressive behaviors repeatedly created a danger to himself and others around him.

45. Student was physically restrained by District staff members on five separate occasions in the 2015-2016 school year when Student was emotionally escalated and behaving aggressively so as to create a physical danger to himself and or others. District staff drafted a Behavior Emergency Report regarding each of these instances on September 18, 2015; December 17, 2015; January 13, 2016², February 22, 2016, and March 29, 2016. District provided Parents copies of the Behavior Emergency Reports. Mother was very upset when District staff physically restrained Student.

46. District staff used physical restraints on Student only when he was physically aggressive and attempting to hit, kick, bite, head butt, grab or scratch staff members or other

² The first page of this Behavioral Emergency Report appears to have been mistakenly dated January 13, 2015.

children. In those instances, District used physical restraints, such as blocking Student's kicks, hits, scratches and putting Student in holds to contain him, for the minimum amount of time necessary to de-escalate Student's aggressive behaviors.

47. Certain Emblem Academy staff members, including Ms. Peters, Ms. Minkus and Ms. Moran, who worked with children predisposed to acting aggressively toward staff members and other children, were trained by certified trainers in NCI, a non-violent physical crisis intervention method. The purpose of NCI is to enable staff to safely handle emergency behavior situations with minimal physical restraints when students act aggressively and put themselves and others in danger of physical injuries. NCI utilizes techniques such as blocking, child control positions, holds and releases from grasps. The NCI techniques eliminate or mitigate physical danger to students and staff members in emergency behavioral situations. In each of the five instances that District staff physically restrained Student in the 2015-2016 school year, they used NCI techniques to contain Student until he calmed.

48. Student incurred minor scratches and red marks on his skin during the five instances in which he was physically restrained at school. He did not seek or receive any professional medical help regarding those injuries. Mother cleaned up Student's scratches at home. Student's pediatrician, Dr. Sylvia Hannah, who testified very credibly at hearing, was never consulted regarding injuries Student allegedly sustained in school while being physically restrained or emotional distress that Student may have suffered as a result of being physically restrained.

49. Mother informed District she was concerned about Student's safety at school. District representatives inquired regarding what specific safety concerns Mother had. However, Mother never specifically identified the nature of the danger that concerned her.

STUDENT'S FREQUENT ABSENCES AND TARDIES IN THE 2015-2016 SCHOOL YEAR

50. During the 2015-2016 school year Student was absent 45 out of 166 school days. Twenty-three of those absences were unexcused. Student was tardy arriving to school 34 times in the 2015-2016 school year. Student's excessive absences and tardies undermined the structure of Student's school schedule and created significant difficulties for Student.

51. On days Student attended school Mother frequently pulled him out of school for a portion of the day, and later brought him back to school. Mother also sometimes picked Student up to take him out for lunch at a time when his class was not scheduled for lunch. When Mother returned Student to school his class was eating lunch. In those instances Student missed class time and later sat idly while the rest of his class ate lunch.

52. Student had difficulty attending to his work and behaving appropriately when he arrived at school late because his regular schedule was disrupted. Student's schedule provided for him to go to the occupational therapy clinic each morning to participate in sensory activities which supported his access to the curriculum for the remainder of the day.

On the days Student arrived to school late he often missed his morning sensory activities. This made it harder for Student to behave appropriately and attend to his academic goal work during the rest of the school day.

53. Student's frequent absences and tardies in the 2015-2016 school year significantly reduced the time Student was available to work on his academic goals. Absences and tardies also triggered Student's negative and aggressive behaviors, which further reduced the time Student had available to work on goals. Ms. Peters and Ms. Minkus were concerned about Student's poor attendance, frequent tardies and partial day absences.

54. District staff collected data regarding Student's academic goal work and progress in the 2015-2016 school year, which was governed, for the most part, by the March 25, 2015 IEP.

55. Ms. Minkus administered a functional behavior assessment to Student from December 2015 through March 2016. Student was absent frequently during the assessment period. Ms. Peters' primary concern for Student was his aggressive behavior, which included: hitting, kicking, biting, scratching or head-butting others. Data collected by Ms. Minkus indicated that over 48 school days from December 1, 2015, through March 17, 2016, Student exhibited aggressive behaviors 404 times. In January 2016, Student exhibited aggressive behaviors an average of 11.5 times a day. By March 2016, the frequency of Student's aggressive behaviors had decreased to an average of 4 times a day. Student's aggressive behaviors continued to be severe in intensity and primarily occurred when Student was prevented from having an item he wanted; a preferred item was taken away from Student; a preferred activity was stopped; or if someone told Student "no." Student's behaviors caused a safety concern and caused injuries to staff and other children.

JANUARY 19, 2016 IEP AND BEHAVIOR INTERVENTION PLAN

56. The IEP team held a meeting on January 19, 2016, to discuss Student's progress since returning to the regional autism program. Student's progress on his goals and in speech and language therapy and occupational therapy were discussed. Ms. Minkus reported she was in the process of conducting a functional behavior assessment.

57. Ms. Minkus also presented a revised behavior intervention plan, which was adapted by the team. The revised behavior intervention plan was nearly identical to the March 25, 2015 behavior intervention plan, except for an enhanced description of the "token system" used to reinforce Student's positive behaviors, and a few additions to the prescribed structure and supports recommended to decrease Student's aggressive behaviors.

58. Student's January 19, 2016 behavior intervention plan did not prohibit District staff from physically restraining Student. At least 8 district employees were injured by Student when he exhibited aggressive behaviors in the 2015-2016 school year. Student was not able to work on his academic goals when he was emotionally escalated and behaving aggressively.

59. District staff members eventually developed a strategy for dealing with Student when he was physically aggressive. Staff would clear everyone from the classroom, except for Student and two staff members, who were each stationed at one of the two doors in the room. When Student approached one staff member aggressively to attempt to hit, kick, grab or bite him/her, that staff member would exit out the door, leaving Student in the room with the other staff member who was located at a distance from Student in front of the other door. If Student aggressively approached the remaining staff member, he or she would exit out the door and the other staff member would enter the room through the other door. After a period of time Student would eventually calm down to a degree that he could return to his regular class routine. Student calmed down more quickly when this strategy was used. Once Student was calmed, he eventually returned to his academic work.

FEBRUARY, 2016 ASSESSMENT BY CALIFORNIA DEPARTMENT OF EDUCATION
DIAGNOSTIC CENTER

60. The California Department of Education Diagnostic Center for Southern California conducted a transdisciplinary assessment of Student during the first week of February 2016, when Student was ten years old. The Diagnostic Center's March 30, 2016 assessment found Student's cognitive skills were comparable to those of children two to four years old. Student's delayed cognitive skills were indicative of an intellectual disability. The report further stated, "[t]he combination of [Student's] intellectual disability and autism will continue to impact all aspects of his development. He will continue acquiring and generalizing new skills throughout his life, but at a much slower pace." Student often had difficulty communicating his wants and needs and "[a]s a result, he becomes frustrated and resorts to aggressive behaviors in order to express himself."

MAY 16, 2016 IEP

61. District held Student's annual IEP meeting on May 16, 2016. A general education teacher did not attend the meeting. At the beginning of the meeting, Mother informed Ms. D'Elia that Mother wanted to proceed with the IEP meeting even though a general education teacher was not present. Ms. D'Elia, Ms. Erica Henson, District's coordinator of student services, and Mr. Jon Baker, principal of Emblem Academy, all attended this meeting. Each of them holds a California general education teaching credential. Ms. D'Elia and Ms. Henson both offered to serve as the required general education teacher at the meeting. However, Mother declined to allow either Ms. D'Elia or Ms. Henson to serve as the general education teacher. At the end of the meeting Mother declined to sign a written consent excusing a general education teacher from attending the meeting.

62. The IEP team discussed Student's progress. Student did not meet any of the academic and pre-academic goals stated in his March 25, 2015 IEP, which governed his educational program from March 25, 2015 to May 16, 2016. However, he had made progress on his mathematics (addition) goal. He had also made a great deal of progress on his reading goals (following written instructions and reading functional word list) in spring

2016, and his behaviors had improved. He met his speech and language goals. Student's frequent absences from school and tardy arrivals, as well as his negative behaviors, interfered significantly with his progress on academic goals. Ms. Minkus reported on data gathered for the functional behavior assessment. The IEP team agreed on seven annual goals in the following areas: mathematics, behavior, reading comprehension, reading, functional skills, and number correspondence. The team also added two speech and language goals. After discussion, the IEP team made the following offer for the 2016-2017 school year: specialized academic instruction at a nonpublic school to be funded by District; speech and language therapy; occupational therapy; specialized academic instruction; and speech and language therapy for the extended school year.

63. The seven new academic/behavioral goals adapted at the May 16, 2016 IEP meeting for Student to achieve by May 2017, were as follows:

- (A.) When given five math problems Student will use a calculator to perform basic math problems with eighty percent accuracy on 8 of ten days.
- (B.) When using a visual or written prompt Student will follow multi-step directions with one hundred percent accuracy in 8 of 10 trials.
- (C.) When a story is read aloud Student will identify the main events of the story presented by using pictures to identify the correct answer with ninety percent accuracy in 8 of 10 trials.
- (D.) Student will recognize seventy-five sight words with ninety percent accuracy for 8 out of 10 trials.
- (E.) Student will state the emotion he is feeling or request a break or more time for his break when given a visual or written prompt with one hundred percent accuracy in 10 out of 10 trials.
- (F.) Student will produce his ID card and state his personal information with one hundred percent accuracy in 8 out of 10 trials.
- (G.) When presented with numbers 1 to 15 in random order and asked to identify a specific number of items, Student will identify the correct number of corresponding numbers with ninety percent accuracy in 9 out of 10 trials.

64. The non-public school considered by the IEP team for Student's placement did not offer a general education curriculum. Mother did not request information about the sixth- grade general education curriculum at the IEP meeting. She agreed the general education setting was not appropriate for Student. Both Ms. D'Elia and Ms. Henson are knowledgeable about the general education curriculum for sixth graders and could have answered Mother's questions at the meeting if she had asked.

65. Parents chose, without offering any explanation at hearing, to keep Student out of school for 18 days from April 25, 2016, through June 9, 2016, the last day of the school year. Parents requested that District provide Student with compensatory education services because of his absences from May 20, 2016, through June 6, 2016. District denied this request.

66. Following the May 16, 2016 IEP meeting, when there were about three weeks remaining in the 2015-2016 school year, Student was absent from school for 10 days and arrived tardy to school on three days. The last time Student attended a school in the District was the end of the 2015-2016 school year. Student began attending a non-public school for the 2016-2017 school year at District's expense.

67. Some of Mother's testimony during hearing, particularly regarding the reasons for Student's absences from school at the end of the 2015-2016 school year, was both indirectly and directly contradicted by the testimony of District professional staff members and Student's pediatrician, Dr. Hannah. When weighed against Mother's testimony, District's staff members and Dr. Hannah's testimony was more credible than Mother's contradictory testimony.

LEGAL AUTHORITY AND CONCLUSIONS

Introduction – Legal Framework under the IDEA³

1. This 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 (2006)⁴ et seq.; Ed. Code, § 56000 et seq.; 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 (FAPE) that emphasizes special education and related services designed to meet their unique needs and 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); See 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 individualized education program (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 that are 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 also called designated instruction and services].) In general, an IEP is a written statement for each child

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

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

with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes 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)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, 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. 951, 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); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; 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, § 56502, 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, subd. (l).)

5. 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 administrative hearing decision is a preponderance of the evidence].) Because Student filed the request for due process hearing in this matter, he has the burden of proving the essential elements of his claims.

Issue No.1: Failure to Implement Behavior Intervention Plan

6. Student contends District denied him a FAPE by failing to implement his behavior intervention plans dated March 25, 2015, and January 19, 2016, by physically restraining Student. District denies this contention and asserts it properly implemented Student's behavior intervention plans, which did not prohibit physical restraint of Student when his aggressive behaviors put him or others in danger.

LEGAL AUTHORITY

7. When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child fall "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822.) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a FAPE." (*Id.* at p. 821.) However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Id.* at p. 822.) The *Van Duyn* court emphasized that IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, and "not to decide on its own no longer to implement part or all of the IEP." (*Ibid.*)

8. The use of physical restraints on students with exceptional needs is addressed in detail by the California Education Code. Emergency interventions may only be used to control unpredictable, spontaneous behavior 1) that poses clear and present danger of serious physical harm to the individual with exceptional needs, or others, and 2) that cannot be immediately prevented by a response less restrictive than the temporary application of a technique used to contain the behavior. (Ed. Code, § 56521.1(a)). Emergency interventions may not be used as a substitute for the systematic behavioral intervention plan that is designed to change, replace, modify, or eliminate a targeted behavior. (Ed. Code, § 56521.1(b)). Emergency interventions shall not include an amount of force that exceeds that which is reasonable and necessary under the circumstances. (Ed. Code, § 56521.1(d)(3).) To prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions, the parent, guardian, and residential care provider, if appropriate, shall be notified within one school day if an emergency intervention is used or serious property damage occurs. A behavioral emergency report shall immediately be completed and maintained in the file of the individual with exceptional needs. (Ed. Code, § 56521.1(e).)

ANALYSIS

9. Student did not meet his burden. Student offered no evidence proving Student was ever physically restrained during the 2014-2015 school year, or that his behavior intervention plans were not implemented that academic year.

10. During the 2015-16 school year, Student was physically restrained five times but these instances did not constitute a failure to implement Student's behavior intervention plans dated March 25, 2015, and January 19, 2016. District staff credibly testified that District only used physical restraint when Student's aggressive behaviors presented a clear danger to himself and/or others, which is permissible under California Education Code section 56521 and not prohibited under Student's behavior intervention plans. When physical restraint of Student was necessary, District trained staff members used the NCI method, consisting of non-violent blocks and holds, using minimal physical force for the shortest period of time necessary to protect everyone's safety during behavior emergencies.

11. District complied with Student's behavior intervention plans, and only used physical restraints as a last resort when Student's behaviors were so aggressive that he presented a clear and present danger of serious physical harm to himself and/or others. Student's aggressive behaviors could not be immediately stopped by a response less restrictive than the NCI methods used by District staff to de-escalate the situations as quickly as possible. Student did not offer any evidence that District varied from the NCI method or otherwise used any manner of physical restraint on Student that was more aggressive or longer in duration than necessary to contain Student safely until he de-escalated. Furthermore, District complied with all steps and procedures prescribed by California Education Code section 56521.1 during all five instances in which Student was physically restrained by District staff in the 2015-2016 school year.

12. Student failed to prove by a preponderance of the evidence that District denied him a FAPE by failing to materially implement Student's behavior intervention plans dated March 25, 2015, and January 19, 2016, by physically restraining Student at times when it was appropriate and legally permissible to do so.

Issue No. 2: Failure to Implement Academic Goals

13. Student contends District denied him a FAPE since June 9, 2014, by failing to implement academic goals stated in Student's IEPs dated March 31, 2014; January 23, 2015; March 25, 2015; and May 16, 2016. District denies this contention and asserts it implemented the academic goals in Student's IEPs every day that Student was in school since June 9, 2014.

LEGAL AUTHORITY

14. Paragraph 7 of the section entitled Legal Authority and Conclusions is incorporated herein by reference.

15. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under Rowley if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level or failure to meet the goals stated in his

IEP are not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. *E.S. v. Independent School Dist, No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School Dist.* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

16. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School Dist., supra*, at p. 1484, [“...procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE.”].) 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 individualized education program.” (Ed. Code, § 56505, subd. (j).) While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist. supra*, at p. 892.)

ANALYSIS

17. Student worked on his academic goals as set forth in the March 31, 2014, and March 25, 2015 IEPs, every day he was present in school for the 2014-2015 and 2015-2016 school years, except during the times when Student's behaviors interfered with his academic work. After the May 16, 2016 IEP meeting Student attended school for only about one week before the 2015-2016 school year ended. Therefore, the seven academic/behavioral goals set forth in the May 16, 2016 IEP applied to Student's individualized curriculum only for about one week near the very end of the 2015-2016 school year. No evidence was offered regarding Student's lack of goal work for the single week Student attended school from May 17, 2016, to the end of the 2015-2016 school year.

18. In the 2014-2015 school year Student met five (half) of his academic goals and made progress on his other five academic goals in addition/subtraction, reading lists, reading comprehension, sentence writing, writing or stating personal identification information. Student's success in meeting half of his goals and making progress on the other half of his goals indicates Student's academic goals were appropriately implemented during the 2014-2015 school year.

19. Student did not meet any of his academic goals in the 2015-2016 school year, as set forth in the May 25, 2015 IEP. However, he made progress on his mathematics

(addition) goal and he made a great deal of progress on his reading goals (following written instructions and reading a functional word list). In the 2015-2016 school year Student was absent for more than 25 percent of the school year. He was also frequently tardy to school, which disrupted Student's schedule and caused him to miss the crucial sensory activities scheduled for the beginning of his school day. Frequent absences and departure from a routine school schedule were particularly difficult for Student due to the nature of his special needs. He needed adherence to a routine schedule. Student's frequent absences and tardies undermined his goal work and also significantly contributed to Student's aggressive behaviors, causing further interference with Student's academic goal work. The District is not responsible for the significant amount of time that Student missed his academic goal work during the 2015-2016 school year because Parents elected to keep Student home from school.

20. Moreover, Mother elected to exit Student from special education from October 27, 2015 to November 13, 2015. During that time Student was in a general education classroom and the academic goals in his March 25, 2015 IEP were not implemented per Mother's revocation of her consent for Student's participation in special education. District is not obligated to implement Student's IEP goals during the time he was exited from special education.

21. The independent assessments of Student conducted by Mr. Geisser and the Diagnostic Center both concluded that Student's cognitive abilities are such that his academic progress will be very slow. The assessors' conclusions further supported the supposition that Student's inability to achieve his annual goals was not caused by District's failure to implement the goals.

22. In sum, only Student's excessive absenteeism and numerous tardy arrivals to school, along with his frequent behavior problems, prevented Student from working on his academic goals. Student met half of his academic goals in the 2014-2015 school year and made progress toward some of his goals in the 2015-2016 school year. Assessments of Student established that his academic progress was expected to be slow. Therefore, Student failed to prove by a preponderance of the evidence that District denied him a FAPE by failing to materially implement the academic goals stated in Student's IEPs dated March 31, 2014, January 23, 2015, March 25, 2015 and May 16, 2016, respectively, at any time from June 9, 2014, through the last day of the school year in the 2015-2016.

Issue No.3: Failure to Report Grades

23. Student contends District denied him a FAPE by failing to give him grades on his report card in the first reporting period of the 2015-2016 school year. District denies this contention and asserts that Student did not receive grades on his report card for the first reporting period of the 2015-2016 school year because he was absent from school too many days during that grading period to justify grades.

24. The IDEA does not require report cards or grades on report cards for special education students. Instead, the IDEA requires that parents periodically receive information regarding how their child is progressing on the annual goals stated in his IEP. (34 C.F.R. § 300.320.) District provided Parents with this requisite information through the daily reports of Student's academic work and progress in Student's goal binder. The absence of grades did not interfere with Student's education because Student's progress on his academic goals were regularly recorded by his teacher and communicated to Parents.

25. Student failed to prove by a preponderance of the evidence that District denied him a FAPE by failing to give Student grades on his report card for the first reporting period of the 2015-2016 school year. The evidence established that Ms. Peters, Student's teacher for part of that grading period, kept a daily record of Student's work and progress on his academic goals. This information was recorded in Student's goal binder, which Student took home on a regular basis for Parents' review. Furthermore, Student's progress on his academic goals was reviewed by the IEP team at each of Student's IEP meetings. Therefore, Student was not deprived of an educational benefit by the absence of grades on his report card for the first reporting period of the 2015-2016 school year.

Issue No. 4: Absence of General Education Teacher at 2016 IEP

26. Student contends District denied him a FAPE by holding an IEP meeting on May 16, 2016, without a general education teacher present at such meeting. District contends that the absence of a general education teacher at the IEP meeting did not constitute a procedural violation because Student was not in a general education curriculum and would not be in a general education curriculum in the future.

LEGAL AUTHORITY

27. The IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties. (*W.G. v. Bd. of Trustees of Target Range School Dist.*, *supra*, at p. 1485.) (*Superseded in part by statute on other grounds by Individuals with Disabilities Education Act Amendments of 1997.*) Those parties who have first hand knowledge of the child's needs and who are most concerned about the child must be involved in the IEP creation process. (*Shapiro v. Paradise Valley Unified School Dist. No. 69* (9th Cir. 2003) 317 F.3d 1072, 1078, citing *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891.) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but a meaningful IEP meeting. (*W.G. v. Bd. of Trustees of Target Range School Dist.*, *supra*, at p. 1485.) A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036.)

28. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of

the child; an individual who can interpret the instructional implications of assessment results; and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district or parents; and, when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); Ed. Code, § 56341, subd. (b).)

29. Required IEP team members may be excused from an IEP team meeting if the parent and the school district consent in writing, and the IEP team member provides input in writing to the IEP team prior to the meeting. (20 U.S.C. § 1414(d)(1)(C); 34 C.F.R. § 300.321(e)(2)(2007); Ed. Code, § 56341, subd. (f).)

30. A failure to have all required members of the IEP team at an IEP meeting, without a parent's consent for the member's absence is a procedural error. However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *W.G. v. Board of Trustees of Target Range School Dist.*, *supra*, at p. 1484, *superseded in part by statute on other grounds* ["...procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."].) 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 individualized education program." (Ed. Code, § 56505, subd. (j).)

31. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J.*, *supra*, 267 F.3d 877 at p. 892.) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (Ed. Code, § 56505, subds. (f)(1), (f)(2)(A)-(C).)

32. Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L., et al., v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 650, fn. 9 (lead opn. of Alarcon, J.)). In separate opinions, concurring in part and dissenting in part, Judges Gould and Clifton agreed that procedural errors were subject to a harmless error test, but must be reviewed to determine whether the error resulted in a loss of educational opportunity to the student. (*Id.* at pp. 652, 658.)

33. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE, unless a procedural violation

impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E).)

34. The IDEA inquiry is twofold. The first inquiry is whether the school district has complied with the procedures set forth in the IDEA. The second inquiry is whether the developed IEP provides the student with a FAPE by meeting the following substantive requirements: (1) has been designed to meet Student's unique needs; (2) has been reasonably calculated to provide Student with some educational benefit; and (3) comports with Student's IEP.

ANALYSIS

35. District did not commit a procedural error by proceeding with the May 16, 2016 IEP meeting without a general education teacher present. The presence of a general education teacher was not required because Student was not and would not be participating in the general education environment in the future. A central purpose of the May 16, 2016 IEP meeting was to choose a non-public school placement for Student for the 2016-2017 school year. The non-public schools considered by the IEP team did not offer general education curriculum. The IEP team did not consider a general education classroom or any portion of the general education curriculum for Student's placement for the upcoming school year. Multiple witnesses, including Mother, testified that a general education curriculum was inappropriate for Student. Mr. Geisser's and the Diagnostic Center's assessments also established that a general education curriculum was not an appropriate option for Student. Because Student was not, and would not, be in general education, the absence of a general education teacher at the May 16, 2016 IEP meeting did not constitute a procedural error.

36. Moreover, Student offered no evidence which supported a finding that the absence of the general education teacher at the IEP meeting impeded Student's right to a FAPE; significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to Student; or caused Student to be deprived of educational benefits. The evidence proved the contrary. Also, Student offered no evidence that suggested any decisions made at the May 16, 2016 IEP meeting undermined the appropriateness of Student's IEP which was developed at that meeting. Therefore, Student failed to prove by a preponderance of the evidence that District denied him a FAPE by holding an IEP meeting on May 16, 2016, without a general education teacher present at such meeting.

ORDER

All relief sought by Student is 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, District was the prevailing party on all issues presented.

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 20, 2016

_____/s/
CHRISTINE ARDEN
Administrative Law Judge
Office of Administrative Hearings