

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MONROVIA UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2011040473

DECISION

The due process hearing in this matter was held on July 12, 2011, in Monrovia, California, before Administrative Law Judge (ALJ) Clifford H. Woosley, Office of Administrative Hearings (OAH). Mother and Father appeared on behalf of Student. Nancy Finch-Heurman, Parker & Covert, LLP, appeared on behalf of Monrovia Unified School District (District). Michael K. Jason, Ph.D., Director of Special Education, attended the hearing for District.

On April 13, 2011, Student filed a Request for Due Process Hearing (complaint). On May 19, 2011, OAH granted, for good cause, a continuance of the due process hearing, pursuant to the parties' joint request. On July 12, 2011, at the close of hearing, the parties were granted permission to file written closing arguments by July 22, 2011. Upon receipt of the written closing arguments, the record was closed, and the matter submitted.

ISSUE

At any time within the two years prior to the April 13, 2011 filing of Student's complaint, did District deny Student a free and appropriate public education (FAPE) by offering to provide his occupational therapy (OT) at the District's clinic, and not at a nonpublic agency?

FACTUAL FINDINGS

1. At the time of hearing, Student was seven years old and scheduled to enter the second grade in the fall of 2011. Student has autism, and qualifies for special education under the eligibility category of autistic-like behaviors. His autism is characterized by intellectual functioning scores that are well within the delayed range, adaptive behaviors within the delayed range of functioning, and behavioral issues, which have included physical aggression, biting, hitting, and spitting on staff and fellow students. Student has limited language skills and uses the Picture Exchange Communication System (PECs)¹ to communicate at school, where he attends a special day class (SDC) with a modified school day and modified assignments. He has a one-on-one aide and a positive behavior intervention plan (BIP).

2. On February 24, 2009, District convened Student's annual IEP team meeting, which also addressed Student's transition from pre-school to kindergarten for the 2009-2010 school year. Attending were Mother, the District administrator, the school psychologist, the special education (SE) teacher, the speech and language pathologist, the adaptive physical education (APE) teacher, and Student's OT therapist, Kimberlee Waters. Mother agreed in writing to excuse the general education teacher from the meeting.

3. The APE teacher stated that Student made good progress on his balance goal and achieved the goal for catching. The SE teacher discussed Student's progress toward his other goals and participation in the pre-school SDC. Ms. Waters reported that Student had not met his two prior OT annual fine motor and sensory motor goals. She expressed concern about Student's absences from the OT clinic sessions, noting that Student had regressed. For the following year, the team developed three goals in Social/Emotional Skills, two goals of Fine Motor Skills (to be addressed in the classroom), one APE goal in Motor Skills Development, and two goals in Language/Communication. The team also accepted Ms. Waters' proposals of one OT goal in the area of Sensory Processing/Motor Planning and two OT goals for Motor Skills Development.

4. The team offered continued placement in the pre-school SDC class, 180 minutes per day, for the balance of the school year. The team also offered kindergarten placement in the SDC, 310 minutes per day, for the following school year. The IEP's proposed related services were: speech and language (SAL) in the speech room, 60 minutes per month; 120 minutes per week of APE; 30 minutes per month of OT consult; and 120 minutes per week (two one-hour sessions) of individual OT in the District's OT clinic. The IEP provided for accommodations and modifications in the classroom environment and for social skills training.

5. Mother, who testified at the hearing, agreed to the IEP team's determination of eligibility and goals, but disagreed with the offered program placement and related services.

¹ PECs is an augmentative communication system developed to help individuals quickly acquire a functional means of communication

Mother told the IEP team that she wanted to home-school Student for the remainder of the 2008-2009 school year. The District representatives expressed their strong belief that Student needed specialized instruction to address his needs. The District would be unable to implement Student's goals, by providing the placement and related services, if Student was in home-school. Mother said she understood the implications of a parental unilateral placement in home-school. Mother declined the District's offer in favor of home-schooling. Parents could have accepted and utilized the District's OT clinic for Student's individual OT services even if he was home-schooled, but they did not.

6. In fall 2009, Student returned to school and began attending the kindergarten SDC at District's Wild Rose Elementary School (Wild Rose). On September 29, 2009, District convened an amendment IEP team meeting to discuss Student's progress and related services since returning from home-school. Attending were Mother, the District administrator, the school psychologist, the SDC teacher, the SAL pathologist, the APE teacher, and Student's OT therapist, Jiane Li. Ms. Li stated that she would like to see Student in the OT clinic two times a week, for 60 minutes of individual OT, and the development of a sensory diet. Mother expressed concern about Student's ability to handle two activities after school, but Ms. Li said that Student would benefit from clinic-based, as opposed to just classroom-based OT services. The team agreed with Ms. Li's recommendations.

7. Mother reported to the team that Student had a sleep disorder that sometimes caused him to miss school. The SDC teacher wanted Student to come to school, even if late. After hearing from the SDC teacher, the SAL pathologist, the APE teacher, and the school psychologist, the IEP team reaffirmed the goals set in the February 24, 2009 IEP. At the recommendation of the psychologist, the team developed two additional Social/Emotional behavior goals and a detailed behavior support plan (BSP). The team also concluded that Student required a one-on-one aide, for 300 minutes of each day, in addition to the related services initially offered in the February 24, 2009 IEP, including two hours per week of OT at the District OT clinic. Mother agreed to and signed the amendment IEP.

8. Mother thereafter decided that she was again going to home-school Student, who stopped attending school as of October 26, 2009.

9. On November 30, 2009, District convened a special amendment IEP team meeting to discuss Student's absence from school. He had been present only 36 percent of the time since the beginning of the school year and had a significant number of unrecorded tardies. Attending were Mother, a Parents' advocate, the principal of Wild Rose, the school psychologist, the SDC teacher, the SAL pathologist, the APE teacher, a behavioral specialist, OT therapist Ms. Li, and San Gabriel/Pomona Regional Center Service Coordinator Mutia

Hull.² District's Director of Special Education, Dr. Michael K. Jason, also attended because he wanted Student to return to school and access his related services.

10. Dr. Jason earned his bachelor of arts in psychology from the University of Dallas in 1981, a masters of education in special education from University of Missouri, St Louis, in 1991, and a doctoral degree from University of California, Los Angeles, in 2003. He had been the District's Special Education Director for more than three years, having previously served as the Interim Director of Special Education and Coordinator of Special Education at Santa Monica-Malibu Unified School District for four years. He was Interim Director of Special Education and an Adjunct Professor at Mount Saint Mary's College for five years. He was also a SE teacher for Burbank Unified School District for 13 years.

11. Mother told the IEP team that Student's negative behaviors at home declined since he started school and that she felt Student was calmer when he did not go to school. The District told Mother that Student's excessive tardies and his absences were unacceptable and had prevented the District from evaluating the effectiveness of Student's placement and services. Dr. Jason further explained that Mother was not certified to home-school, which was a state requirement when a student reached kindergarten. In response to Mother's concerns, the IEP team agreed to start Student on a modified school schedule of two hours per day, with no related services for the first two weeks following his return. The modified school day schedule would be reviewed by January 30, 2010. The placement and related services remained those initially offered in the February 24, 2009 IEP, including two hours a week of OT at the District OT clinic. Mother agreed and indicated she would resume bringing Student to school.

12. Beginning in January 2010, the team held Student's 2010 triennial IEP, which consisted of three meetings. The first was January 25, 2010. The team reviewed Student's progress following his return to school on a modified schedule and agreed upon the assessments necessary to provide an appropriate and meaningful triennial IEP. Mother, Ms. Hall and all requisite District team members attended. The SAL therapist reported on Student's progress toward speech goals. The SDC teacher reviewed classroom goals and generally reported that Student was doing well, except for focusing. The OT therapist, Ms. Li, reported that Student was improving his ability to stay on-task, but required many prompts. Considering Student's progress, the IEP team proposed increasing Student's modified school schedule from two hours to two and one-half hours per day. Mother consented to the increase. Also during the January 25, 2010 meeting, the behaviorist and school psychologist agreed to look at applied behavior analysis (ABA), and its various components, as a means of addressing Student's behavior. Mother signed an assessment plan for the triennial assessments. In the meantime, the placement and related services remained those initially offered in the February 24, 2009 IEP, including two hours per week of OT at the District OT clinic.

² Ms. Hull briefly testified at the hearing, but provided no information related to the issues.

13. Ms. Li prepared an Occupational Therapy Educational Assessment Report, dated March 22, 2010, for the triennial IEP. She noted that Student had resumed his individual OT therapy at the District OT clinic in January 2010. His attendance had been “fairly consistent” over the previous nine weeks, with a few absences for illnesses. She was unable to perform a formal assessment because Student had limited interest and understanding of required tasks. Ms. Li’s assessment of Student consisted of an interview with his teacher, working with him directly, reviewing previous reports, and clinical observations.

14. Ms. Li observed Student for the assessment in the OT clinic during a scheduled treatment session. She then prepared present levels of performance (PLOPs) of Student in organization of behavior, sensory processing, gross motor/graphomotor³/visual motor, and self-care. Ms. Li concluded that Student was making progress, but slowly, because of his history of inconsistent attendance for clinic-based OT. Since resuming therapy in January 2010, Student had been able to transition and sit at the table and engage with several tasks for up to 15 minutes with one or two breaks. He was able to remain on a piece of equipment for three minutes. She recommended that Student continue to receive OT services.

15. The second triennial IEP team meeting was convened on March 22, 2010, for the purpose of reviewing the speech, OT and behavioral reports, and preparing new annual goals. Attending were Mother, District administrator, SDC teacher, SAL therapist, behavior specialist, school psychologist, and the OT therapist Ms. Li. Mother acknowledged receipt of the OT assessment report. Ms. Li reported that Student had met only some of his prior goals. She expressed concern about Student's attendance, noting that Student had missed all sessions in November and December 2009. Mother did not question the appropriateness of the OT assessment. Ms. Li proposed new OT goals in sensory processing/motor planning, and fine motor skills, to address Student’s unique needs, to which Mother agreed. The IEP team agreed to continue OT at the District OT clinic, for two one-hour sessions per week. Mother signed the IEP document, agreeing to the offered services.

16. School Psychologist Ryan McGill, Ed.S., conducted a psychoeducational assessment, and prepared an April 23, 2010 Assessment Team Report for the triennial reevaluation. He summarized various tests, observations, and scales for Student’s social/emotional functioning, behavior, sensory-motor functions, academic levels, and cognitive measures. He recorded reports of Student biting, hitting and spitting on staff and faculty when Student was upset. He found Student to have an inability to use oral language for appropriate communication and to be extremely resistant to controls. Dr. McGill confirmed that Student exhibited autistic-like behaviors, which qualified Student to continue to receive special education services under the eligibility of autistic-like characteristics.

17. The third and final session of Student’s triennial IEP team meeting took place on April 23, 2010. Attending were Mother, District administrator, school psychologist, SDC

³ Relating to or affecting movements made in writing.

teacher, a student teacher, and a behavior specialist. The SAL and OT therapists had been excused because the IEP team received their reports at the previous meeting, when they agreed upon new SAL and OT goals. A general education (GE) teacher did not attend because Student was not receiving any mainstreaming with GE pupils at the time.

18. The IEP team agreed with the psychologist's eligibility recommendations and discussed Student's academics and behaviors. In addition to the goals already accepted at the prior meeting, the team fashioned new goals for Cognitive Skills and Social/Emotional Skills, as well as a detailed BSP. The team offered continued placement in the SDC for 210 minutes per day, SAL in the speech room, two times per week, for 30-minute sessions; 30 minutes per month of OT consult; and 120 minutes per week (two one-hour sessions) of individual OT in the District's OT clinic. The IEP provided for accommodations and modifications in the classroom environment and for social skills training. The team also offered Student 20 days of extended school year (ESY), 210 minutes per day, for summer 2010, during which Student could access his individual OT clinic therapy. Mother signed and agreed to the IEP.

19. For the 2009-2010 school year, Student was absent 50 out of 180 school days; 20 absences were excused; 30 were unexcused. The SDC teacher reported in IEP meetings that Student also had numerous unreported tardies. Mother did not take Student to ESY for summer 2010. Mother testified that summertime was for family activities and travel.

20. Mother testified that Student had received parentally funded OT services from Rosemary Johnson and Associates (RJA), beginning September 2009 through April 2010, one hour per week. Mother did not provide RJA with District's OT assessment or with a copy of Student's IEP and OT goals. Parents did not provide District with any assessment, report or evaluation from RJA.

21. An amendment IEP was convened on September 20, 2010, at Mother's request. Attending were Mother, District administrator, school psychologist, GE teacher, SDC teacher Cheryl Watkins, Ms. Hull, the behavior specialist, and the OT therapist Ms. Li. Mother called the meeting because she wanted more of Student's modified school day to coincide with her daughter's school day. She also wanted the OT services administered in the classroom only, not at the District OT clinic. Mother stated that the current OT schedule outside of school was too much for her to keep up with and, therefore, requested OT be in the classroom instead. Mother made no complaints regarding the individual clinic OT services or the District OT clinic facility.

22. Ms. Watkins told the IEP team she observed Student to have significant sensory concerns and stated that services should continue in the clinic, not just the classroom. Ms. Li agreed, stating that the clinic setting should continue before implementing services within the classroom. Ms. Li wanted to continue seeing Student twice a week within the clinic, noting that there had been a break in OT services over the summer. Student continued to have issues with gross motor development, especially in core muscles. Student disliked

fine motor tasks, where he continued to be developmentally delayed. Student still struggled with sensory deficits and organization of behavior delays. Ms. Li said she would talk to Mother outside the IEP meeting to address her scheduling concerns. Mother agreed to continue with OT services within the clinic for the time being and to revisit the issue at the next annual IEP.

23. Ms. Watkins advised the team that Student had been tardy by an hour to an hour and half, three times since the recent commencement of school. She expressed concern about the lack of consistent and timely attendance. Mother responded by stating that Student continued to have unpredictable sleep patterns, which caused scheduling difficulties involving her daughter. The team discussed various means to assist Mother in establishing a routine for Student and the family, including the use of the regional center for support in getting Student ready in the morning. Ms. Watkins recommended extending Student's modified school day of two and one-half hours by 30 to 60 minutes. Mother agreed to discuss extending the school day in two weeks and the team agreed to a new meeting for October 12, 2010.

24. On October 12, 2010, the IEP team met to discuss extension of Student's modified school day and related services. Attending were Mother, District administrator, school psychologist, SAL therapist, SDC teacher Ms. Watkins, the behavior specialist, and the OT therapist Ms. Li. Mother reported on the status of Student's doctor visit regarding his sleep. Ms. Li reported that Student had attended only one session of OT, which Mother confirmed in her testimony. Mother responded that she believed the clinic OT made Student more hyperactive.

25. Ms. Watkins reported she had not seen any improvement in Student's fine motor skills. Ms. Li explained the purposes of the OT activities and how they were designed to assist with sensory integration, attention, and organization. Ms. Li emphasized that Student still had problems with body in space. Ms. Li reiterated that consistency was important. The lack of consistent OT had resulted in no progress. Mother responded by saying she wanted more time to decide about the OT, other proposed related services, and the extension of Student's modified school day. The district team representatives recommended an APE evaluation and continued OT services, indicating they would implement the last, signed IEP. Mother left the meeting without signing the IEP or agreeing to any related services.

26. An emergency IEP team meeting convened on December 6, 2010, to address an incident of physical aggression in which Student hit the SDC teacher. Attending were Mother, District administrator, school psychologist, SAL therapist, Ms. Watkins, the behavior specialist, Ms. Li, and Dr. Jason. Ms. Watkins stated that Student had been becoming increasingly aggressive towards staff and fellow students. Student had been suspended once after hitting another student. Other team members similarly noted Student's increasingly aggressive behaviors. Ms. Watkins again recommended OT and APE because

Student needed more proprioceptive⁴ input and increased body awareness, which related to his aggressive behavior.

27. Dr. Jason asked the team if a functional analysis assessment (FAA) had been recommended and was told that Mother had previously declined. When asked, Mother stated that she was concerned that observations would increase Student's aggressive behaviors. Mother agreed to the FAA, but continued to decline OT and APE services. The meeting adjourned and the team planned to reconvene after the FAA's completion. The offered placement and related services remained unchanged and included two hours per week of OT at the District OT clinic.

28. Student's annual IEP convened on February 9, 2011. Attending were Mother, Ms. Hull, District administrator, school psychologist, SAL therapist, Ms. Watkins, the behavior specialist, and Dr. Jason. The IEP notes and Dr. Jason's testimony showed that Mother had agreed to excuse the OT, Ms. Li, from the meeting. The team noted that Mother had previously declined the services of OT and APE. Student had attended a "few" OT sessions since the beginning of the year. Student did not meet his OT goals. After reviewing the FAA report, the District team members concluded that Student's sensory needs and behaviors required a comprehensive special education program that included the consistent provision of OT and APE. The IEP team members other than Mother believed that all of the offered services were needed to enable Student to access his classroom curriculum.

29. Ms. Hull asked about placement. Dr. Jason responded that placement was difficult to evaluate because the District had not had an opportunity to implement a consistent and comprehensive program. Mother asked if the District could provide the nonpublic agency (NPA) RJA for Student's OT. The team declined, and proposed putting all services (including OT) in place for a few months, with the newly drafted goals, track Student's progress, and then reconvene to evaluate. They also proposed conducting an OT assessment, since Student's OT levels of performance could not be evaluated because he did not attend his OT sessions. The team could then reconvene within 30 days to further address OT and APE.

30. The District's offer of placement and services was District's SDC, 210 daily minutes of specialized academic instruction, 210 daily minutes of intensive individual instruction, 120 weekly minutes of individual OT at the District OT clinic, SAL therapy of 60 minutes per week, and OT and APE evaluations. Mother stated that she would look over the IEP and FAA, consult with her advocates, and then respond to the District's proposal and offer. Mother subsequently signed the IEP on February 14, 2011, agreeing to the goals, placement, and related services.

⁴ Proprioception is the sense of how one's limbs are oriented in space.

31. Since Mother signed the IEP, Dr. Jason asked Ms. Waters to contact Mother to arrange for the individual OT at the District OT clinic. Ms. Waters testified that she called Mother the first week of March 2011 to set up the OT session and to discuss OT strategies. However, Mother declined any OT services and said she was awaiting a letter from Dr. Jason regarding NPA OT. Ms. Waters said that Mother was very courteous, but was very firm. Consequently, Ms. Waters had no opportunity to discuss OT strategies, including the possible use of a therapeutic listening program.

32. By letter dated March 11, 2011, Dr. Jason informed Mother that District would not pay for an NPA to provide Student's OT. Dr. Jason reviewed the District's offer of placement and services, and indicated that the offer met FAPE standards. He stated that the offer was reasonably calculated to meet Student's unique educational needs in the least restrictive environment. Accordingly, the District denied Mother's request. Student filed the request for due process on April 11, 2011.

33. Father testified that he had taken Student to an OT session and was shocked at what he heard when his son went into the clinic building. Father remained only about 10 minutes and never entered the structure. He testified that the clinic was old, noisy, had no foundation, was without central air conditioning, and was too loud for Student.

34. Mother also testified that the District OT clinic was inappropriate for Student because the building was noisy, with a loud "window" air conditioner. Mother stated that Student was hyperactive after the OT sessions and therefore more difficult at home.

35. Ms. Waters was Student's OT in pre-school and had observed Student with Ms. Li during some OT sessions in kindergarten. She stated that Student sometimes entered the clinic over-stimulated and then calmed down. Sometimes Student became over-stimulated during sessions, and sometimes Student's behaviors would fluctuate throughout the session. She noted that Student did not have enough language to communicate and identify the specific triggers for his varying behaviors. Ms. Waters never observed Student behave in a manner—such as putting his hands over his ears—indicating he was reacting to a particular environmental sound, such as an air conditioner.

36. Ms. Waters possessed personal knowledge of the OT clinic and testified at the hearing. Ms. Waters obtained her bachelor of arts in occupational therapy from Eastern Michigan University, in 2001. She is registered through the National Board for Certification in Occupational Therapy and is licensed to practice in California. She is certified in the Sensory Integration and Praxis Test (SIPT). She has been an OT for the District since 2002. She said that the District had the OT clinic for about seven years in a full-sized standard classroom portable building. She listed the clinic's equipment, which included swings, ball box, bean pool, climbing structure, ladders, and a trapeze. She testified the equipment was appropriate and provided the therapist with the ability to fashion a program for Student's changing unique needs, in order to meet his goals. She did not believe the clinic to be unusually loud, even when two students were present and working with their respective therapist.

37. Dr. Jason testified that the clinic building was large enough to have previously housed a fifth grade class of approximately 30 to 32 students. The air conditioner was part of the portable classroom, located outside, next to the building, with two air vents in the ceiling and an automatic thermostat to control the heating/cooling level. Dr. Jason testified that the OT clinic building met, and continued to meet, all California state laws related to school building requirements.

38. Mother testified that the District OT would not allow Student to chew gum, demanding that Student get rid of his gum before entering the clinic. Mother stated that she was told the District did not allow gum because it did not want to get it on the equipment. Mother said that gum chewing satisfied Student's sensory need, thus helping him keep calm. Ms. Waters stated that the OT demanded that Student remove the gum because Student might otherwise choke during the vigorous OT session, creating a safety hazard.

39. Mother testified that the OT would tell her that Student had put something in his mouth, which required the OT to pinch Student's nose. It also bothered Mother that the OT would report this conduct in front of Student. Ms. Waters said that the OT would try to preserve about 10 minutes at the end of the session to brief the parent, including inappropriate behaviors. When a student would put an object inside the mouth, the OT would first ask the Student to remove the object. If the Student would not comply, the OT applied pressure to the nostrils to cause mouth breathing, thus opening the mouth for the object's retrieval. This was done to prevent the student from choking. The OT would report these occurrences to the parent.

40. Mother testified that RJA used an interactive metronome program to improve motor planning, sequencing, and processing. Ms. Waters stated that she was familiar with the interactive metronome methodology, which had been used successfully for stroke victims, brain injuries, motor planning, and sequencing. She did not know if it could be sufficiently modified to meet Student's needs. However, Ms. Waters testified that the District staff utilized several other effective methodologies, which addressed and focused on the same OT areas.

41. Mother also testified that RJA used a therapeutic listening program, which helped to calm Student and keep him focused. Ms. Waters testified that she was trained in this methodology, which utilizes headphones with modulated music of high and low frequencies, and which must be implemented and overseen by an OT. The program is highly structured. An OT must carefully design and monitor the program to assist temporal-spatial organization for an individual. Ms. Waters was unsure if this methodology would be effective with Student, stating that it was but one tool to be used within a larger strategy. Ms. Waters was going to discuss the possibility of introducing therapeutic listening to Student, and evaluate its effectiveness, when she called Mother in early March 2011 to arrange for OT sessions. However, Mother declined the OT and Ms. Waters did not have an opportunity to discuss this OT strategy.

42. Dr. Jason provided his professional opinion that the District appropriately assessed Student's OT needs, offered OT services designed to meet Student's unique needs, and was able to implement the OT services consistent with the IEP and proper standards. The OT therapists were licensed, experienced and qualified. The District OT clinic met all state building standards for a classroom and was properly equipped, thus providing the therapist with the professional flexibility to administer Student's individual OT in a manner that was responsive to Student's progress toward his goals.

43. Dr. Jason testified that the District would offer a student an NPA when a related service was recommended by the IEP, but the District did not have the resources to provide the service. Dr. Jason said the District had the resources to provide Student with the OT services and, therefore, the District did not grant Mother's request for an NPA. Mother claimed that the District's OT services did not benefit Student.

LEGAL CONCLUSIONS

1. Student contends that District's individual OT related services did not meet Student's unique needs because the clinic building was too loud and noisy, the District OT therapist would not allow Student to chew gum during OT, and the therapist would sometimes physically force Student to open his mouth to remove a foreign object and then tell Mother about the conduct in front of Student. Student further contended that the District did not meet his unique needs by not using an interactive metronome and therapeutic listening programs as part of Student's sensory diet.

2. District contends that Student's OT needs were appropriately assessed, the OT services were designed to meet Student's unique needs, and that the District properly implemented OT in the OT clinic. The clinic building met state standards and was properly equipped. The OT therapist administered the OT in a manner that assured Student's safety, which meant no gum chewing or foreign objects in the mouth during sessions. The interactive metronome program and the therapeutic listening program are only two methods available to meet the Student's sensory diet needs, which the District was addressing through the clinic-based OT services.

Applicable Law

3. In a special education administrative due process hearing, the party seeking relief has the burden of proving the essential elements of its claim. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this matter, the Student has the burden of proof.

4. Under the Individuals with Disability Education Act (IDEA) and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(a); 34 C.F.R. § 300.101 (2006); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the special needs pupil at no charge to the parents, that meet state

educational standards, and that conform to the child’s IEP. (20 U.S.C. § 1401(a)(9); 34 C.F.R. § 300.17 (2006); 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(a)(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) Specially designed instruction also includes accommodations that address a child’s unique needs and that ensure access to the general curriculum. (34 C.F.R. § 300.39(b)(3) (2006).) “Related services” are developmental, corrective and support services that are required to assist a special needs pupil to benefit from special education. (20 U.S.C. § 1401(a)(26); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) In California, related services are called designated instruction and services (DIS).

5. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a pupil with a disability to provide a FAPE. The Court determined that a student’s IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student’s abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide a “basic floor of opportunity” that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School District* (9th Cir. 2009) 575 F.3d 1025, 1034, 1037-1038 & fn. 10 (*Mercer Island*).

6. There is no one test 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 is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130 (*Walczak*); *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.)

7. Under *Rowley*, the factual showing required to establish that a student received some educational benefit is not demanding. For a student in a mainstream class, “the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress.” (*Walczak, supra*, 142 F.3d at p. 130.) A district need not guarantee that a student will make a month’s academic progress in a month’s instruction; a student may benefit even though his progress is far less than one grade level in one school year. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341, 349 n.3.) A two-month gain in reading in 10 instructional months has been held an adequate showing. (*Delaware Valley Sch. Dist. v. Daniel G.* (Pa. Cmwlth. 2002) 800 A.2d 989, 993-994.) A student derives benefit under *Rowley* when he improves in some areas

even though he fails to improve in others. (See, e.g., *Fort Zumwalt Sch. Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area School v. Scott P* (3d Cir. 1995) 62 F.3d 520, 530.) He may derive benefit while passing in four courses and flunking in two. (*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.* (S.D.Tex. 1995) 931 F.Supp. 474, 481.)

8. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and placement must be designed to meet the student's unique needs and be reasonably calculated to provide some educational benefit in the least restrictive environment. (*Ibid.*)

9. To determine whether a pupil was denied a FAPE, an IEP must be examined in terms of what was objectively reasonable at the time it was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Roland M. v. Concord Sch.* (1st Cir. 1990) 910 F.2d 983, 992.)

10. The methodology to be used to implement an IEP, even IEPs for children with autism, is left up to the district's discretion so long as it meets a student's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley*, 458 U.S. at p. 208; *Adams v. State of Oregon*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.)

Analysis

11. Student asserts that his unique OT needs could only be met by NPA OT services, such as those provided by RJA. Student does not challenge the appropriateness of the District's OT assessments or the sufficiency of the IEP's OT related services. Instead, Student asserts that the place, manner, and substance of the individual clinic-based OT caused Student to be hyperactive and failed to benefit Student, thus denying Student a FAPE. Student fails to meet his burden of demonstrating that the District was unable to meet Student's OT needs or that District's OT related services did not benefit Student. Thus, Student is not entitled to an NPA for his OT. (Legal Conclusions 3, 7-8.)

12. Dr. Jason credibly testified that District would have offered Student an NPA if the District did not have the resources to provide the related OT service. District appropriately assessed Student's OT needs, offered OT services designed to meet Student's unique needs, and was able to implement the OT services consistent with the IEP and proper standards. The OT therapists were licensed, experienced and qualified. The District OT

clinic met all state building standards for a classroom and was properly equipped, thus providing the therapist with the professional flexibility to administer Student's individual OT in a manner that was responsive to Student's progress toward his goals. The District had the resources to provide Student with the OT services. Therefore, the District properly denied Mother's request for an NPA. (Factual Findings 36-37, 42-43; Legal Conclusions 5-8.)

13. The Parents' testimony regarding the OT clinic's building failed to establish that the physical structure was inappropriate for Student. The OT therapist Ms. Waters credibly addressed Mother's statement that Student was unusually hyperactive following the clinic sessions. Student's moods and activity level would vary as Student participated in multiple OT exercises. Ms. Waters saw no indication that alleged loud air conditioning and the building's unfavorable acoustics affected Student's activity level. (Factual Findings 34-36; Legal Conclusions 4-8.)

14. Mother's testimony regarding the clinic building affecting Student's elevated activity level was not convincing. When Student attended District's clinic OT during the second semester of kindergarten, Mother made no complaints about the building. Also, Mother called the September 2010 IEP to discuss the OT. Mother's primary complaint was that the clinic OT scheduling was troublesome. No mention was made of the building being too noisy for Student. Father's testimony regarding the building was similarly unpersuasive. His detailed descriptions of the room's acoustics, especially the air-conditioning unit's noise, contrasted with his limited contact with the portable classroom. Father went to the clinic only once, he never entered the building, and he remained on the scene for only 10 minutes. (Factual Findings 11, 19, 20-21, 33-34; Legal Conclusions 7-9.)

15. District's rule against gum chewing during OT sessions is a reasonable safety precaution. The fact that the rule also prevented the gum from soiling the equipment was an ancillary benefit. Similarly, putting pressure on a student's nostrils, causing the student to open and breathe through the mouth, was a reasonable method for extracting foreign objects when the student refused to voluntarily remove the object. Children can choke on small objects in the mouth, especially during the physical activity of OT. The District's failure to take affirmative action in such situations would be unreasonable. Also, telling Mother about Student's propensity to put objects in his mouth, and then refuse to remove them, was appropriate. Mother felt that telling her in front of Student was inappropriate. Ms. Waters testified that the therapists reserved the last 10 minutes of the OT sessions for communicating with parents. The fact that Student sometimes heard the OT discuss his conduct was not as significant as Mother knowing that Student was acting in an unsafe manner. (Factual Findings 32; Legal Conclusions 8-10.)

16. Student claims that the District's failure to use an interactive metronome program rendered the District OT inappropriate. Mother testified how RJA used this methodology to improve motor planning, sequencing, and processing, when Student was in kindergarten. Ms. Waters was familiar with the metronome program, which had been successfully used for stroke victims, brain injuries, motor planning, and sequencing. She did not know if the program could be modified to address Student's needs. Other than Mother's

anecdotal statements, Student presented no evidence that the interactive metronome program actually benefited Student or that the program was the only means of achieving such benefit. Ms. Waters credibly testified that the District staff utilized several other effective methodologies, which addressed and focused on the same OT areas. (Factual Findings 40; Legal Conclusions 10.)

17. Similarly, Student's assertion that District's failure to use a therapeutic listening program rendered the OT insufficient is unsupported by the evidence. Ms. Waters testified that she was trained in therapeutic listening, which utilizes headphones with modulated music in high and low frequencies. Ms. Waters was willing to consider evaluating therapeutic listening for Student and intended to confer with Mother when she called in March 2011 to schedule OT. However, Mother refused to accept OT services and the option was never discussed. An OT must carefully design and monitor the program to assist temporal-spatial organization for an individual. Ms. Waters was unsure if the program would benefit Student. She believably testified that the OT therapists used other tools to address the Student's needs in this area. Student offered no evidence that Student's needs were not being met by other OT methods. (Factual Findings 41; Legal Conclusions 10.)

18. The weight of Student's assertions is greatly undermined by Mother's history of opposing clinic OT for reasons other than those now asserted in this due process proceeding. Student did not have OT for most of pre-school, because he was home-schooled. Student did not start OT in kindergarten until January 2010 because Mother kept Student home during the first semester or refused to take Student to OT after he returned to school. These absences had nothing to do with the clinic building, gum chewing, foreign objects in the mouth, or different OT methodologies. The IEPs reflect that Mother was overwhelmed with scheduling challenges, which caused Student to be chronically absent and tardy. The clinic OT was especially difficult to schedule because it was after school, which is why Mother wanted the OT administered in the classroom. Mother refused to take Student to the four weeks of ESY during summer 2010 because she believed summer was for family time and travel. According to Mother, Student attended only one OT session for the entire 2010-2011 school year. (Factual Findings 2, 8-9, 11, 13, 19-21, 25-28; Legal Conclusions 10.)

19. The evidence showed that Student made some progress when he regularly attended OT in the second semester of the 2009-2010 kindergarten year. However, the progress soon turned to regression because Student has attended only one OT session since kindergarten. The evaluations were clear. Student required intensive OT services. District consistently offered appropriate OT services that were reasonably calculated to provide him with some educational benefit. Student's parents prevented him from participating in OT, to his detriment. (Factual Findings 3-5, 6-7, 11, 13-15, 22, 24-26, 29-31; Legal Conclusions 4-9.)

20. Given the above, Student failed to demonstrate that District failed to offer him a FAPE by not offering NPA OT services. (Factual Findings 2-43; Legal Conclusions 12-19.)

