

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2011120772

DECISION

Administrative Law Judge (ALJ) Marian H. Tully, Office of Administrative Hearings (OAH), State of California, heard this matter on May 29 and May 30, 2012, in Los Angeles, California.

Attorney Patrick Balucan represented Los Angeles Unified School District (District). District representative Dorene Rubin attended both hearing days. Student's parents (Parents) declined to present a defense on Student's behalf.¹

On December 22, 2011, District filed a request for due process hearing. OAH granted a first continuance of the due process hearing on January 9, 2012. On March 21, 2012, OAH granted an agreed upon request for a second continuance.

At the hearing, the ALJ received sworn testimony and documentary evidence. On motion by District, the ALJ granted a continuance until June 8, 2012, to allow District time to file a closing brief. District timely filed its closing brief and the record was closed on June 8, 2012.

¹ A telephonic Pre-hearing Conference was held on May 21, 2012. Student's mother appeared on behalf of Student. An Order Following Pre-hearing Conference was served May 22, 2012. Date, time, location and procedures for the hearing were explained during the Pre-hearing Conference and set forth in the Order. The ALJ was informed by counsel for District at the date and time set for hearing that Student's mother had advised District there would be no appearance on behalf of Student at the hearing. The ALJ trailed the matter for one half hour and OAH staff telephoned Student's mother. Student's mother informed OAH that no appearance would be made at the hearing.

ISSUE

Was District's individualized education program (IEP) dated June 13, 2011, an offer of a free appropriate public education (FAPE) in the least restrictive environment (LRE)?

FACTUAL FINDINGS

1. At the time of hearing, Student was six years old and resided with Parents within the District. Student was determined to be eligible for special education and related services under the category of autism on July 23, 2008.

2. Student's last consented-to IEP was dated June 17, 2010, and was the result of a settlement agreement. Pursuant to the settlement agreement and the June 17, 2010, IEP, Student attended Cheerful Helpers, a non-public preschool, for the 2010-2011 regular and extended school year (ESY) with related services provided by District. The related services included 90 minutes of language and speech (LAS) therapy per week and 30 minutes of occupational therapy (OT) per week at Third Street Elementary School, Student's school of residence.

3. The settlement agreement also required District to conduct multidisciplinary assessments and convene an IEP team meeting for the 2011-2012 school year. These assessments were completed in May and June 2011. Student was assessed in the areas of academics, social/emotional functioning, LAS, and motor abilities. The IEP team met on June 13, 2011 to discuss the assessments.

Assessments

4. Veronica M. Ricci assessed Student in June 2011 and prepared a Psycho-Educational Report on June 12, 2011. Ms. Ricci was employed by the District for 14 years as a bilingual school psychologist. Her primary duties with the District were conducting student assessments and providing student counseling. Ms. Ricci holds a bachelor's degree in psychology, a master's degree in counseling, and a master's degree in educational psychology. She holds a pupil personnel services (PPS) credential. The PPS credential allows her to practice as a psychologist in a school setting. Ms. Ricci credibly testified at the hearing and demonstrated she was qualified to offer opinions in connection with Student's unique needs in the educational setting.

5. Ms. Ricci assessed Student to determine his present social/emotional functioning levels and to develop an appropriate placement and level of services to meet Student's academic needs in the least restrictive environment. Ms. Ricci's assessment included a review of Student's previous assessments, previous IEP documents, reports from Cheerful Helpers, classroom observation during directed lesson and free play, interviews with Student's mother (Mother) and Student, and standardized testing.

6. Assessment materials included the Achenbach Teacher Report Form (TRF), the Conners Teacher Profile, Third Edition, the Conners Parent Profile, Third Edition, the Achenbach Child Behavior Check List (CBL), the Childhood Autism Rating Scale (CARS), and the Asperger Syndrome Diagnostic Scale (ASDS). The assessment materials were selected and the procedures were valid for the purposes for which they were used, the materials were administered in Student's primary language of English, selected to be non-discriminatory and were administered without regard to race, gender or culture. The tests were administered in accordance with the producer's instructions and the results were valid and reliable.

7. The TRF and Connors Teacher Profile, Third Edition, are ratings scales completed by a student's teachers. The TRF is designed to identify behavior characteristics and provide information as to the student's social/emotional adjustment. Student's TRF scores in "Total Problems," "Internalizing," and "Externalizing," were classified as clinical. Student's scores in "Anxious/Depressed" and "Social Problems" were borderline clinical. Student's scores in "Withdrawn, Somatic Complaints, Thought Problems, Attention Problems, Delinquent Behavior, and Aggressive Behavior" ranked within normal range, as did subscales for both "Inattention" and "Hyperactivity-Impulsivity." The Connors Teacher Profile focused on attention and externalized behavior. The Connors Teacher Profile is norm referenced for students between the ages of six and 18. At the time of the assessment, Student was five years, 10 months, of age. Ms. Hylton used the test as an informal criterion reference, e.g., the number of letters in the alphabet Student was able to write. She did not use this test to arrive at her conclusions. Ratings from the Connors Teacher Profile suggested Student had atypical inattention, aggression, opposition, and social skill deficits for a male his age. Overall, ratings from these two teacher observation reports indicated Student was able to perform academically and make steady academic progress, but his social and adaptive impairments hindered his ability to function in the classroom.

8. The CBL and Connors Parent Profile are ratings scales completed by parents to obtain information about a child's behavior and social/emotional adjustment. Parents' CBL revealed clinically elevated scores in "Total Problems," "Internalizing," "Externalizing," "Withdrawn," "Anxious/Depressed," "Social Problems," "Thought Problems," "Attention Problems," and "Aggressive Behavior." "Somatic Complaints" were within normal range. These results indicated problems related to withdrawal, anxiety, social relationships, inattention, rule breaking and aggression. These behaviors were more pronounced in the home environment than in the school environment. Parents' response in the Connors Parent Profile indicated elevated scores for aggression, hyperactivity, and impulsivity, and deficits in learning and executive functioning. Ratings from the two parent observation reports indicated Student's impairments affected his academic and social functioning and hindered the overall quality of home life.

9. Ms. Ricci administered the CARS and ASDS ratings scales. Student registered in the mild to moderate range within the autism spectrum.

10. Ms. Ricci used both formal and informal processes in a clinical interview with Student. Because of Student's age and maturity level, Ms. Ricci used several processes including conversational questions, sentence completion, feelings statements, and Draw-a-Person. Based on this interview, Ms. Ricci concluded Student was basically a happy child, with positive feelings about his home, his mother, and his family, but he worried about his behavior and that he would not do well.

11. Ms. Ricci observed Student in his classroom participating in a directed lesson for approximately one half hour and in free play for approximately 15 minutes. There were seven other male students, one teacher and four assistants in the classroom. The adults were seated intermittently between students. There was no adult beside Student. Student completed tasks, raised his hand to answer questions, and was easily redirected when off task. He was not distracted by the noise level in the classroom or by disruptive behavior by his classmates. He occasionally appeared disengaged and did not contribute to class discussion. He did not play with his classmates during free play. Eventually, with prompting from the preschool director, he engaged in conversation with a classmate about a character he was building with Play Doh. The conversation ended as he became more focused on building his character. He became distressed and cried during a three minute conversation with the director when the director asked him to retrieve a "mouth" from a tray to replace pickle slices he used to represent a mouth on his character. Ms. Ricci also interviewed Mother and reviewed reports provided by Student's preschool. Student's behavior as shown in the classroom and reported by Mother was consistent with the results of the tests administered and the ratings obtained. Student was able to function in the classroom at age/grade level although Student demonstrated deficits in attention, social skills, transitioning, distractibility and self-control. He also demonstrated high activity level, anxiety, hyper-emotionality, and a tendency to withdraw from non-preferred tasks.

12. Ms. Ricci concluded, based upon the ratings scales, interviews with Mother and Student, Student's medical reports, school records, and her own observations, that Student was a well behaved, imaginative, charismatic and bright child, who enjoyed the learning process, was able to participate in familiar classroom routines, had adequate self-help skills, and had grade level academic skills. However, Student's autistic-like behaviors impacted his classroom performance, his ability to interact with typical peers, interfered with his ability to sustain attention, concentration and effort, and adversely affected his educational performance and progress. Student had difficulty with adaptability, self-regulation, flexibility of thought, perseverative thinking, excessive worry, selective attention, difficulty with transitioning, distractibility, and high activity levels. Ms. Ricci opined these behaviors, with appropriate related services, would not impede Student's ability to attend a general education kindergarten class and function at grade level.

13. Ms. Ricci summarized her findings in a written report that was provided to Student's parents and discussed at an IEP team meeting on June 13, 2011.

14. Rowena Galam was a District occupational therapist. Her duties included student assessment and treatment, individually and in collaboration with teachers, parents

and other service providers. She was employed by District for eight years. Before she came to District, she was an occupational therapist at a private pediatric clinic for two years. Ms. Galam holds a bachelor's degree, a California license and certification in OT. Ms. Galam demonstrated that she was qualified to offer opinions in connection with Student's occupational therapy needs in the educational setting.

15. Ms. Galam provided school based OT for Student for the 2009-2010 and 2010-2011 school years. The treatment was provided at Third Street Elementary School while Student was attending Cheerful Helpers. Ms. Galam performed OT assessments in 2010 and 2011. Ms. Galam assessed Student over a four day period in May 2011. She prepared a written report on May 31, 2011.

16. Ms. Galam used the Ecological Model of Student Performance in her assessment. This model is used to establish the student's present level of performance (PLOP) taking into account the student's curriculum, educational environment and abilities. Ms. Galam interviewed Student's teacher and Mother, observed Student at Cheerful Helpers, conducted one-to-one testing through observation and work samples at Third Street Elementary School, and used the Visual Motor subtest of the Miller Function and Participation Scales (MFUN). Assessment procedures and materials were selected and valid for the purposes for which they were used, administered in Student's primary language of English, and without regard to race, gender or culture. Tests were administered in accordance with the producer's instructions and the results were valid and reliable.

17. The OT assessment showed Student met his goals from 2010. Ms. Galam further concluded that Student demonstrated adequate neuromuscular skills and fine motor skills. Student's ability to process and modulate tactile information, vestibular information, motor planning and his body awareness (proprioception), were adequate. Student had moderate difficulty with visual motor skills in letter formation. Ms. Galam concluded Student required OT. Accordingly, Ms. Galam recommended adapted writing strategies and opportunities for visual motor development. Student also demonstrated adequate organization of behavior and attention to participate in grade level classroom tasks but had difficulty in participating in non-preferred tasks. This difficulty could be attributed to behavior rather than sensory/motor development. Ms. Galam observed Student was more successful participating in non-preferred tasks when behavioral strategies included visual reinforcers, rewards, consequences, and verbal praise.

18. Ms. Galam summarized her findings in a written report that was provided to Parents and discussed at an IEP team meeting on June 13, 2011.

19. Dawn Salyards was a District LAS pathologist assigned to Third Street Elementary School, and a pre-school clinic at that location, for 13 years. Her duties included screening children to determine whether they might require services, providing therapy, conducting assessments, and providing teacher and parent education. Before she was employed by District, Ms. Salyards was employed for over four years as a LAS pathologist at a rehabilitation center associated with a hospital. Ms. Salyards holds a bachelor's and a

master's degree in communicative disorders, a certificate of clinical competence from the American Speech-Language Hearing Association and a ryan clear credential. Ms. Salyards was Student's speech therapist for two school years, 2009 - 2010 and 2010 - 2011. Ms. Salyards was qualified to offer an opinion as to Student's unique LAS needs.

20. Ms. Salyards assessed Student in May 2010 and in April 2011. The 2011 assessment was a comprehensive review to prepare for Student's transition to kindergarten. She prepared a written report of the 2011 assessment on May 28, 2011. Ms. Salyards' assessment included a battery of standardized tests. The standardized tests administered and the procedures used were selected and administered so as to avoid racial, cultural or sexual discrimination, valid for the purpose, administered in Student's primary language of English, and in accordance with the instructions of the producers. Ms. Salyards also conducted clinical observation, interviewed Mother, and reviewed Student's LAS therapy progress, a language sample, and a report from the director of Cheerful Helpers.

21. Ms. Salyards administered the following assessments and Student achieved the following results: Expressive One-Word Picture Vocabulary Test (EOWPVT), 58th percentile for students his age; Receptive One-Word Picture Vocabulary Test (ROWPVT), 48th percentile; Comprehensive Assessment of Spoken Language (CASL), 82nd percentile; Antonyms, 65th percentile, Syntax Construction, 53rd percentile; Paragraph Construction, 90th percentile, and Pragmatic Judgment, 90th percentile. These results were within the average range or higher. Student's Language Sample based upon a picture description task using conversation with the pathologist demonstrated Student's vocabulary and word choice were within average range, but his pragmatic skills, including the ability to carry on a conversation, to make needs and ideas known, and his ability to stay on topic, were below average.

22. Ms. Salyards concluded, based upon standardized tests, parent interview, school report, and her individual assessment, that Student's receptive and expressive language skills were within average range. His language skills were functional and interactive, but Student continued to have a mild deficit in pragmatic language. Student's articulation was age appropriate and intelligibility was at 95 percent or greater accuracy. Student met the goals and objectives from his 2010 IEP. Student's areas of need included frequent perseveration on topics or objects, difficulty engaging in conversation and appropriate behavior with same age peers, and disruptive behaviors throughout therapy sessions which impacted his ability to benefit from therapy. Student's pragmatic skills were impacted by behaviors typically demonstrated by children with autism.

23. Ms. Salyards summarized her findings in a report that was provided to Parents and discussed at the IEP team meeting on June 13, 2011.

24. Tracy Hylton was employed with District for 16 years. She had been in her current position as an itinerant resource specialist for two years, and had previously been a school site based resource specialist for 11 years, as well as a teacher in a special day class for three years. As an itinerant resource specialist she conducted assessments and

implemented IEP services. Before Ms. Hylton became employed by District, she taught in a special needs private school in Connecticut for three years. Ms. Hylton holds a bachelor's degree in general education and special education, a master's degree in special education, a general education credential, a ryan cpecialist credential, and a resource specialist certificate. Ms. Hylton was qualified to offer an opinion as to Student's unique needs.

25. Ms. Hylton conducted an Academic Assessment of Student on May 27, 2011. She prepared a written report of her assessment on June 10, 2011. In preparing her academic assessment, Ms. Hylton considered reading, math, writing, listening, speaking, behavior and vocational ability. Ms. Hylton's assessment included the Kaufman Test of Educational Achievement, Second Edition (KTEAII), interviews with Mother and the director of Cheerful Helpers, on site observation at Cheerful Helpers, review of school records and work samples, and the Brigance Comprehensive Inventory for Basic Skills.

26. The KTEAII results demonstrated Student was working in the average range when compared to age level peers in all areas except oral language. Student's oral language skills were slightly below average. Student was willing and cooperative during the test and the results were a valid reflection of Student's skills and abilities. Testing, teacher information, work samples, and Ms. Hylton's observations showed that Student was working at grade level. However, his skills were inconsistent due to difficulty with oral communication and behaviors that interrupted his ability to stay on task. Student's academic inconsistency was not due to environmental, cultural, or economic disadvantage. Accordingly, Ms. Hylton opined Student needed support and modeling in oral communication and social skills, behavior support, and strategies to help Student stay on task, such as visual cues, breaks and movement opportunities, frequent teacher feedback, etc., to access the general curriculum.

27. Ms. Hylton summarized her findings in a report that was included in the IEP. She also provided draft goals and objectives in reading, writing, math, vocational education, social skills, and oral language to the IEP team, and attended the June 13, 2011, IEP team meeting.

28. Roberta Wrobel was employed by District for 10 years in the special education department. At the time of hearing, she worked with behavior support teams helping with behavior support development and behavior support implementation. Her duties included work with IEP teams to help determine appropriate behavior support services and to implement those services. Ms. Wrobel holds a bachelor's degree in special education, a master's degree in educational administration, a mild to moderate credential in special education, and an administrative services credential. She had completed all required course and field work to become a Board Certified Behavior Analyst (BCBA), and was scheduled to sit for the board exam in September 2012.

29. Ms. Wrobel attended the IEP team meeting as an IEP facilitator. Her role at the meeting was to evaluate all of the assessments, review the IEP to make sure sufficient behavior support services were in place and collaborate with the team to develop an IEP that

would meet Student's needs in the LRE. She assisted the IEP team to develop the accommodations, modifications and supports contained in the IEP.

June 13, 2011, IEP Team Meeting

30. The IEP team met on June 13, 2011. In addition to Ms. Ricci, Ms. Galam, Ms. Salyards, Ms. Hylton, and Ms. Wrobel, Mother, District Administrator Lillian Waters, general education teacher Irma Navarette, Cheerful Helpers' director Ellen Perlman, and Student advocate Bobbie Westil attended. Ms. Ricci, Ms. Galam, Ms. Salyards, and Ms. Hylton presented and explained their assessments, PLOP's and proposed goals and objectives.

31. Mother, her advocate, and the director of Cheerful Helpers actively participated in the IEP meeting. Parents were provided copies of the goals before the meeting to share with Cheerful Helpers so that they could help with development of goals. The director of Cheerful Helpers provided draft goals to the IEP team. Although Parents declined to be present at hearing, the IEP sets forth Mother's input and Parental Concerns with particularity. Mother was provided "A Parent's Guide to Special Education Services" including "Procedural Safeguards."

32. The IEP team reviewed and discussed Student's prior assessments, goals and PLOP's. The IEP team determined that Student had met all 10 goals from his then current IEP and each of the two objectives for each goal, although Student continued to need help or prompting from adults in the social/emotional area and he forgot safety rules when anxious.

33. Student's PLOPs in reading, writing, math, oral language, vocational/behavior, LAS, visual motor, and social/emotional were discussed and Mother's input was noted throughout. Input from Ms. Perlman was also noted. Student's PLOP's reflected Student's strengths and needs in each area.

34. Student's PLOP's in reading, receptive and expressive language, and math were within average range, although he had some difficulties in each area. In reading, Student's phonemic awareness was within normal range. He had trouble completing reading tasks without being silly and he needed multiple prompts to follow directions during testing. He did not separate words into phonemes, had difficulty matching letters with sounds, distinguishing non-rhyming words and identifying words with similar ending sounds. Comprehension became more difficult with longer stories. Student met his language goals. He was receiving 90 minutes of LAS per week. He was able to participate in his LAS session almost flawlessly for 30 minutes with an incentive. Although Student's LAS had improved, he continued to need help with pragmatics in social situations and in communicating with peers. Student's math difficulties were with word problems, telling time, recognizing symbols and writing his numbers properly.

35. Student had difficulty with visual motor skills, social skills, oral language and behavior. Student could write his first name with a mix of upper and lower case letters but

not his last name. He could write 18 out of 26 letters in the alphabet. He could copy letters and words when given a model but had difficulty with neatness and letter formation. He did not complete writing tasks even when given multiple prompts. Student's oral language difficulty was in pragmatics, and in answering literal and inferential comprehension questions in stories comprised of six to eight sentences. When asked to describe a picture, he was unable to accurately describe two or more events depicted in the picture. Student's LAS needs related to deficits in social skills and conversation. Student's behavior difficulties impacted his ability to interact with peers, transition from one activity to another, and perform non-preferred tasks. He struggled with selective attention and distractibility.

36. Student was described as engaging, funny, bright, and eager to learn. He responded well to direction from adults. OT and LAS providers reported Student often responded to clear firm directives, tangible rewards, such as stickers, and a structured environment. His ability to manage his emotions and communicate his needs was improving. Student's autism continued to impact his ability to interact appropriately with peers, manage his emotions, and complete his work independently.

The IEP

37. The team considered all of the observations, assessments and academic testing, Student's PLOP's, and information obtained from his Parents, his teacher and the director of Cheerful Helpers. The team, including Mother, agreed that the appropriate placement for Student was a general education kindergarten.

38. The team determined that Student would need accommodations, modifications and supports to provide instruction, opportunities for modeling appropriate behavior, peer interaction and practice in the area of social skills. Several modifications and accommodations addressed Student's difficulties with anxiety and transitioning using visual cues and strategies such as a picture schedule to help Student prepare for transitions through classroom activities, help Student to work through tasks, and understand classroom expectations. Student's behavior issues were addressed by providing sensory breaks, and opportunities to move to alleviate frustration and reduce stress when Student became overwhelmed. Academic supports to help Student succeed in the larger general education class included clear directions with verbal and visual prompts to follow classroom routines, procedures and instruction followed by frequent checks for comprehension and explicit instruction. These accommodations, modifications and supports included frequent rewards and praise when Student demonstrated appropriate social interaction to address Student's difficulty with social skills and peer relationships.

39. The team determined that Student would need additional services beyond what was available in the classroom. These services included LAS, behavior intervention development (BID), behavior intervention implementation (BII), counseling, OT, and resource specialist program (RSP) in math, reading, writing, oral language, vocational education, social skills, and behavior support. The team further determined a Functional

Behavior Assessment (FBA) plan would be developed by September 30, 2011 and an IEP meeting held in December 2011 to determine the level of behavior supports needed.

40. The IEP included 10 goals: 1) in reading, Student would state the name and sound of a letter with 90 percent accuracy in four of five trials; 2) for behavior, Student would use particularly identified strategies to appropriately handle anxiety, excitement and distress with 80 percent accuracy in three of five trials throughout the school day; 3) in writing, on visual or verbal cue, Student would write words and three brief sentences on a given topic using correct word order with 80 percent accuracy in four of five trials; 4) in math, Student would use objects to demonstrate single digit addition and subtraction problems with 80 percent accuracy in four of five trials; 5) in vocational education, Student would transition to new or non-preferred activities within two or three minutes with one teacher prompt and work for 10 minutes with 90 percent accuracy in four of five trials; 6) in social skills, Student would sustain attention with a peer for five to 10 minutes in a common activity with 90% accuracy in three of five opportunities during a school day; 7) in oral language, Student would answer oral comprehension questions about a story or event by remaining on topic, retelling in correct order using content to clarify meaning, and making predictions using complete sentences with 90 percent accuracy in three of four trials; 8) in language pragmatics, Student would participate in conversation with peers and adults over three to five turns staying on topic, using comments and/or questions, and paralinguistic cues, in five to seven opportunities throughout the school day; 9) in visual motor, Student would copy one sentence using proper letter formation, sizing, and spacing between parallel lines, using no more than two verbal or physical prompts, with 80 percent accuracy in three of four trials; and 10) in pupil counseling, Student would use verbal statements to describe distress, anxiety and/or frustration 50 percent of the time. Incremental objectives for each goal were also set forth in the IEP.

41. District offered placement in a general education kindergarten classroom at Third Street Elementary School with accommodations, modifications and related services. Related services included: LAS for 195 minutes per month, with 120 of those minutes in a pull-out setting;² BID for 1,200 minutes per month; BII for 3,600 minutes per month; counseling for 45 minutes per week in a pull-out setting; RSP services to address math, reading, writing and language, each for 100 minutes per week in a pull-out setting; RSP services to address vocational education, social skills, and behavior support for 100 minutes a week; and OT services for 60 minutes per month with 30 of those minutes in a pull-out setting.

42. Parents did not agree with District's offer. Although Parents agreed Student required placement with typical peers in a general education classroom, they believed Student needed a smaller class size and a more appropriate curriculum. They believed pull-out services would be disruptive. Parents requested placement at an alternative school of

² "Pull-out" and "push-in" settings describe whether the services are provided outside the classroom or in the class room, respectively.

their choice with an aide from a non-public agency (NPA), and that District continue Student's present levels of LAS and OT.

LEGAL CONCLUSIONS

1. District contends that the June 13, 2011, IEP constituted an offer of FAPE in the LRE. As discussed below, the placement and related services included in the June 13, 2011, IEP offered Student a FAPE in the LRE.

Applicable Law

2. As the petitioning party, District has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

3. A child with a disability has the right to a FAPE under the Individuals with Disability Education Act (IDEA). (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE means special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (p).) The term "related services" (in California, "designated instruction and services"), includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

4. In *Board of Education of the Hendrick Hudson Central School Dist., et al. 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, 207; *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031.)

5. 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 Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) 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.*) 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/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to

provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

6. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209; *Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992.)

7. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

8. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

9. An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4)(2006)³; Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications and, the anticipated frequency, location and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Only the information set forth in title 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code, § 56345, subds. (h) & (i).)

³ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

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

11. An IEP team is required to include: one or both of the student’s parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

12. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child’s problems, attends the IEP meeting, expresses disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.*, *supra*, 993 F.2d at p. 1036 [parent who has 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].)

13. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; 2) placement is determined annually, is based on the child’s IEP and is as close as possible to the child’s home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

14. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability

is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114 (a); Ed. Code, § 56031.) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) “the educational benefits of placement full-time in a regular class”; 2) “the non-academic benefits of such placement”; 3) the effect [the student] had on the teacher and children in the regular class”; and 4) “the costs of mainstreaming [the student].” (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette’s Syndrome].)

15. If a parent refuses services in an IEP that had been consented to in the past, or the school district determines that the refused services are required to provide a FAPE, the school district shall file a request for a due process hearing. (Ed. Code, § 56346, subds. (d) & (f).)

Analysis

16. As an initial matter, District demonstrated that Student was properly assessed in all areas of suspected disability prior to the development of District’s IEP offer. The areas of suspected disability were identified in the settlement agreement. Each of the assessors was credible and well qualified based on years of experience and professional credentials. All of the assessors used a variety of assessment instruments and methods. None of the assessors relied upon any single test or procedure or any single source of information. All of the assessment materials were appropriate, the assessments were properly administered in Student’s primary language and the results were valid. (Factual Findings 2-11, 14-16, 19-21, 24-26; Legal Conclusion 8.)

17. The IEP team meeting was also procedurally proper. The IEP team included all necessary members, Mother, a regular teacher, a special education teacher, representatives from District, as well as an advocate and the preschool director invited by Student. All of the professionals who conducted assessments attended, and each of them was qualified to explain her results and recommendations. Parents, their advocate, and the director of Student’s pre-school, fully participated in the IEP team meeting. Their input was included, they had an opportunity to ask questions and their concerns were addressed in the IEP. (Factual Findings 13, 18, 23, 27, 28-31, 33, 37; Legal Conclusions 11- 13.)

18. The IEP met all written requirements. The IEP contained a full description of the offered placement, and all services, modifications, and accommodations. The IEP contained measurable annual goals that addressed academics, behavior, visual motor skills (writing), social skills, oral language, language pragmatics, and pupil counseling, all of the areas of need identified by the assessments and the IEP team. The evidence showed that all

of the goals were drafted based on an extensive review of Student's PLOP's, past goals, and new information obtained through the assessment process. (Factual Findings 36-40; Legal Conclusions 7, 9-10.)

19. Finally, as discussed below, the IEP was designed to meet Student's unique needs and was reasonably calculated to provide Student with some educational benefit in the LRE. (See *Rowley*, *supra*, 458 U.S. at pp. 200-204.)

20. First, the offer of placement in general education kindergarten was appropriate because Student was able to function at age/grade level with accommodations and support. The general education kindergarten class in Student's school of residence, with appropriate related services, was the LRE. The IDEA expresses a policy preference for inclusion to the maximum extent appropriate as an aspiration for all children with special needs. (See 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114 & 300.116; Ed. Code, § 56031.) The *Rachel H.* case from the Ninth Circuit demonstrates that the question of whether general education is appropriate requires balancing multiple factors. (See *Rachel H.*, *supra*, 14 F.3d at p. 1404.) Applying the *Rachel H.* factors in this case, District's offered program met the IDEA's aspiration of inclusion to the maximum extent appropriate. The school psychologist, occupational therapist, LAS pathologist, special education resource specialist, and the behavior support specialist all testified Student was able to access the general education kindergarten curriculum with appropriate related services. District demonstrated Student was capable of doing the work assigned to him in the general education setting, that he was able to work with his teachers and classmates, and that he would benefit academically and socially in the general education environment. Student was making improvement in all areas. There was no evidence Student's behaviors adversely affected other students. He was well behaved, bright and responded to adult direction. Parents did not object to general education placement. Rather, Parents believed Student required full inclusion with typical peers at an alternative school site and an NPA aide. However, *Rowley* leaves program methodology to District's discretion and, while District is required to consider Parental input, Parent's placement preference is not controlling. At hearing, there was no evidence to contradict District's evidence showing the offer of placement was appropriate. (Factual Findings 12, 17, 22, 26, 29, 31-42; Legal Conclusions 3-6, 13-14.)

21. Finally, District's evidence showed that the type, frequency, and duration of related services, as well as the accommodations and modifications were appropriate. Student's behaviors impacted his ability to function in the classroom. The IEP included a comprehensive program of BID and BII services, modifications and accommodations to be used in the classroom to address these behaviors and an FBA to further determine the level of supports needed. Student's previous goals for LAS and OT had been met. Student's assessments showed adequate LAS and motor skills but that he had pragmatic language difficulties communicating with his peers and moderate difficulty writing letters. The IEP addressed these needs by including "pull-out" OT and LAS therapy to provide specialized training, and "push-in" OT and LAS therapy so Student could practice these skills with classroom supervision. Student was working at age/grade level in all areas except oral language but his performance was inconsistent due to his behaviors. The IEP included

classroom accommodations, modifications and supports relating to transitioning, on task performance, stress reduction, comprehension checks and explicit instruction. The team also addressed Student's psychological and academic needs with appropriate levels of counseling and RSP in math, reading, writing, oral language, vocational education, and social skills, in addition to the behavior support. (Factual Findings 12, 17, 22, 26, 29, 32-41; Legal Conclusions 3, 5-6, 9.)

ORDER

The IEP dated June 13, 2011, offered Student a FAPE.

PREVAILING PARTY

Pursuant to 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. In accordance with that section, the following finding is made: District prevailed on the sole issue heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: June 22, 2012

/s/

MARIAN H. TULLY
Administrative Law Judge
Office of Administrative Hearings