

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

In the Matter of:

YUCAIPA-CALIMESA UNIFIED SCHOOL
DISTRICT,

Petitioner,

v.

STUDENT,

Respondent

OAH CASE NO. N 2007090402

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, Special Education Division, State of California (OAH), heard this matter in Yucaipa, California. The hearing commenced on January 8, 2008, and continued on January 9, 11, 14 and 15, 2008.

Gail Lindberg, Program Manager of the East Valley Special Education Local Plan Area (SELPA), represented the District. Patti Metheny, Director of Student Services, attended the hearing on behalf of the District. Ralph O. Lewis, Jr. represented the Student. Student's mother (Mother) attended the hearing on behalf of Student.

The District filed its request for due process hearing on September 17, 2007. On December 12, 2007, OAH granted a request for continuance of the initial due process hearing dates in the case. The hearing commenced on January 8, 2008, and the record closed on February 14, 2008, upon receipt of written closing arguments.

ISSUE

The sole issue for determination is whether the District's offer of placement and services as contained in its June 1, 2007 Individualized Education Plan (IEP) constitutes an offer of a free appropriate public education (FAPE) in the least restrictive environment (LRE).

CONTENTIONS

The District contends that Student's June 1, 2007 IEP provided an appropriate offer of placement and services which constituted a FAPE as defined by the Individuals with Disabilities Education Act (IDEA). The District contends that the IEP team's offer of placement and services was designed to meet Student's unique needs, provided educational benefit and comported with the IEP. Therefore, the District is requesting that its June 1, 2007 IEP offer be deemed a FAPE.

Student contends that the District faces several procedural violations of the IDEA by which the IEP offer of placement and services cannot substantively rise to the level of a FAPE. Student contends that no general education teacher attended the IEP, and the IEP team predetermined most, if not all, of the IEP, including the offer of placement.¹ More

¹ It is noted in Student's Closing Argument Brief, that counsel raises assessment issues and argues that the District offered no evidence it conducted its assessments in conformance with the various elements of Education Code, section 56320. The District's request for due process hearing does not request any relief regarding its assessments, nor does it need to do so to request a determination of FAPE regarding the IEP. Further, Student has not filed his own due process hearing request to challenge the District's assessments. Therefore, while Student may challenge the validity of District's description of Student's present levels of performance as contained in the IEP, he may not now, in

importantly, the District could not make a valid offer of placement at the June 1, 2007 IEP because the proposed SDC placement did not exist as of that date. Further, the autism program described to Student's parents at the IEP meeting was not the program which the District ultimately implemented on August 29, 2007, when school resumed.

FACTUAL FINDINGS

BACKGROUND:

1. Student is a six-year-old child who resides within the District. Student qualifies for special education and related services as a child with autistic-like behaviors.
2. Student first attended public school in the fall of 2004, in a County operated preschool for children with autism. In March 2005, Student's parents unilaterally placed him in an applied behavior analysis (ABA) program operated by Behavioral and Educational Support Team (BEST). Parents subsequently filed a due process hearing request seeking that the District fund this ABA program.²
3. The District conducted several subsequent IEPs for Student between March 2006 and October 2006, in "an effort to develop a plan for transitioning Student into a

closing, raise procedural issues regarding the District's assessments.

² The decision on this matter, Case No. 2005070042, issued January 9, 2006, ordered that the District fund Student's ABA program at BEST, not to exceed 40 hours per week, one-to-one, intensive ABA intervention along with supervision, not to exceed 12 hours per month, and six hours per month of clinic meeting. The Decision further ordered the District, Student's parents, and BEST to arrange to have the general education component of Student's services provided by the District with appropriate BEST support. The decision required the District, Student's parents and BEST to cooperate in working toward Student's full transition into the public regular education program.

public school program.” Parents again disagreed with the District and filed a request for due process hearing requesting an Independent Expert Evaluation (IEE) in the area of occupational therapy (OT).³

4. In May 2007, the District conducted Student’s triennial assessment, which was reviewed at Student’s June 1, 2007 IEP. There is no disagreement between the parties or their experts that Student is best served through an ABA-based program. The District’s offer at this IEP consisted of a full day placement in the District’s autism special day class (SDC) at Calimesa Elementary School, two 30 minute speech therapy sessions per week, one 30 minute direct OT session per week, plus 15 minutes of in-class OT per month, in-home ABA services two hours per day after school, and two hours per month of ABA supervision. Parents did not agree with the District’s offer of placement and services.

THE JUNE 1, 2007 IEP

5. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. A student has not received a FAPE only if the procedural violation did any of the following: (1) impeded the student’s right to a FAPE; (2) significantly impeded the parent’s opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits.

6. An IEP is crafted by a team including a student’s parents, teachers and the local educational agency. The IEP document must contain the student’s current level of performance, annual goals, short and long term objectives and the criteria for measuring a student’s progress, the specific services to be provided, and the extent to which the student may participate in regular education programs. The IDEA imposes upon the district the duty to conduct a meaningful IEP meeting with the appropriate parties.

³ This was the subject of OAH Case No. 2006100272, decided March 3, 2007.

7. The District held Student's triennial IEP on June 1, 2007.⁴ Student's parents and their attorney attended the IEP meeting. The District's Director of Student Services, along with a Special Education teacher, School Psychologist, Speech and Language Pathologist, Occupational Therapist, and Program Specialist also attended. Additionally, the SELPA Autism Specialist, Student's private school preschool teacher and Principal, and a representative from Student's non-public agency (NPA) service provider, BEST attended the meeting.

8. Student contends that the IEP team at the June 1, 2007 IEP did not include a general education teacher. An IEP team is required to include no less than one regular education teacher of the student, if the student is, or may be, participating in the regular education environment. Further, the regular education teacher shall participate in the development, review, and revision of the student's IEP, to the extent appropriate.

9. The June 1, 2007 IEP reflects that Elizabeth Schmidt attended the IEP meeting as the general education teacher. Ms. Schmidt was Student's preschool teacher at Yucaipa Christian School (YCS) for the 2006-2007 school year. While Ms. Schmidt's attendance at the IEP meeting provided invaluable information regarding Student's present levels of performance (PLOP), she was not qualified to act as the general education representative at the IEP. Ms. Schmidt has been a kindergarten teacher at YCS for two years, however, she has no teaching credential. Although she attended the IEP meeting as Student's then-current preschool teacher, Ms. Schmidt had no understanding of the general education program in the District, nor was she comfortable participating in creating goals or discussing placement at the IEP meeting. Ms. Schmidt, in fact, left the IEP meeting early.

⁴ No issues were raised regarding the sufficiency of notice to Student regarding the IEP meeting. Student's parents were mailed notice of the IEP meeting on May 21, 2007, and they attended the IEP meeting on June 1, 2007.

10. Applicable law no longer requires the presence of the student's current regular education teacher on the IEP team. The phrase "at least one regular education teacher of such child," gives a school district more discretion in selecting the regular education teacher."⁵ While the general education teacher is not required to be Student's current teacher, the District is still required to ensure that the teacher selected has sufficient knowledge of the District's general education programs to effectively participate in the IEP meeting. Although several other District employees attended the IEP, none of them were identified as the general education teacher, and their familiarity with general education remains unknown. What is known is that Ms. Schmidt is not a credentialed teacher and has no experience with the District. She could not provide useful input regarding the possibility or extent of Student's contact with general education peers at Calimesa Elementary School. While she could provide information regarding Student's PLOP, that information needed to be further discussed with input from a general education teacher, employed by, and familiar with the general education program at the District. The failure to have a District general education teacher as part of the IEP team is a procedural violation of the IDEA. However, not every procedural violation of the IDEA is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid.

11. As stated in Factual Finding 5, determining whether a procedural violation of the IDEA involves a three-pronged test. In this matter, neither of the parties requested placement in a bona fide general education setting.⁶ Had Student requested a true

⁵ See R.B. Ex Rel., F.B. v. Napa Valley Unified School District (*9th Cir. 2007*) 496 F.3d 932, 939.

⁶ Although troubling, Student's existing placement at YCS is not an issue in this matter. YCS may be a "general education setting" due to its lack of special education

general education placement or substantial mainstreaming from the District, the contributions of a general education teacher would be essential. That is not the case here. Given Student's current PLOP, extended placement in a general education setting is not recommended, nor is Student seeking it. The District's offer of placement in the SDC contemplated Student's participation in general education during recess, lunch and at school activities. Further, Student clearly desires to maintain his current non-public school placement at YCS. Student's primary objections to the IEP are on other grounds unrelated to the participation of a general education teacher. The omission of a general education teacher from the IEP meeting did not cause Student substantive harm nor was it a significant violation of the IDEA.

12. Student contends that the District predetermined the June 1, 2007 IEP. Patty Metheny,⁷ the Director of Student Services for the District, prepared a draft of the IEP prior to the IEP meeting and submitted it to the IEP team at the meeting on June 1, 2007. Merely pre-writing proposed goals and objectives does not constitute predetermination. The test is whether the district comes to the IEP meeting with an open mind and discusses options before final recommendations are made.

13. As indicated in Factual Finding 5, Student's parents attended the IEP meeting with their attorney, as well as Monica Bernaldo⁸ from BEST. The IEP is 24 pages in total, and

classes, but it is by no means a mainstream placement among Student's typical peers. Student, who is nearly seven years old, is placed in a classroom of primarily four year olds.

⁷ Ms. Metheny has been Director of Student Services for six years. She has multiple subject and special education teaching credentials, and a M.A. in Educational Psychology and Administration. She is highly knowledgeable regarding the IEP process, specifically with preparing IEP reports.

⁸ Ms. Bernaldo is the Regional Manager for BEST. She has been trained and

all but one page contains interlineations or handwritten comments obtained from the attendees at the IEP meeting. The IEP notes reflect that Student's triennial assessments were discussed at length. BEST did not provide its data and report to the District prior to the IEP meeting. Therefore, when provided information by Ms. Bernaldo at the IEP meeting, the IEP team added this information to Student's PLOP and goals. As a result, several proposed goals were deleted. Other goals were modified based upon information provided by BEST. The IEP notes indicate that Student's attorney did not agree with the goals developed with the school staff and BEST staff collaboration. Further, the parents did not respond when asked for their input. Mother testified that she would not discuss Student or accept recommendations from anyone who had not personally met Student, and she knew that several of the IEP team members, specifically the special education teacher and District Administrator, had yet to meet Student.

14. It is clear from the IEP document itself that substantial changes were made to the IEP at the IEP meeting. The IEP team participated in a lengthy discussion regarding Student's abilities and goals. The District sought dialogue with the parents, who elected to remain silent. The District did not predetermine the IEP.

15. Student contends that the District failed to provide Student with the necessary information to agree to a proposed placement where the placement was non-existent and the teaching program was undetermined as of the June 1, 2007 IEP.

16. In order to determine the appropriateness of the District's offer of services and placement, it is necessary to first provide additional background regarding the proposed autism SDC. Approximately three to four years ago, the District noted an

employed by BEST for six years. Ms. Bernaldo has a B.A. in Child Development and Special Education, and a M.A. in Teaching. She is currently working on her certification as a Board Certified Behavior Analyst.

increase in autism referrals from the local Regional Center involving children ages three to five. Although the District had special education classes, it had no autism specific programs. In response, the District determined a need to create its own autism program. The process to develop this program District began over two years ago, as a cooperative effort of the District, the County and the SELPA. Over this period the District obtained funding, selected a site for the classroom, selected teachers and staff, and reviewed teaching materials. The District endeavored to design a proactive autism program, which would meet the needs of children with autism and get them ready to learn. The District intended that the program would work on behavior, stress language development and social skills, and provide exposure to academics. DIS services would be provided on site. The teacher and staff would be trained in advance of the classroom opening, scheduled for August 29, 2007.

17. By the time of Student's IEP on June 1, 2007, the District's autism program existed on paper. The program had been funded, and the District had selected a classroom site at Calimesa Elementary School. Vicki Wood had been selected as the special education teacher. Several students had already been selected for the class. The actual, physical classroom had not yet been constructed, and the teaching staff had not yet completed training.

18. Student has offered no authority to suggest that the District does not maintain the ability to determine its own class scheduling as well as the flexibility to make physical changes, i.e., location of classroom or selection of teacher, as long as the changes comport with a student's IEP. Instead, Student cites *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, and argues that the formal requirements of an IEP are not merely technical, and should be enforced rigorously. Student equates the *Union* requirement of a formal, written IEP document, with a need for an actual classroom, physically existing at the time of the IEP. *Union* makes no such demand. The classroom did exist, and as Ms.

Metheny stated, it was just as solid as any other class scheduled for the 2007-2008 school year. As stated by the United States Department of Education in its comments to the newly-authorized federal regulations: "The Department's longstanding position is that placement refers to the provision of special education and related services rather than to a specific place, such as a specific classroom or specific school."⁹ The lack of an actual classroom on June 1, 2007, prevented Mother from observing the physical makeup of the classroom. This alone, however, is not determinative of whether Student's IEP failed to offer a FAPE.

19. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but a meaningful IEP meeting. In this regard, Student's reliance on *Union* does have merit in determining whether the IEP team provided Student's parents with sufficient information regarding the offer to enable them to develop a reasoned understanding of the proposed placement. In determining whether or not to accept or reject a placement, the parents have the right to consider the entire offer. The reasons to impose this requirement are (1) to alert the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA; (2) to help the parents determine whether to oppose or accept the placement with supplemental services; and (3) to allow the district to be more prepared to introduce sufficient relevant evidence at hearing regarding the appropriateness of the placement.

20. The District's written offer of placement is most troubling. The offer is non-definitive and stated as follows: "The District is offering placement for Student in a district SDC designed specifically for students with autism and implementing strategies based on research shown to be effective with students with autism." While this statement is to some

⁹ (71 Fed.Reg. 46687 (August 14, 2006).)

extent a paraphrasing of the legal requirements of an offer, it provides no specific information as to what will be provided to Student other than "360 minutes a day in this classroom." The IEP notes add that Vicki Wood, who had been selected as the SDC teacher, spoke extensively about her training and the class.

21. Vicki Wood has been a SDC teacher for the District for 11 years. She has a B.S. in psychology. She has credentials in mild to moderate special education. Her teaching experience has primarily been in a middle school SDC setting, dealing with severely emotionally disturbed students. In early 2007, the District determined that Ms. Wood would teach the autism SDC in the 2007-2008 school year. Ms. Wood indicated that she would have two aides in the new autism SDC, however, she would be responsible for providing a safe learning environment, working with each student on individual needs and IEP goals, and exposing them to State standards.

22. Prior to Student's June 1, 2007 IEP, Ms. Wood had some sensory issues training and language training from Lindamood-Bell. In addition, she attended a structured teaching workshop conducted by Treatment and Education of Autistic and Communication Handicapped Children (TEACCH). TEACCH is an autism teaching strategy, which differs from applied behavior analysis (ABA) in both methodology and application.

23. Ms. Wood participated in developing the autism classroom, which now uses an ABA approach. She stated that she originally intended to utilize TEACCH strategies, however, after taking Dr. Leaf's¹⁰ ABA training, she preferred the ABA program. It is her opinion that ABA sets high expectations, is more naturalistic and provides a lesser restricted environment for students. Ms. Wood demonstrated a thorough knowledge of

¹⁰ Dr. Ronald Leaf is a preeminent expert on ABA. Dr. Leaf worked with Dr. Ivar Lovaas at the UCLA Autism Center for 13 years. Dr. Leaf co-founded Autism Partnership and now primarily provides trainings in ABA.

ABA principles; however, she did not obtain this knowledge until attending her ABA training which occurred after Student's IEP. Any descriptions of the District's autism SDC at the IEP, were descriptions of a TEACCH classroom, not an ABA classroom. As example, the District reported that the SDC would have a sensory room which is a trait of TEACCH based programs. The actual SDC, which follows ABA, does not have the sensory room, as was described to the parents at the IEP. District witnesses spent an exceptional amount of time illuminating the success of their ABA program, and definitively describing components of ABA methodology. Their testimony was not sufficiently relevant, as it provided a portrait of what the SDC became in the 2007-2008 school year, instead of a snapshot of what the District contemplated at the time of Student's IEP.

24. The District contends this is an argument of methodology. Therefore, as long as it provides an appropriate education, the methodology is left up to the District's discretion. Although methodology is generally left to the discretion of the District, it is not a missive to unilaterally change the proposed program after a Student's IEP. Since the District was unable to have Mother observe the actual SDC, to "see for herself," it became imperative that the District fully and accurately describe the placement at the IEP. While there is no question that the District had the ability to select the methodology to be used in its SDC, it also had the obligation to accurately describe it to the parents. Without an accurate description at the IEP, it is impossible for the parents to make an informed decision regarding the offer of placement. The classroom and program offered to Student on June 1, 2007, was not the classroom and program which went into effect on August 29, 2007. The failure to accurately describe Student's proposed placement is a procedural violation of the IDEA.

25. Again, in order to constitute a denial of FAPE, the procedural violation must have (1) impeded Student's right to a FAPE; (2) significantly impeded his parent's opportunity to participate in the decision making process; or (3) caused a deprivation of

educational benefits. While it is clear that Student's parents did not actively participate in the IEP process and were neither candid nor cooperative at the IEP meeting, it is not their duty to present the proposed education plan at the IEP. It is the responsibility of the District to clearly and completely describe the offer sufficiently for the parents to consider. The District's failure to clearly and accurately describe the SDC and autism program offered to Student made it impossible for Student's parents to reasonably participate in the decision making process, and thereby represents a significant procedural violation of the IDEA which constitutes a denial of FAPE.

26. Given that the District procedurally failed to offer Student a FAPE, it is unnecessary to further determine the substantive issues addressed in the IEP.

LEGAL CONCLUSIONS

APPLICABLE LAW

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. The District has the burden of persuasion in this matter.

2. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or the Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA. Special education is defined as specially designed instruction provided at no cost to parents, calculated to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29); Ed. Code, § 56031.)

3. The issue of whether a school district has offered a FAPE has both procedural and substantive components. States must establish and maintain certain procedural

safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School District*, (9th Cir. 1992) 960 F.2d 1479, 1483 (W.G.)) Citing *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034], the court also recognized the importance of adherence to the procedural requirements of the IDEA, but noted that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at p. 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*Ibid*)

4. While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 892.) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (Ed. Code, § 56505, subds. (f)(A)-(C).)

5. An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. §

1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).) It shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

6. The IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties. (*W.G., supra*, at p. 1485.) Those parties who have first hand knowledge of the child's needs and who are most concerned about the child must be involved in the IEP creation process. (*Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d. 1072, 1079, citing *Amanda J., supra*, 267 F.3d. 877, 891.) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but a meaningful IEP meeting. (*W.G., supra*, at p. 1485.) A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036.)

7. At least one regular education teacher shall be included on the IEP team if the child is or may be participating in the regular school education environment. (20 U.S.C § 1414(d)(1)(A)(iv); Ed. Code, § 56341, subd. (b)(2).) A school district's failure to obtain any input or participation from the Student's regular classroom teacher may be a serious procedural violation. (*W. G., supra*, at pp. 1484-85.) The rationale for requiring the attendance of a regular education teacher is closely tied to Congress's "least restrictive environment" mandate. The input provided by a regular education teacher is vitally important in considering the extent to which a disabled student may be integrated into a regular education classroom and how the student's individual needs might be met within

that classroom. (*Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840.)

8. Predetermination is a procedural violation which deprives a student of a FAPE in those instances where placement is determined without parental involvement at the IEP. Merely pre-writing proposed goals and objectives does not constitute predetermination. The test is whether the school board comes to the IEP meeting with an open mind and several options are discussed before final recommendation is made. (*Doyle v. Arlington County School Board* (E.D. Va 1992) 806 F.Supp. 1253, 1262; *Deal, supra*, 392 F.3d at p. 858.)

9. In *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526), the court emphasized the importance of the formal offer requirement. The formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in presenting complaints with respect to any matter relating to the educational placement of the child.

10. In the *Union* case, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. However, that right does not mean that a change in location of a program amounts to a change in placement, or that the district failed to make a clear, written offer of placement. As stated by the United States Department of Education in its comments to the newly-authorized federal regulations: "The Department's longstanding position is that placement refers to the provision of special education and related services rather than to a specific place, such as a specific classroom or specific school." (71 Fed.Reg. 46687 (Aug 14, 2006); see also

Johnson v. SEHO (9th Cir. 2002) 287 F.3d 1176.)

11. Our own decisions follow in step with *Union*. In determining whether or not to accept or reject a placement, the parents have the right to consider the entire offer. The reasons to impose this requirement is (1) to alert the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA; (2) to help the parents determine whether to oppose or accept the placement with supplemental services; and (3) to allow the district to be more prepared to introduce sufficient relevant evidence at hearing regarding the appropriateness of the placement. (*Student v. San Juan Unified School District* (SN02-02308) March 7, 2003.)

12. 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. 208.) This rule is applied in situations involving disputes regarding choice among methodologies for educating children with autism. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141; *Pitchford v. Salem-Keizer School District* 155 F.Supp.2d 1213, 1230-32 (D. Ore. 2001); *T. B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84.) Courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B., supra*, 361 F.3d at p. 84.)

13. An IEP is assessed in light of information available at the time it was developed; it is not judged in hindsight. (*Adams, supra*, 195 F.3d at p. 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann, supra*, 993 F.2d at p. 1041.) It must be assessed in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

DETERMINATION OF ISSUES

14. The District held Student's IEP meeting on June 1, 2007. Pursuant to Legal Conclusion 6, the IDEA imposes a duty upon the District to conduct a meaningful IEP meeting with appropriate parties present. Pursuant to Legal Conclusion 7, at least one

regular education teacher shall be included on the IEP team. As stated in Factual Finding 9, the IEP indicates that Elizabeth Schmidt attended the IEP meeting as the general education teacher. Based upon Factual Findings 9 and 10, Ms. Schmidt is not a credentialed teacher and has no knowledge of the District's educational programs. As such, she was not qualified to act as the District's general education teacher at the IEP. Pursuant to Legal Conclusion 4, not all procedural violations of the IDEA result in a denial of FAPE. Based upon Factual Finding 11, the absence of a general education teacher did not impede Student's right to a FAPE, impede his parents an opportunity to participate in the decision making process, or cause a deprivation of educational benefits. The omission of a general education teacher at the IEP meeting did not constitute a denial of FAPE.

15. Based upon Factual Finding 12, the District's Director of Student Services prepared a draft of the IEP prior to the IEP meeting and submitted it to the IEP team at the meeting on June 1, 2007. Pursuant to Legal Conclusion 8, the test of predetermination is not whether a document has been written prior to the IEP, but rather whether the District comes to the IEP meeting with an open mind and options are discussed before final recommendations are made. Predetermination is a denial of FAPE in those instances where decisions are made without parental involvement at the IEP. Based upon Factual Findings 13 and 14, Student's parents attended the IEP with counsel. Representatives of Student's private school and ABA program attended the IEP. The IEP contains 23 pages of handwritten interlineations, amendments and deletions. Information from BEST, which had previously been withheld from the District, was discussed and incorporated in the IEP. Although the parents elected to generally remain silent, the District provided them with an opportunity to participate and contribute to the IEP discussion. The District did not predetermine Student's IEP.

16. Pursuant to Legal Conclusion 9, the requirement of a formal written IEP document is not merely technical. It serves to provide a clear record of what placement

and services were offered. Further, pursuant to Legal Conclusion 13, the IEP is assessed in light of the information available at the time it was developed. It is not judged in hindsight. Based upon Factual Finding 17, at the time of Student's IEP on June 1, 2007, the autism SDC existed on paper, however, the physical existence of the classroom did not exist, and the teaching staff training had not yet been completed. As stated in Factual Finding 18, Student has presented no authority which requires a classroom to be in existence as of the IEP or which mandates parental observation of the exact classroom offered to a student. The SDC existed to the same extent as any other class scheduled for the following school year. The dilemma created by Mother being unable to "see for herself" is not determinative of a denial of FAPE, but certainly is a factor in her ability to fully participate in the IEP process.

17. Pursuant to Legal Conclusions 6 and 9, the District is required to conduct a meaningful IEP meeting and ensure that the placement offered is based upon the Student's IEP. Based upon Factual Finding 20, the District's written offer of placement was vague and legalistic at best. It contained no information specific to Student. Further discussion and explanation of the placement was provided by Ms. Wood at the IEP. Based upon Factual Findings 21, 22, and 23, it is clear that Ms. Wood had only received training in TEACCH methodology prior to Student's IEP, and, as of June 1, 2007, she intended to initiate a TEACCH program in the SDC. Ms. Wood's expertise in ABA methodology was developed after Student's IEP, and, therefore, she would not have discussed the ABA approach at the IEP meeting.

18. Pursuant to Legal Conclusion 12, teaching methodology is generally left to the discretion of the district. While the court is ill-equipped to second guess a district's choice of methodology, it still requires that the district actually choose one. The District must select a methodology, presents it to the parents, and stick with it. In those cases where a student's program is "to be announced" or where, as here, the District unilaterally

changes the program, the parents are unable to realistically participate in a meaningful IEP meeting. The District has no more ability to unilaterally change the entire teaching program used with Student, than it can unilaterally change Student's IEP without explaining the changes to his parents. The fact that the changes implemented on August 29, 2007, were more appropriate for Student does not negate the fact that his parents were unable to meaningfully participate in the June 1, 2007 IEP, as determined in Factual Findings 20 through 24, and Legal Conclusions 3, 5, 6, 9, 10 and 11. The District's failure to accurately define Student's placement and program at the June 1, 2007 IEP was a procedural violation of the IDEA which resulted in a denial of FAPE.

19. As the District has failed to provide Student with a FAPE based upon procedural issues, there is no need to further rule on the substantive content of the IEP.

ORDER

The District's request for a finding that Student's June 1, 2007 IEP constitutes a FAPE is denied.

PREVAILING PARTY

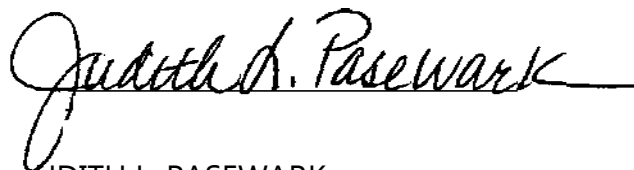
Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

1. Student prevailed on issue 1.

RIGHT TO APPEAL THIS DECISION

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

Dated: March 21, 2008

A handwritten signature in black ink, reading "Judith L. Pasewark". The signature is fluid and cursive, with a long horizontal line extending from the end of the name.

JUDITH L. PASEWARK

Administrative Law Judge

Office of Administrative Hearings

Special Education Division