BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT on behalf of STUDENT, v. CABRILLO UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2008120207

DECISION

Administrative Law Judge (ALJ) Steven Charles Smith, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Half Moon Bay, California on March 23 - 27, and April 6, 2009.

Ralph O. Lewis, Jr., Attorney at Law, appeared on behalf of Student. Mother was present at the hearing on all days. Father was present intermittently. Student did not appear.

Kathryn Alberti, Attorney at Law, appeared on behalf of the Cabrillo Unified School District (District). Kimberly Kopp (Kopp), District's Director of Special Services, was present at the hearing on all days.

On December 5, 2008, Student filed a Request for Due Process Hearing (Student's Complaint) naming District as respondent. A continuance was granted for good cause on January 14, 2009. On the last day of hearing, the parties were granted permission to file written closing briefs by May 11, 2009. Upon receipt of the closing briefs, the record was closed and the matter was submitted.

ISSUES[1]

1. Did the District deny Student a free, appropriate, public education (FAPE) at the December 6, 2006 IEP meeting by:

a) Pre-determining its offer of FAPE?

[1] All issues originally set out in the Pre-Hearing Conference Order have been restructured herein for clarity, but are materially the same.

b) Failing to allow Parents meaningful participation in the IEP meeting?
c) Failing to identify Student's present levels of performance in Student's IEP?
d) Failing to develop measurable annual goals and objectives for Student?
e) Failing to offer Student an appropriate placement?

2. Did District deny Student FAPE by failing to provide written prior notice to Student's Parents of District's refusal to provide Sea Crest School and Student's home program as the appropriate educational placement?

3. Did District deny Student FAPE by failing to provide written prior notice to Student's parents of District's refusal to fund Independent Educational Evaluations (IEE's) requested by the parents?

4. Did District deny Student FAPE by failing to convene an IEP meeting for the 2007-2008 regular and extended school year?

5. Did District deny Student FAPE by failing to convene an IEP meeting for the 2008-2009 regular and extended school year?

FINDINGS OF FACT[2]

Jurisdiction and General Background

1. At the time of the hearing, Student was a boy aged eight years who, at all relevant times, resided with Parents within the boundaries of District. Student's public school of residence was El Granada Elementary School (El Granada).

2. At hearing, Mother testified that on December 5, 2005, when Student was almost five years old, and not previously known to District, Mother emailed Kopp, then District's Lead School Psychologist and Program Specialist, to inform Kopp that Student had been "diagnosed with hyperlexia – on the autism spectrum," and to request information as to how to obtain services for Student from District. Kopp testified that she did not receive Mother's email and therefore did not respond to it. Mother did not make any other communication attempts at or near that time, so District remained unaware of Student's existence until spring of 2006. At the time, Student attended pre-school at Holy Family Children's Center (Holy Family), near Student's residence.

[2] Student's Request for Due Process Hearing was filed December 5, 2008. The statutes of limitation applicable to this case are two years from the time the parents knew of should have known of the alleged action that formed the basis of the complaint. (20 U.S.C. §§ 1415(b)(6)(B), 1415(f)(3)(C); 34 C.F.R. 300.507(a)(2), 300.511(e) (2006); Ed. Code, § 56505, subds. (l) & (n).) Therefore, only those allegations in Student's Complaint of actions occurring on or after December 6, 2006, were considered for potential remedy; however, events predating December 6, 2006, are herein discussed, and findings of fact made, where necessary to the reader's understanding of the context in which this Decision was made.

3. On May 3, 2006, at Parent's initiative and expense, Student began to undergo an extensive multidisciplinary evaluation[3] through the Children's Health Council (CHC), in part, to determine Student's level of personal and academic functioning.

4. On May 8, 2006, Mother completed and submitted an open enrollment form to District for an intra-district transfer and requested that Student be allowed to attend kindergarten in fall, 2006, at District's Kings Mountain Elementary School (Kings Mountain), rather than El Granada. Kings Mountain was a very small school, up a mountain road, about a 30 minute drive from Student's residence. Due to its size and location, Kings Mountain had very limited special education capacity or services. The intra-district transfer form clearly stated that, "I understand the following requirement regarding a requested transfer: … If my child requires special education services and the IEP cannot be implemented at the requested school, the open enrollment transfer may be denied." Mother read and understood the requirement. At the time, Mother did not inform District of Student's special education needs, nor did Mother inform District of the CHC evaluation of Student that was underway.

5. On June 12, 2006, CHC completed its report of the Multidisciplinary Team Evaluation of Student (CHC Report), which was the result of seven days of testing and observations, including nine standardized tests and school observation of Student at Holy Family. Mendy A. Boettcher, Ph.D. (Dr. Boettcher) led the evaluation and wrote the CHC Report.

6. Dr. Boettcher, a California Licensed Psychologist, had an approximately ten years of educational and professional background in psychology which included the following: Bachelor of Arts in Psychology/Biology (Claremont McKenna College), Master of Arts in Counseling Psychology, and Doctor of Philosophy in Counseling and School Psychology (University of California, Santa Barbara). Dr. Boettcher also undertook a Post-Doctoral Clinical Psychology Fellowship, with an emphasis in autism, (Yale University), where she assessed approximately 100 children for possible autism. At the time of the CHC Report, Dr. Boettcher was a CHC Staff Psychologist. At the time of the DPH, Dr. Boettcher was Clinical Assistant Professor of Child Psychology, Stanford University. In light of Dr. Boettcher's educational and professional background, the CHC Report was given significant weight.

7. The CHC Report revealed that Student, then five and one-half years old, had markedly diminished social relatedness and interactions, including: little or no ability to engage in or sustain a conversation; inability to transition well from school activity to school activity without adult prompts; little interaction with peers; and, an intermittent response to

[3] "Evaluation" and "assessment" have the same legal meaning in this Decision and are used interchangeably, consistent with the terminology used by the parties, the witnesses and documentary evidence. (See 20 U.S.C. § 1414(b); Ed. Code, § 56302.5.)

social advances of turning his back toward the other person and growling to avoid the interaction.

8. The CHC Report further revealed Student as a sweet-natured child, who was usually cooperative in the clinical test setting. Student needed several repetitions and modeling to understand test tasks. He was unable to complete any of the age-appropriate tests related to Processing Speech IQ. However, from the portions of the Wechsler Preschool and Primary Scale of Intelligence, Third Edition (WPPSI-III) IQ test that Student was able to complete, his scores (where 100 was the mean and 15 the standard deviation) were: Verbal IQ – 70 (2nd percentile)[4]; Performance IQ – 90 (25th percentile); General Language IQ – 91 (27th percentile); and, Full Scale IQ – 73 (4th percentile: borderline range of cognitive functioning, suggesting significant impairment). Subtests were similar in result, that is, on practical, non-verbal tasks, Student did better than on verbal reasoning tasks. Student's reading decoding ability was superior, yet he was unable to sound out words or understand much of their meaning. Conceptual thinking subtests placed Student in the deficient range. Student's expressive and receptive skills were determined to have been significantly delayed for a child of his age. Student rarely made eye contact with evaluators or peers, reciprocal communication was diminished, and he often engaged in delayed echolalia and repetitive behaviors. Student displayed many atypical behaviors that were consistent with autism spectrum disorder (ASD).

9. According to the CHC Report, in many areas of language, Student demonstrated abilities more akin to a three or four year old child than a five and one-half year old as was Student. During a test of communicative intent, out of 183 exchanges, Student responded appropriately only 27 times without echoing. Much of the time, Student did not respond or only made non-communicative sounds. Occasionally, Student did have correct, understandable communication exchanges. On the Preschool Language Scale, Fourth Edition (PLS-4) which tests typical, age-appropriate, expressive and receptive language skills, Student scored at the third percentile for auditory comprehension and first percentile for expressive comprehension, for an overall language score of the second percentile. Based on the combination of strengths, challenges and delays displayed by Student in the areas of verbal and non-verbal communication, socialization skills and behaviors, the CHC Report concluded that Student met the criteria for autism as described in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (also known as DSM-IV).[5]

10. Based on the foregoing, the CHC Report's educational recommendations included, among others: Parents to notify Student's local public school district of Student's condition and request an IEP be developed for Student; in fall, 2006, Student to attend "an

[4] "Percentile" rank refers to the level of performance measured against other test participants where the number expressed as a percentile indicates the percentage number of other test takers whose scores were less than the expressed percentile rank. Student's second percentile rank meant that approximately two percent of test takers would have scored below Student and approximately ninety-eight percent would have scored above Student.

[5] The DSM-IV criteria for autism differs from the Education Code criteria, but in this case overlapped. (See, Ed. Code, § 56846.2.)

appropriate kindergarten level placement for children with language disorders and delays, as well as autism spectrum disorders, " for which the "setting may be a special education pre-kindergarten/kindergarten, or a regular education kindergarten with a full time one-to-one aide"; a classroom of structured, predictable, consistent routines in a low student-to-staff ratio; a classroom in which the teacher was knowledgeable of speech and language disorders and autism; a classroom in which the other students would have similar intellectual levels and social/learning profiles as Student; small group instruction which would allow the teacher to be aware and able to redirect Student given Student's observed intermittent passive and unmotivated attitude when faced with difficult or unfamiliar tasks; an educational placement with students of similar functioning profiles given Student's impaired verbal abilities; and, if placed in a special education setting, mainstream Student in a regular education setting for certain activities to facilitate social and language development through exposure to typically developing peers, assisted by one-to-one adult support. The CHC Report further recommended twice weekly speech and language therapy (SLT), twice weekly occupational therapy (OT) pursuant to a separate CHC OT Report, daily social skills intervention, daily communication intervention, and various methods for implementing these recommendations.

District's 2006 Assessment of Student

11. On June 21, 2006, Mother wrote to Kopp advising that Student had recently been diagnosed with autism and that Mother was "formally" requesting that District's special education process begin, including conducting an initial assessment to determine Student's eligibility. On June 27, 2006, Kopp replied to Mother's June 21, 2006 letter, described the process and timing of assessment and eligibility determination and requested the name of the professional who had diagnosed Student, as well as a copy of the diagnostic report. Kopp explained that, due to summer break, an assessment plan for Student would be readied by September 7, 2006, and the assessment of Student completed within 60 days following receipt of Parents' written consent to assess. Kopp's June 27, 2006 letter to Mother included a Release of Information form and Notice of Procedural Safeguards and Parents' Rights.

12. On July 17, 2006, Mother delivered the CHC Report to District. After District personnel reviewed the CHC Report, District determined that it could not meet Student's special needs, as described in the CHC Report, at Kings Mountain, but, could do so at El Granada, Student's public school of residence. Therefore, consistent with the policy requirements for an intra-district transfer, as described on the enrollment form that Mother read and understood (Findings of Fact 4), District rescinded the intra-district transfer to Kings Mountain in a letter to Parents dated August 23, 2006, and returned Student's initial public school enrollment for the upcoming school year (2006-2007) to El Granada.

13. Parents disagreed with the District's decision to rescind Student's intra-district transfer and, on August 24, 2006, met with District Assistant Superintendent and Special Education Director Allan Kass (Kass) to discuss the matter. Kass explained District's review of the CHC Report, commissioned by Parents, and the need to provide services to Student that were not available at Kings Mountain. Kass inquired of Parents whether they were aware that, had District known of Student earlier, District could have been providing services to

Student. Mother replied that she had chosen not to identify herself or Student to District until June, 2006. Parents understood District's concerns, but, by letter of August 24, 2006, maintained their disagreement with District's decision, and stated, "We understand that the [D]istrict's reason for recommending this transfer is due to their concern that [Student's] special education needs exceed what is available on site at Kings Mountain School." Parents then requested to proceed with starting Student at Kings Mountain upon condition of not holding District legally responsible for Parents' placement of Student at Kings Mountain. By separate letter of same date, Parents also requested that Student "stay put" at Kings Mountain and that District begin the IEP development process, provide an aide to Student and begin providing speech, language and occupational therapy to Student. At approximately this point in time, Father told Kass that, for personal reasons, Father would never send Student to El Granada.

14. Between the August 24, 2006 meeting and the DPH, Kass had been elevated to Interim District Supervisor, then, upon completion of his 30 year career, had retired. Because of Kass's demeanor and thoughtful responses under examination at the DPH, his personal observations in this matter, his prior executive positions with District, and his retirement terminating any continuing employer-employee association with District, Kass's testimony was considered quite credible.

15. On August 25, 2006, Kass reaffirmed to Parents that Kings Mountain was not able to meet Student's needs, but that El Granada was. He reaffirmed that District, through Kopp, would begin the formal assessment process for Student, and then, with Parents, develop an appropriate IEP for Student. District was clear in this letter and in District's prior communications on the topic, that Student's intra-district transfer to Kings Mountain had been rescinded, and that Student's enrollment documents were being transferred to El Granada. Kass further made clear that Student was welcome at El Granada and that El Granada's Principal was looking forward to meeting Student and Parents when school started the following Monday morning. Despite the foregoing, Parents attempted to deliver Student to Kings Mountain for classes when school opened. Student was denied seating at Kings Mountain and Parents were instructed that Student would have to attend El Granada. Parents did not deliver Student to El Granada. Instead, on September 5, 2006, they unilaterally placed Student at Sea Crest School (Sea Crest), a private elementary school within the boundaries of District. Parents also provided home schooling for Student through private service providers. Parents did not notify District of their placement of Student at Sea Crest at this time; rather, they allowed District to think that Student was not attending any school.

16. In early September, 2006, Parents provided written consent for District to evaluate Student and District undertook the evaluation shortly following. During District's evaluation process, District representatives questioned Mother as to where Student was attending school, so that District could observe Student's conduct as part of the evaluation process. Mother denied that Student attended any school. Mother also left blank the area on District forms asking for information about Student's current school enrollment, thereby giving the impression that Student did not attend any school. On or about October 6, 2006, a District representative was at Student's house to observe Student when she saw a Sea Crest

calendar and asked whether Student was attending Sea Crest. At this time, Mother acknowledged that Student was attending Sea Crest and agreed to allow District personnel to observe Student in that school setting for the benefit of the evaluation process. A few days later, at a time District personnel reasonably thought Mother had approved, District personnel went to Sea Crest to observe Student. About twenty minutes into the observation, Mother arrived and, in a loud voice, in front of students in the classroom, ordered District personnel to leave. Mother's conduct was unreasonable and an intentional effort to interfere with the evaluation process. District was not given further access to Student for assessment observations at Sea Crest. Mother was evasive and contradictory when questioned at hearing about her denial of Student's attendance at any school, and about her interference with District's observation of Student at Sea Crest. Because of her evasive answers at hearing, her prior evasive conduct in applying to Kings Mountain and in completing District forms, her initial, untrue answers to District regarding Student's attendance at Sea Crest, her statements of wanting services for Student and denying wanting services for Student, and her demeanor as a witness at hearing, Mother's testimony lacked credibility and was given little weight in any area of examination.

17. The District's special education assessment of Student was completed on an unspecified date in October, 2006 (District's 2006 Assessment). The multidisciplinary assessment team was composed of School Psychologist Kopp, Speech-Language Specialist Kristin Milio (who did not testify at hearing), School Occupational Therapist Leslie Bourdon (Bourdon), Special Education Teacher Carol Owens (Owens), and General Education Kindergarten Teacher Jan Grierson (Grierson).

18. Kopp had been the District's Director of Special Services (i.e., Special Education) since October of 2007. Her relevant professional experience prior to that was: Principal of Kings Mountain (2004-2005 school year); District's Program Specialist and School Psychologist (2000-2007) leading a multi-disciplinary team of special education teachers, speech-language therapists, occupational therapists, and other specialists in assessing and providing services to students with special needs, including ASD; and, School Psychologist (Northglenn, Colorado, 1999-2000; Kersey, Colorado, 1997-1998). Kopp held the California Professional Clear Pupil Personnel Services Credential (School Psychology Specialization), and California Preliminary Administrative services Credential. Kopp's educational credentials were: Bachelor of Arts, Psychology (Emory University, 1991); Master of Education, School Psychometry (Georgia State University, 1994); and, Kopp only needed to complete her dissertation to obtain a Ph.D. in Professional Psychology (University of Northern Colorado). In addition, Kopp had attended numerous seminars and workshops related to children with autism, and had taught seminars related to intellectual assessment and neuropsychology. Examples of Kopp's seminar teaching included Intellectual Assessment, Neuropsychology of Learning Disorders and Traumatic Brain Injuries (U. of N. Colorado); Substance Problems of Primary Care Medicine (U. of Colorado, School of Medicine); and, juried presenter for National Association of School Psychologists regarding neuropsychology. Given Kopp's position, professional experience and education, coupled with her demeanor and responsiveness to examination, her testimony was given significant weight.

19. Bourdon had been District's Director of Occupational Therapy since 2003. Her relevant professional experience prior to that was: California, school-based, special education program occupational therapist since 2002 (including children with ASD); and, Occupational Therapist (Massachusetts, 2001-2002; New York, 1999-2000 . Bourdon held a Bachelor of Health Sciences (Quinnipiac University, 1999) and had undertaken significant continuing education in the field of occupational therapy for children with ASD. Given Bourdon's professional experience and education, as well as her demeanor upon examination, her testimony within her area of professionalism, as well as of her percipient observations, was given significant weight.

20. Grierson had been a District Classroom Teacher (kindergarten through second grade), at El Granada, since 1991. Her relevant professional experience prior to that was: Teacher, Hatch Elementary School, Half Moon Bay, California (1990); Private Tutor, Language Arts, California (1977-1988); and, Classroom Teacher, Shelfield Infants Primary School, Walsall, England (1973-1976). Grierson's educational background included: Certificate of Education, with honors (St. Katherine's College, Liverpool University, England, 1973); Bachelor of Arts in English, with departmental prize in literature (College of Notre Dame, 1989); Masters of Administration, Public Education (College of Notre Dame, 1994). Given Grierson's professional teaching experience, educational background, and demeanor upon examination, her testimony falling within her area of professionalism, as well as of her percipient observations, was given significant weight.

21. Owens had been a District Special Education Teacher in a primary SDC setting, at El Granada since 1999. Her relevant professional experience prior to that was: Special Education Teacher in a primary SDC setting, Cupertino, California (1990-1997); and, Second Grade Teacher, Pomona, California (1985-1989). Owens held California Clear-Multiple Subject Teaching Credential (California State Polytechnic University, 1986); and, California Learning Handicapped Teaching Credential (San Jose State University, 1992). Her educational background included: Associate of Arts, Early Childhood Education (American River College, 1982); Bachelor of Arts, Liberal Studies (Sacramento State University, 1984). In addition, she undertook two years of collaboration and consultation regarding her students with ASD through the Foundation for Autistic Childhood Education and Support (FACES) and Pacific Autism Learning Services (PALS), 2004-2006. Given Owens's special education teaching experience, her credentials, education and demeanor upon examination, her testimony falling within her area of professionalism, as well as of her percipient observations, was given significant weight.

22. District's 2006 Assessment was comprehensive and included: standardized testing; a short, in-class observation of Student (District's observation was limited to twenty minutes due to Mother's withdrawal of consent to observe; Findings of Fact 16); clinical observation of Student at El Granada; questionnaire and interview of Mother; review of some of Student's records from Sea Crest; review of the CHC Report; and, review of records from, and interviews with, Student's consulting treatment and educational service providers. The findings and conclusions drawn about Student from the foregoing, by the District's 2006 Assessment team, were, for all practical purposes, the same as those discussed above with

regard to the CHC Report; specifically Student had ASD. Additionally, District's 2006 Assessment team accurately determined Student's present levels of performance, to the extent information was available, including that one of Student's greatest academic strengths was math. The assessment team opined that Student might benefit from some participation in a general education setting for specific activities, at certain times of the day, to further his math, social and language development. The District's team then deferred specific goals, objectives, services, and placement recommendations for discussion at an upcoming IEP meeting. Overall, because of the composition and leadership of the District's multidisciplinary evaluation team, the District's 2006 Assessment was very credible and given significant weight.

The 2006 IEP

23. Upon completion of District's 2006 Assessment, District offered to Parents to convene an IEP team meeting on October 23, 2006. Parents declined. District then negotiated an IEP team meeting appointment that was agreeable to Parents on November 15, 2006 at 11:00 a.m. at District's offices. At 11:15 a.m., inasmuch as Parents had neither arrived, nor telephoned to advise that they would be late, District's IEP team meeting was cancelled and the team disbanded. At approximately 11:20 a.m., Parents and their attorney arrived and were advised of the cancellation of the meeting. The next agreeable date to assemble the entire IEP team, including Parents, was December 6, 2006, as confirmed in writing by District's letter of November 28, 2006 to Parents and by Student's attorney's letter to District of November 29, 2006.

24. On November 17, 2006, Kass wrote to Parents' attorney. In his letter, Kass informed Parents' attorney that, "on August 23, 2006, when I inquired of the [Parents] whether they were aware that we [District] could have been serving [Student], they responded that they were aware and that they had not wanted services from [District]."

25. On December 6, 2006, the IEP team meeting commenced as scheduled and lasted approximately five hours. The IEP team meeting included District personnel, District's legal counsel, Parents, Parents' legal counsel and Sea Crest personnel, including Student's Sea Crest Resource/Learning Support Specialist Kathryn Gray (Gray).

26. Gray was Student's Resource Specialist Program (RSP) teacher at Sea Crest and had approximately four months of almost daily experience with Student at the time of the December 6, 2006 IEP team meeting which she attended. Her relevant prior professional experience included: public school SDC pre-school teacher in Foster City, California, primarily teaching children with ASD; and, public school SDC kindergarten/first grade teacher in Palo Alto, California, primarily teaching children with ASD. Gray held the California Early Childhood Special Education Credential, for mild to moderate disabilities. Her educational background included: Master of Arts in Special Education (Santa Clara University, 2001); and, Master of Arts in Education Administration (Santa Clara University, 2009). In light of Gray's special education teaching experience, certification and education,

in addition to her four months of almost daily teaching experience with Student at Sea Crest, and her forthright demeanor at hearing, her testimony was given significant weight.

27. During the IEP team meeting, the team, including Parents, discussed and considered the following: District's 2006 Assessment; the CHC Report; CHC OT Report; a two-page letter from a Sea Crest teacher regarding Student and his education at Sea Crest; the educational placement of Student in the least restrictive environment (LRE), including a general education class without special services, general education class with special services (such as an aide), general education class with resource specialist, general education class with intense adult support, SDC, and part-day SDC/part-day general education class with aide; physical location, including, El Granada, and, briefly, Kings Mountain and Sea Crest; numerous goals and objectives; parties responsible for obtaining progress toward the goals and objectives (for example, SDC teacher, OT, SLP); Student's present levels of performance (only limited information was available because, at the time of the December 6, 2006 IEP, Student had never attended a District school and District personnel had only been able observe Student at Sea Crest for about twenty minutes due to Mother's withdrawal of consent to observe); socializing opportunities for Student with typically developing peers; general education classroom opportunities for Student with typically developing peers; frequency and duration of classroom attendance, subject matter instruction and special education services; special accommodations, such as visual models, visual timers, repeated verbal directions, access to adult support during mainstreaming time; and, transition services to aide Student in a transition from Sea Crest to El Granada. All present team members and their representatives alike, had an opportunity to discuss any IEP related matter they chose.

28. In anticipation of the IEP meeting, District brought a partially prepared IEP form to facilitate initial team discussion to develop an educational program to accommodate Student's unique needs. By the end of the meeting, the IEP form, as finalized by the team, including Parents, was seventeen pages, not counting District's inserted and incorporated, eighteen-page, 2006 Assessment of Student, the inserted and incorporated, two-page letter from a Sea Crest teacher regarding Student and his education at Sea Crest, nor Parents' attached three-page Dissent to IEP. Of the seventeen IEP form pages, fifteen had significant, handwritten changes, additions and deletions resulting directly from collaborative IEP team discussions, including some of Parents' concerns. As finalized on the IEP form, the present levels of Student's performance were specifically noted, or were discernable from the District's inserted and incorporated 2006 Assessment. The team-developed educational goals and objectives were understandable, specific, appropriate in view of the District's 2006 Assessment and the CHC Report, and measurable, as credibly attested by Kopp, Gray, Bourdon, Grierson and Owens.

29. Ultimately, District found Student eligible for special education services at the December 6, 2006 IEP meeting, due to a primary disability of "Autism" (ASD) and a secondary disability of "Speech and Language Impairment." Parents agreed with Student's eligibility determination, but dissented as to all other material particulars of the December 6, 2006 IEP.

30. At the conclusion of the IEP meeting, District's offer of FAPE to Student was placement at El Granada during the school year and possible extended school year (ESY), in a low student-to-teacher ratio SDC for part of each school day with mainstreaming into a regular/general education setting for part of each school day with a one-to-one aide. Speech and language therapy and occupational therapy were each offered twice weekly for 45 minutes per session. Student's ESY program was to be determined at an IEP meeting before the end of 2006-2007 school year. The FAPE offer also had, as a goal noted in the comments section of the IEP form, increasing Student's general education involvement as appropriate. As testified by Kopp, Bourdon, Grierson, Owens, and Gray, the District's offer of FAPE was appropriate to Student's unique needs and was designed to provide educational benefit. Kopp, Bourdon, Grierson, Owens, Gray and Dr. Boettcher (author of the CHC Report) further credibly testified that the District's offer was materially consistent with the recommendations of the CHC Report. Gray, as Student's Sea Crest RSP, credibly testified that not only was the District's offer appropriate, but that Sea Crest was not, in her opinion, an appropriate placement for Student, and that she had expressed that point of view at the time Student was considered for enrollment at Sea Crest. Parents did not consent to District's December 6, 2006, offer of FAPE.

31. Parents written dissent to the IEP stated: District failed to provide services to Student beginning on December 5, 2005; District expelled Student from Kings Mountain on August 28, 2006, after one appearance; Parents disagreed, without specificity, with District's 2006 Assessment, yet Parents did not request an IEE in their Dissent, or at any other time; Parents' preference for placement of Student in a general education setting with a one-to-one aide, excluding altogether any SDC; Parents' disagreement with the amount of time offered to Student for OT and SLP; District predetermined Student's placement; Parents' request for reimbursement for educational services due to District's failure to offer services; Parents' request for compensatory services due to District's failure to provide services; Parents' request for a specific educational methodology for Student's education.

32. Following the December 6, 2006 IEP meeting, Parents maintained Student at Sea Crest and provided additional home schooling to Student through outside service providers. At the time of hearing, Student had never attended any District school.

District's Request to Convene 2007 IEP

33. Between December 7, 2006 and June 7, 2007, District and Parents had no contact with each other. On June 8, 2007, District, through Kopp, sent a letter to Parents reaffirming District's knowledge of Student's identification as a child with special needs and that Student had previously been recommended for special education services through an IEP. District then requested that Parents contact Kopp to arrange a meeting to conduct an annual review of Student's IEP and the possible need for an updated assessment plan. Mother testified that Parents received this letter, but did not respond to it.

District's Request to Convene 2008 IEP

34. On April 22, 2008, District received a letter of request from Parents for "a full psycho-educational evaluation of [Student] related to all of his disabilities." On May 5, 2008, Kopp replied to Parents on behalf of District by agreeing to assess Student as necessary, and providing an assessment plan, information release forms, and notice of procedural safeguards and parental rights. Thereafter, District conducted an updated assessment by reviewing all of Student's prior evaluations, obtaining and reviewing new records from Student's private service providers, conducting interviews with Student's private service providers, and observing Student at Sea Crest. On September 2, 2008, Kopp wrote to Parents and requested that Parents contact District to convene an IEP team meeting to develop a new IEP, if Parents were interested. Mother acknowledged receiving this letter. Parents did not respond to the letter.

35. Paul Lebby, Ph.D. (Dr. Lebby), was a California Licensed Clinical Psychologist, retained by Student's Parents and attorney in November, 2008, to assess Student's cognitive and behavioral functioning and to provide educational placement recommendations. Dr. Lebby obtained his Ph.D. from University of California, Berkeley in neuropsychology in 1994, and, at the time of hearing, was Assistant Clinical Professor of Neuropsychology at School of Medicine, University of California, San Francisco. Dr. Lebby's accomplishments, publications and presentations were noteworthy. The parties stipulated that Dr. Lebby was an expert in the assessment and educational placement of children with ASD. Dr. Lebby's assessment report of Student confirmed Student's ASD and supported Student's placement at Sea Crest, with use of outside service providers as "optimal" for Student. Dr. Lebby's testimony and report, while insightful, were considered only as after-the-fact corroboration of Student's ASD. They were given little weight since Dr. Lebby's evaluation was not available to the parties at the December 6, 2006 IEP or to District at any time prior to the filing of Student's Complaint.

CONCLUSIONS OF LAW

Burden of Proof

1. In IDEA due process hearings, the petitioning party bears the burden of proof. (*Schaeffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528].) In this case, Student was the petitioning party and so, bore the burden of proof as to all issues.

Statutes of Limitation and Scope of Due Process Hearing

2. Due process complaints filed after October 9, 2006, are subject to a two-year limitations period with limited exceptions. (20 U.S.C. §§ 1415(b)(6)(B), 1415(f)(3)(C); 34 C.F.R. 300.507(a)(2), 300.511(e) (2006); Ed. Code, § 56505, subds. (l) & (n).) No evidence was presented that any exception applied, therefore, the time period considered in this Decision begins on December 6, 2006, two years prior to the filing of Student's Complaint.

3. The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) To the extent new issues may have been raised during the hearing or in written closing arguments, those issues were beyond the scope of the hearing and are not addressed in this decision.

Issues 1a & 1b: District's Pre-Determination of Offer of FAPE and Failure to Allow Parents Meaningful Participation in the December 6, 2006 IEP Meeting

4. Student contends that District denied Student FAPE because District pre-determined its offer of FAPE and failed to allow Parents meaningful participation in the IEP team meeting of December 6, 2006. District contends that it did not pre-determine its offer of FAPE and Parents fully participated in the IEP team meeting to the extent that they desired.

5. A child with a disability has the right to a FAPE under the IDEA. (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as 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 individualized education program (IEP). (Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services," includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from his or her education. (Ed. Code, § 56363, subd. (a); 20 U.S.C. § 1401(26).) In California, the term designated instruction and services (DIS) means "related services." (Ed. Code, § 56363, subd. (a).)

6. There are two principal considerations in claims brought pursuant to the IDEA; substantive denial of FAPE and procedural denial of FAPE. Unlike substantive failures, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484; (*Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] (*Rowley*).)

7. Once a student has been determined eligible for special education services, an IEP must be developed according to the unique needs of the child. The IEP team must consider the results of the most recent assessment of the pupil. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, §56341.1, subd. (a)(3).) Initially, an annual IEP must materially meet the content requisites of IDEA and the California corollary to IDEA, both of which require the IEP to be in writing and contain: a statement of the student's present levels of academic achievement; a statement of measurable annual goals; a description of the manner in which progress toward the goals will be made; a statement of the special education and related services, and

supplementary aids to be provided to the student; an explanation of the extent, if any, to which the pupil will not participate with non-disabled pupils in regular classes and activities; a statement of individual appropriate accommodations necessary to measure a student's academic achievement and functional performance on state and district assessments; projected services start dates, duration, frequency, location of services and modifications; and, if 16 years or older, measurable post secondary goals and appropriate transition services to help the student achieve those goals. (20 USC § 1414(d); Ed. Code, § 56345(a).) After the annual IEP meeting for the school year has resulted in an IEP, amendments to the existing IEP can be made without convening the whole IEP team, and without redrafting the entire document. An amendment created in this manner requires only that the amendment be reduced to written form and signed by the parent. The IEP and its amendment are viewed together as one document. (20 USC § 1414(d)(3)(D) & (F); 34 CFR § 300.324(4) &(6); Ed. Code, § 56380.1.)

8. The development of an IEP is a collaborative activity accomplished by an IEP team convened by the LEA. A parent is an integral and required member of the IEP team. (20 U.S.C. § 1414 (d)(1)(B)(i); 34 C.F.R. § 300.344(a)(1); Ed. Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parent for enhancing his or her child's education. (20 U.S.C. § 1414(d)(3)(A)(ii); Ed. Code, § 56341.l, subd. (a)(2).) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan [the IEP]." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882; editorial added.) Among the information that an IEP team must consider when developing a pupil's IEP are the concerns of the parents or guardians for enhancing the education of the pupil. (Ed. Code, § 56341.1, subd. (a)(2).)

9. The IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties, including parents. To achieve a meaningful IEP meeting, 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.) A parent who has had an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has meaningfully participated in the IEP process. (*Fuhrmann v. East Hanover Board of Educatio*n (3d Cir. 1993) 993 F.2d 1031, 1036.)

10. An LEA's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 2007 WL 1989594 [107 LRP 37880, 48 IDELR 31]; see also *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131("A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification.").)

11. School officials are permitted to engage in preparatory activities to develop a proposal or response to a parent proposal that will be discussed at a later meeting. (34 C.F.R. § 300.501(b)(1) & (b)(3)(2006); *T.P. and S.P. on behalf of S.P. v. Mamaroneck Union Free School District* (3d Cir. 2009) 554 F.3d 247, 253.) School district personnel may bring a draft of the IEP to the meeting; however, the parents are entitled to a full discussion of their questions, concerns and recommendations before the IEP is finalized. (Appen.A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed.Reg. 12478 (Mar. 12, 1999); see *J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, n. 10.) There is no requirement that the IEP team members discuss all placement options, so long as alternative options are available. (See, *L.S. v. Newark Unified School District*, (N.D.Cal., May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, p. 6.)

12. Here, the evidence was persuasive that District, after conducting and completing its 2006 Assessment of Student, deferred specific goals, objectives, services, and placement recommendations to the December 6, 2006 IEP team meeting. At the IEP meeting, at which Parents were accompanied by their attorney and Sea Crest personnel, Parents' concerns were discussed and considered, as were the unique needs of Student.

13. Additionally, Parents presented the CHC Report to District which was considered not only in the District's 2006 Assessment, but by the December 6, 2006 IEP team. The CHC Report represented many of Parents' concerns. Consideration of it by the IEP team was contradictory to the notion of pre-determination or failure to allow Parents meaningful participation. The IEP form was replete with changes, additions and deletions that were made during the approximately five hour IEP meeting. The magnitude of those modifications (fifteen of the seventeen finalized IEP form pages were significantly altered during the IEP meeting), and the amount of time spent by all parties in the meeting were, standing alone, strong evidence that nothing was pre-determined. When coupled with the credible testimony of those attending the IEP meeting, including Gray, Student's RSP at Sea Crest, the evidence was overwhelming: Parents not only had full opportunity to participate, but did participate in the IEP process; their concerns were genuinely considered, and some of Parents' concerns found their way into the pages of the IEP form.

14. Student has failed his burden of proof on these issues; District did not deny Student FAPE. (Legal Conclusions 1-14; Findings of Fact 1-32.)

Issues 1c & 1d: District's Failure to Identify Student's Present Levels of Performance and to Develop Measurable Goals and Objectives for Student at the December 6, 2006 IEP Meeting

15. Student contends that District denied Student FAPE in that District failed to identify (that is, accurately determine and document) Student's present levels of performance and failed to develop measurable goals and objectives for Student at the December 6, 2006 IEP meeting. District contends that, to the extent information was reasonably available to it, District identified Student's present levels of performance and then developed measurable

goals and objectives for Student at the December 6, 2006 IEP meeting with the participation of Parents.

16. Once a student has been determined eligible for special education services, an IEP must be developed according to the unique needs of the child. The IEP team must consider the results of the most recent assessment of the pupil. (20 U.S.C. § 1414(c)(1)(A); Ed. Code, §56341.1, subd. (a)(3).) Initially, an annual IEP must materially meet the content requisites of IDEA and the California corollary to IDEA, both of which require the IEP to be in writing and contain: a statement of the student's present levels of academic achievement; a statement of measurable annual goals; a description of the manner in which progress toward the goals will be made; a statement of the special education and related services, and supplementary aids to be provided to the student; an explanation of the extent, if any, to which the pupil will not participate with non-disabled pupils in regular classes and activities; a statement of individual appropriate accommodations necessary to measure a student's academic achievement and functional performance on state and district assessments; projected services start dates, duration, frequency, location of services and modifications; and, if 16 years or older, measurable post secondary goals and appropriate transition services to help the student achieve those goals. (20 USC § 1414(d); Ed. Code, § 56345(a).)

17. An important aspect of the parents' right to participate in the IEP process is the LEA's obligation to make a formal written offer which clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) The requirement of a formal, written offer creates a clear record that helps eliminate troublesome factual disputes years later, and alerts the parents to the need to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services. (*Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107 (citing *Union, supra,* 15 F.3d at p. 1526).)

18. After the annual IEP meeting for the school year has resulted in an IEP, amendments to the existing IEP can be made without convening the whole IEP team, and without redrafting the entire document. An amendment created in this manner requires only that the amendment be reduced to written form and signed by the parent. The IEP and its amendment are viewed together as one document. (20 USC § 1414(d)(3)(D) & (F); 34 CFR § 300.324(4) &(6); Ed. Code, § 56380.1.)

19. Under IDEA, the process of the development of an IEP is a collaborative one. The collaborative concept applies to both LEA's and parents. Parents cannot simply abandon the process, then effectively complain that an imperfect or incomplete IEP resulted in a denial of FAPE. (*Systema ex. rel. Systema v. Academy School Dist. No. 20,* (10th Cir. 2008) 538 F.3d 1306, (even though the IEP had not been finalized, parents' rejection of the IEP and withdrawal from the process bars their claim for a denial of FAPE); see also *MM ex rel. DM v. School Dist. Of Greenville County,* (4th Cir. 2002) 303 F.3d 523 (parents' lack of cooperation with the development process prevented their claim of lost educational opportunities for their student); *Hjortness ex rel. Neenah Joint Sch. Dist.,* (7th Cir. 2007) 507

F3d 1060 (parents chose not to avail themselves of the IEP process, therefore there was no denial of FAPE to student).)

20. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) Preparation of an IEP is "an inexact science." (*Honig v Doe*, (1988) 484 US 305, 321[108 S.Ct. 592].)

21. After District's comprehensive 2006 Assessment was completed, which included accurate identification of Student's present levels of performance to the extent such information was available, District left the development of measurable goals and objectives to the IEP team, which included Parents. District presented the 2006 Assessment, along with District's initial IEP form to enable the IEP team to begin its task of creating goals and measurable objectives. District's 2006 Assessment, inserted and incorporated as a part of the IEP form, contained many of Student's Present Levels of Performance and the balance were documented on the pages of the IEP form itself. District's IEP team members included in the IEP all material information reasonably available to District at the time regarding Student's present levels of performance. To the extent that the District's 2006 Assessment did not have accurate or complete information regarding Student's present levels of performance, Parents cannot be heard to complain. In the first place, Mother interfered with District's assessment process by limiting District's observation of Student in his educational setting (Sea Crest) to twenty minutes. In the second place, Parents and Sea Crest representatives were present at the IEP meeting and had the opportunity to contribute additional information about Student's performance levels. Again, the law is clear that the IEP development process is collaborative; if Parents do not chose to participate, they cannot later complain.

22. Thus, despite Parents' interference with the District's assessment process, the December 6, 2006 IEP team, on a collaborative basis, using the information reasonably available to it at the time, accurately identified and documented Student's present levels of performance. Using Student's documented present levels of performance, the team, including Parents, developed legally-adequate, measurable, annual goals which were understandable, specific, and appropriate to Student's unique special needs, and which were consistent not only with District's 2006 Assessment, but also with the CHC Report that Parents provided to District.

23. Accordingly, Student has failed to meet his burden of proof as to these two issues; District did not deny Student FAPE. (Legal Conclusions 1-3, 5-11, 15-23; Findings of Fact 1-32.)

Issue 1e: District's Failure to Offer Student an Appropriate Placement

24. Student contends that District denied Student FAPE in that District failed to offer Student an appropriate placement. District contends that it offered an appropriate

placement to Student that took into account Student's unique needs, and which comported with District's 2006 Assessment and with Parents' CHC Report, both of which identified Student's educational needs in substantially similar detail.

25. As discussed at Legal Conclusion 20 above, an IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

26. Under *Rowley*, and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must have been designed to meet the student's unique needs; (2) the services must have been reasonably designed to provide some educational benefit; (3) the services must have conformed to the IEP as written; and (4) the program offered must have been designed to provide the student with the foregoing in the least restrictive environment (LRE). While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley, supra,* 458 U.S. at p. 200.) Nor, does the IDEA require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley*, 458 U.S. at pp.198-200; see *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1995) 82 F.3d 1493, 1500.)

27. Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child and provides a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at pp. 200, 203-204.) The Ninth Circuit has referred to *Rowley's* "some educational benefit" standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir.2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon, supra,* 195 F.3d at p. 1149.) It has also referred to the standard simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way Sch. Dist*. (9th Cir. 2004) 394 F.3d 634, 645.)

28. To determine whether the District offered Student a FAPE, the analysis must also focus on the adequacy of the District's proposed program; schools are not required to place a student in a program preferred by the parents. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley*, 458 U.S. at p.208.) As the First Circuit Court of Appeal noted, the legal standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84 [citing *Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 993].)

29. To the extent appropriate, a special education student must be educated in the least restrictive environment; that is, with non-disabled peers in a regular education setting

(mainstreaming). A special education student may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes, with the use of supplementary aids and services, cannot be achieved satisfactorily. The failure to provide a special education student with an LRE is a denial of FAPE. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (2006); see, Ed. Code, §§ 56031, 56342, subd. (b), 56364.2, subd. (a).) Whether a student can be mainstreamed in a regular education class is determined by balancing four factors: (1) the educational benefits of placement in a regular education class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class; and (4) costs of mainstreaming the student. (*Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

30. Summer school (i.e., extended school year or ESY) services shall be offered and provided if the IEP team determines that the services are necessary for the provision of a FAPE to the pupil. (Ed. Code, § 56345, subd. (b)(3).) Such individuals shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in light of the pupil's disability. (Cal. Code Regs., tit. 5, § 3043, subd. (a).)

31. Here, Parents wanted Student to attend Kings Mountain beginning in fall 2006, via an intra-district transfer. When District became aware of Student's special needs, as detailed in the CHC Report, District rescinded the transfer in favor of Student attending his school of residence, El Granada and which had programs and staff appropriate to his needs. Parents offered District a release from liability for Parents' placement of Student at Kings Mountain, if Student could attend. When District rejected Parents' offer, because Kings Mountain was simply inadequate to provide the necessary educational services to Student that were outlined in the CHC Report, Parents ignored District's rescission and attempted to place Student at Kings Mountain none-the-less. When that attempt immediately failed, Parents unilaterally, without notice to District, placed Student at Sea Crest.

32. At the December 6, 2006 IEP meeting, as was documented in Parents' Dissent to IEP, Parents wanted Student to remain at Sea Crest. In lieu of Sea Crest, Parents returned to their quest for Kings Mountain. It was apparent from all of the evidence in this matter that Parents were devoted to their son and had vigorously sought for him what they believed to be the best small-school educational opportunities available, even when they had to fund Student's education themselves. While this was both understandable and commendable, IDEA provides a "basic floor of opportunity." As such, an appropriate placement is one which is designed to provide "some educational benefit," or "meaningful educational benefit," not the parent-preferred, "optimal" benefit.

33. To meet this standard, District was required to provide a placement offer that was designed, at the time, to meet Student's unique needs. District did this by: first, reviewing and considering the CHC Report provided by Parents; second, conducting

District's 2006 Assessment which met state and federal special education law requirements; third, convening an IEP team meeting to discuss both assessments and to obtain the considered thoughts of the entire team, including Parents, their attorney, and Sea Crest personnel; fourth, from those reports and the collective thoughts of the IEP team, developing measurable goals and objectives to provide Student with educational benefit; fifth determining what services were immediately needed to meet the IEP's goals and objectives; deferring ESY consideration to a time close to Summer, 2007, to obtain a better understanding of whether ESY would be needed; then, determining the location and setting most able to provide these services and to attend Student's unique needs, in the least restrictive environment. That LRE was an SDC at El Granada at which Student was offered placement that also included daily mainstreaming and socializing, intensive interventions, and all of the other particulars of the December 6, 2006 IEP, through teachers with significant education and experience in assisting children who, as Student, had ASD. The law does not require placement to be that preferred by Parents.

34. The placement offered was appropriate to Student's unique needs, comported with Student's IEP, was designed to provide meaningful educational benefit and was, given Student's individual characteristics and special needs, the least restrictive environment. District's placement offer did not deny FAPE; rather, it was an offer of FAPE. Therefore, Student failed to meet his burden of proof. (Legal Conclusions 1-3, 5-13, 16-22, 24-34; Findings of Fact 1-32.)

Issue 2: District's Failure to Provide Written Prior Notice to Student's Parents of District's Refusal to Provide Sea Crest and Student's Home Program as the Appropriate Educational Placement

35. Student contends that District was obligated to give Student's Parents prior written notice of District's refusal to provide Sea Crest and Student's home program as the appropriate educational placement for Student. District contends to the contrary.

36. Special education law requires that written prior notice to the parents of a child be given "whenever the local agency – (A) proposes to initiate or change; or (B) refuses to initiate or change, the identification, evaluation, or educational placement of a child, or the provision of a free appropriate pubic education to the child." (20 U.S.C. § 1415(b)(3) and (c)(1); Ed. Code, § 56500.4(a) and (b).)

37. By his issue, Student raises a procedural error theory that when the initial IEP team, which included Parents, considered a range of placement options, the team's collaborative selection of some options, at the exclusion of other options, triggered the prior notice requirement, which Student says District failed to meet. However, District was materially compliant with the prior written notice specifications of IDEA in that: in response to Parents' written request of June 21, 2006, for an assessment of Student and development of an IEP, District, through Kopp's letter of June 27, 2006, agreed to assess Student, explained the assessment and IEP process, and enclosed a release of information consent form, as well as notice of Parent's procedural safeguards; by letter of November 28, 2006,

District, through Kopp, reaffirmed its intention to hold an initial IEP meeting and suggested dates to facilitate the process, to which, on November 29, 2006, Student's attorney responded and accepted the proposed date of December 6, 2006; and, on December 6, 2006, District memorialized the IEP team's placement consensus and offer of FAPE for Student in the IEP document. Thus, at all relevant times, Parents were informed in writing.

38. Accordingly, selection by the IEP team of the El Granada placement for Student, at the exclusion of Sea Crest and home schooling, was neither a procedural error, nor a denial of FAPE. Student has failed to meet his burden of proof as to this issue. (Conclusions of Law 1-3, 5-11, 19-20, 35-38; Findings of Fact 1-32.)

Issue 3: District's Failure To Provide Written Prior Notice To Student's Parents Of District's Refusal To Fund Independent Educational Evaluations (IEE's) Requested By The Parents

39. Student contends that he was denied FAPE, because District failed to provide prior written notice to Parents of District's refusal to fund IEE's Requested by the Parents. District contends to the contrary, and further contends that Parents never requested any IEE, thus, no activity by District was necessary.

40. To determine whether a child has a disability, and therefore a right to a FAPE, a school district must assess a student in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) After a child has been deemed eligible for special education, reassessments may be performed, if warranted by the child's educational needs or related services needs. (34 C.F.R. § 300.303(a)(1); 34 C.F.R § 300.536(b) (1999); Ed. Code, § 56381, subd. (a)(1).) A reassessment must occur at least once every three years, unless the parent and LEA agree in writing that a reassessment is unnecessary. (Ed. Code, § 56381, subd. (a); 20 U.S.C. § 1414(a)(2).)

41. "The assessment shall be conducted by persons competent to perform the assessment, as determined by the local educational agency." (Ed. Code, § 56322.) Assessors must be knowledgeable about the student's suspected disability and must pay attention to the student's unique educational needs, such as the need for specialized services, materials and equipment. (Ed. Code, § 56320, subd. (g).)

42. The procedural safeguards of the IDEA provide that, under certain conditions, a student may be entitled to an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) "Independent educational evaluation

means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE at public expense. (34 C.F.R. § 300.502(b)(1) & (b)(2).)

43. Although Parents stated in their Dissent to IEP on December 6, 2006 that they disagreed with District's 2006 Assessment, Parents never requested an IEE in response to District's 2006 Assessment, or any other assessment. There was no denial of FAPE by District for its failure to give Parents' prior written notice of its denial to fund that which was not requested. Student has failed to meet his burden of proof as to this issue. (Conclusions of Law 1-3, 5-11, 19-20, 39-43; Findings of Fact 1-35.)

Issues 4 & 5: District's Failure to Convene IEP Meetings for the 2007-2008 and 2008-2009 Regular and Extended School Years

44. Student contends that District's failure to convene IEP meetings for the 2007-2008 and 2008-2009 regular and extended school years constituted a denial of FAPE. District contends that because Student was privately placed, and because Parents did not respond to District's IEP meeting requests, the IEP meetings were not required.

45. As discussed in Legal Conclusion 19 above, under IDEA, the process of the development of an IEP is a collaborative one. The collaborative concept applies to both LEA's and parents. Parents cannot simply abandon the process, then effectively complain that an imperfect or incomplete IEP resulted in a denial of FAPE.

46. If the parent of a child refuses to consent to the initial provision of special education and related services, or if the parent fails to respond to a request to provide consent for the provision of initial services, the public education agency will not be considered in violation of the requirement to provide FAPE to the child based on the agency's failure to provide the child with the special education services for which consent was requested. Further, in the absence of consent, the public education agency is not required to convene an IEP team meeting or to develop an IEP for the child for whom consent has been requested. (34 C. F. R. § 300.300(b)(4); Ed. Code, § 56346(b) and (c).) Additionally, a school district is not required to continue developing IEP's for a disabled child who is no longer attending the district's schools, unless the prior year's IEP for the child is under administrative or judicial review at the time an IEP would normally be due. ("In this case, the parents withdrew MM from the District's schools in 1996, but they did not request a due process hearing as to *any* IEP until March of 1998. The District was therefore under no continuing obligation in 1997 to develop an IEP for MM. . . ." (*MM ex rel. DM v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 536 -537).)

47. Since December 6, 2006, Parents have refused to consent to the provision of initial special education services to Student by District. For both school years in question, District sent Parents written requests to coordinate with District to convene IEP meetings to discuss Student's educational circumstances and to make appropriate plans, if Parents were

interested. Mother testified that Parents received the written requests, but did not respond to them. Parents effectively abandoned the IEP process for the school years in question. Parents did not request a due process hearing until December 5, 2008. Accordingly, District was under no obligation, by case law or statute, to convene an IEP meeting, or to develop an IEP. Therefore, there was no denial of FAPE. Student has failed to meet his burden of proof as to these issues. (Conclusions of Law 1-3, 5-11, 19-20, 44-47; Findings of Fact 1-35.)

ORDER

All of Student's requests for relief are denied.

PREVAILING PARTY

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

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 ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: June 5, 2009

/s/

STEVEN CHARLES SMITH
Administrative Law Judge
Office of Administrative Hearings