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United States District Court,
C.D. California.
ORANGE UNIFIED SCHOOL DISTRICT
v.
C.K., a minor, by and through his parents, A.KI. and J.Kw.

No. SACV 11–1253 JVS(MLGx).
June 4, 2012.

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Proceedings: (IN CHAMBERS) Order Affirming OAHks Administrative Record
JAMES V. SELNA, Judge.
*1 Adrianna Gonzalez, Deputy Clerk.

I. *Background*

This action arises under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400, *et seq.* The Orange Unified School District ("District") appeals the special education due process hearing decision by the California Office of Administrative Hearings ("OAH") in *C.K. v. Orange Unified School District*, OAH Case No. 2010100716, July 27, 2011 ("OAH Decision"). The matter was heard by Administrative Law Judge Helfand ("ALJ") on May 18–19 and 23–26, 2011 in Orange, California. (Administrative Record ("AR") 249.)

Defendant and Counterclaimant C.K. ("Student") is a six-year-old boy eligible for special education services under IDEA on the basis of autism. (AR 251.) Student's parents ("Parents") first informed District on October 23, 2008 that they thought Student displayed autistic-like behaviors. (AR 252, 515–517.) Parents indicated Student suffered from many symptoms consistent with autism; for example, Student was not toilet-trained, did not make eye contact, and had a vocabulary of zero to three words. (*Id.*) District speech and language pathologist Shari Franklin ("Ms.Franklin") administered a speech and language preschool assessment to Student on November 21, 2008, during which she noticed that Student "need[ed] frequent prompts" and "displayed poor attending skills." (AR 556–57.) Ms. Franklin referred Student for a complete pysch-educational assessment for consideration of special day class ("SDC") and filled out a Notice of Special Education Referral form. (AR 525, 560.) The Referral form, dated November 21, 2008, indicated that Parents would receive an assessment plan within 15 days. (AR 525.) Parents, however, did not receive the assessment plan until two months later, on January 16, 2009. (AR 525, 575.) Based on Student's initial interview with Ms. Franklin, District commenced an Individualized Education Program ("IEP") for Student. At the OAH hearing, Student claimed that he was denied a free appropriate public education ("FAPE") at three IEP meetings held on December 18, 2008, March 12, 2009, and March 8, 2010.

The December 18, 2008 IEP meeting was Student's first meeting. (AR 253.) District examined Student's speech and language skills, finding that he was eligible for special education services on the bases of "speech or language impairment." (AR 545.) District did not evaluate Student for behavioral disorders, notwithstanding the austistic-like symptoms described by Parents and observed by Ms. Franklin in her two meetings with Student. (*see* AR 544–555.) District

offered Student two 90–minute group speech and language therapy sessions per week, which were conducted by District speech and language pathologist Lindsey Horvath ("Ms.Horvath"). (AR 520–521, 553.) In the speech group, Student was the only child suffering from autistic-like symptoms. (AR 2041–2042.) He did not respond positively to the therapy, and per Ms. Horvath's request, Parents had to pick up Student early from each session. (*Id.*)

*2 At the March 12, 2009 meeting, District changed Student's special education service eligibility to autism, following a three-day assessment in which Student scored in the "Severely Autistic Range" on the Childhood Autism Rating Scale ("CARS"). (AR 635–38.) District offered Student placement in a "non-categorical, or generic," preschool SDC for 200 minutes (3 hours 20 minutes) per day for five days per week and two 30–minute sessions per week of small group speech and language therapy. (AR 681.) The IEP team agreed that Sudent would "start with 100 minutes [per day] until he integrates into the classroom." (*Id.*) The report from the March 12, 2009 IEP meeting indicates that, at that point, Student displayed severely delayed expressive, receptive, and pragmatic language skills and problems socializing with others. (AR 667.) District's offer of FAPE, however, did not include any behavior therapy.

Student was diagnosed with autism on June 3, 2009 by Dr. Mark A. Lerner ("Dr.Lerner"). (AR 685–87.) Dr. Lerner recommended a "preschool emphasizing ABA/IBI and communication interventions," "individualized speech and language services," and "a home intervention program." (AR 687.) Shortly after the beginning of the 2009–2010 school year and per the request of Student's SDC teacher Dawn Bronson ("Ms.Bronson"), District Autism Specialist Adrienne Kessler ("Ms.Kessler") conducted a Cognitive Behavioral Assessment on Student. (AR 697–98; AR 1736:20–1738:21.) Ms. Kessler reported that Student had difficulty with executive functioning, participating in class, and sustaining his attention. (AR 699.) District began providing Student with behavioral therapy on September 3, 2009 in an off-site portable classroom that Student's mother described as "very dim" and "not clean." (AR 2117:18–2118:17.) Student's mother indicated that she withdrew Student from the behavioral therapy due to concerns regarding the qualifications of the therapist and the lack of a detailed Applied Behavior Analysis ("ABA") therapy plan with short-and longterm goals for Student. (AR 453.) On November 2, 2009, Student underwent a function behavior assessment conducted by the Center for Autism and Related Disorders ("CARD"). (AR 749–781.) Based on the evaluation, CARD recommended that Student received 25 hours of direct ABA services per week, focusing on adaptive living skills, maladaptive behaviors, functional communication skills, and social and play skills. (AR 780.) CARD began providing 19 hours per week of individual in-home ABA therapy on January 11, 2010, funded by the Regional Center of Orange County ("RCOC"). (AR 860.)

At the March 8, 2010 meeting, for the first time, District modified Student's IEP to include individual speech and language therapy for five hours per week. (AR 441–42). During the meeting, it was noted that Student had met two out of his four speech and language goals, and that he had been making progress, especially after starting ABA services with CARD. (AR 447.) Speech therapist Melissa Moss ("Ms.Moss") recommended that Student's speech and language therapy be increased to three 30–minute sessions per week on an individual basis. (*Id.*) Ms. Bronson reported that Student had met both of his academic goals (AR 448); however, Student continued to have problems with communication, social cognition, behavior, and executive functioning (AR 460). District's FAPE offer was to have Student continue in Ms. Bronson's SDC for the remainder of the school year five days per week, attend a kindergarten SDC for the next school year, attend three individual speech and language therapy session per week for 30 minutes per session, and attend two 90–minute ABA

therapy sessions per week. (AR 441.) District also offered extended school year ("ESY") services, but they did not include behavior intervention services. (AR 442.)

*3 Student was assessed by District ABA Supervisor Sara Zerby ("Ms.Zerby") on four occasions in March and April 2010. Ms. Zerby's report indicated that Student continued to require frequent prompting, that he engaged in high level of self-stimulatory behaviors, and that Student lacked the ability to have social interaction. (AR 833–834.) Ms. Zerby concluded that Student was making progress in his one-on-one CARD therapy sessions. (AR 835; AR 1959:22–1960:15.) Ms. Zerby recommended that Student receive five hours of individual ABA therapy services per week. (AR 460, 837.)

Unsatisfied with Ms. Zerby's recommendation, Parents advised District that they would solicit a second opinion. (AR 855.) Clinical psychologist Dr. Robin Morris ("Dr.Morris") assessed Student for two days in May 2010. (AR 888.) Dr. Morris concluded that Student's "needs cannot be successfully met in the current class setting without the support of a 1:1 behaviorally trained aide." (AR 907.) Dr. Morris recommended that Student participate in a school setting five days a week for three hours per day and that Student have 25 hours of ABA services per week at home. (*Id.*) IEP meeting convened on May 18, 2010 to consider Dr. Morris' recommendation. (AR 911.) Per Dr. Morris' recommendation, Parents requested three hours per day of one-to-one behavioral aide from CARD. (*Id.*) District denied the request in a letter dated June 8, 2010. (AR 944.)

Parents notified District on June 17, 2010 that they would withdraw Student from the District program and place him in a private pre-kindergarten, Salem Lutheran School ("Salem"), with an ABA-trained aide from CARD to accompany him for the 2010–2011 school year. (AR 961.) Parents informed District that they would be seeking reimbursement from the District. (*Id.*) On September 20, 2010, Dr. Morris observed Student in his private placement, opining that Student benefitted from the current classroom setting and trained aide. Dr. Morris recommended Student continue participating in his private placement. (AR 969.)

Defendant/Counterclaimants filed a due process hearing complaint in the OAH on October 18, 2010, alleging that District denied Student a FAPE at the IEP meetings held on December 18, 2008, March 12, 2009, and March 8, 2010. The specific issues alleged are as follows: [FN1]

> FN1. The issues withdrawn by Student prior to and during the due process hearing are included in the *list to maintain the integrity of the issue numbering from the Order Following Pre–Hearing Conference* (AR 101–106), but they are noted as "withdrawn," in bold.

A) Did the District deny Student a free and appropriate public education ("FAPE") at the December 18, 2008 Individualized Education Program ("IEP") meeting by:

(1) Failing to assess Student to determine if he was eligible for special education under the category of autistic-like behaviors;

(2) Failing to offer Student appropriate behavior support therapy;

(3) Failing to offer Student appropriate speech and language services; [FN2] and

> FN2. District does not appeal the findings on issues A(3), B(2), and B(5). (District's Opening Br. 3, n. 5, Docket No. 43.)

(4) Failing to have a special education teacher at the

IEP meeting?

B) Did the District deny Student a FAPE at the March 12, 2009 IEP meeting by:

(1) Failing to offer Student behavior therapy services;

*4 (2) Failing to provide Student with appropriate speech and language services;

(3) Failing to place Student in the least restrictive environment with the support of a one-to-one aide [Withdrawn]; [FN3]

> FN3. As discussed below, withdrawal of this claim in the context of the least restrictive environment did not foreclose the award for a one-to-one aide in another context.

(4) Failing to assess Student in the area of occupational therapy ("OT") and provide him with appropriate OT services [Withdrawn]; and

(5) Failing to have in attendance at the IEP meeting a speech and language pathologist?

C) Did the District deny Student a FAPE at the March 8, 2010 IEP meeting by:

(1) Failing to place Student in the least restrictive environment with the support of a one-to-one aide [Withdrawn];[FN4]

> FN4. See footnote 3, *supra.*

(2) Failing to provide Student with appropriate behavior services;

(3) Failing to offer appropriate extended school year services; and

(4) Failure to assess Student in all areas of suspected disability [Withdrawn]?

(AR 101–102.) The hearing took place over the course of six days in May 2011. On July 27, 2011, the ALJ ruled in favor of Student, finding that District denied Student a FAPE at each of the meetings in question. (AR 249–297.) The ALJ found many deficiencies in District's IEPs, including District's failure (1) to assess Student in all areas of suspected disability prior to the December 18, 2009 IEP meeting (AR 289), (2) to offer Student behavior therapy services at the March 12, 2009 IEP meeting (AR 291); and (3) to provide Student with a one-to-one behaviorally trained aide after the March 8, 2010 IEP meeting (AR 293).

The ALJ ordered the District to fund (1) the services of an ABA-trained, "one-to-one" behavioral aid from CARD to accompany Student at school for the 2011–2012 school year and extended year 2012 "wherever he attends"; (2) one 30–minute individual speech therapy session per week to work on speech production until January 30, 2012, "in addition to any other speech and language services provided by Student's IEP"; and (3) independent triennial assessment of Student's "academic levels, intellectual development and cognition, social/emotional/behavioral, and speech and language no later than December 1, 2011." (AR 295.) The ALJ also found that Student's "private placement at Salem and the CARD provided one-to-one trained aide was appropriate" in light of District's failure to provide FAPE to Student. (AR 294.) Accordingly, the ALJ awarded Counterclaimants reimbursement for the costs of Student attending Salem and the provision of the one-to-one aide for the 2010–2011 school year, totaling $20,214.00. (*Id.*)

District appealed the OAH Decision to this Court.[FN5]

FN5. District submitted the 2570–page AR looseleaf in a box. The pages were not three-hole punched, so the Court could not easily transfer the AR into binders. As a practical matter, the presentation of the AR made it unduly difficult to sift through the evidence. Counsel is advised to submit the AR bound in a logical, user-friendly manner and to provide an index in the future.

II. *Legal Standard*

A. Individuals with Disabilities Education Act

The IDEA guarantees all disabled children a FAPE that emphasizes "special education and related services designed to meet their unique needs ....". A FAPE is defined as special education and related services that: (1) are available to the student at public expense, under public supervision and direction, and without charge; (2) meet the state educational standards; (3) include an appropriate education in the state involved; and (4) conform to the student's IEP as required by 20 U.S.C. § 1414(d). 20 U.S.C. § 1401(8).

*5 An IEP is a written statement designed specifically for the disabled child, and is created by a team including the child's parents, teacher, a representative of the local educational agency, and the child, if appropriate. 20 U.S.C. § 1414(d). An IEP must include information regarding the child's present levels of performance, a statement of annual goals and objectives, a statement of special educational and related services to be provided to the child, an explanation of the extent to which the child will not participate with non-disabled children in the regular class, and objective criteria for measuring the child's progress. *Id.*

Judicial review of the state hearing officer's decision under IDEA is a two-step process. First, the Court must determine if the procedural requirements of IDEA have been satisfied. Second, the Court must determine whether the state has met the substantive requirement of providing a FAPE. *Henry* *Hudson Cent. Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

IDEA sets forth a number of procedural safeguards. *See* 20 U.S.C. § 1415. Procedural violations do not deny FAPE per se. A procedural violation denies FAPE if the violation results in substantial harm, such as the loss of an educational opportunity, or seriously infringes the parents' opportunity to participate in the IEP formulation process. *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1484 (9th Cir.1992) (*"Target Range "*).

B. Standard of Review

A district court reviews the decision of the ALJ under a modified *de novo* standard. *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1471–73 (9th Cir.1993); *Glendale Unified Sch. Dist. v. Almasi*, 122 F.Supp.2d 1093, 1100 (C.D.Cal.2000). The Court's decision must be supported by the preponderance of the evidence. 20 U.S.C. § 1415(i)(2)(C)(iii). The preponderance of the evidence standard "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley*, 458 U.S. at 206. Rather, the Court must give "due weight" to the administrative proceedings, which means that the district court should not try the case anew. *Id.; Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891–92 (9th Cir.1995). More specifically, the Court "should give substantial weight to the hearing officer's decision if the court finds that the decision was careful, impartial and sensitive to the complexities presented." *Ojai*, 4 F.3d at 1476. The Court "must consider the findings of the hearing officer carefully and endeavor to respond to the hearing officer's resolution of each material issue." *San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir.1996) (quoting *Ojai*, 4 F.3d 1473–44). However, the Court is free to accept or reject the findings of the hearing officer as a whole

once such consideration is granted. *Id.*

*6 In OAH appeals, district courts must make decisions "bounded by the administrative record and additional evidence, and independent by virtue of being based on a preponderance of the evidence before the court." *Ojai*, 4. F.3d at 1471 (quoting *Burlington v. Dep't of Educ.*, 736 F.2d 773, 791 (1st Cir.1984)). Administrative hearing appeals have been described as a "puzzling procedural problem":

> [T]he Federal Rules of Civil Procedure do not plainly speak to how such appeals should be handled. It is hard to see what else the district court could do as a practical matter under the statute except read the administrative record, consider the new evidence, and make an independent judgment based on a preponderance of the evidence and giving due weight to the hearing officer's determinations. The district court's independent judgment is not controlled by the hearing officer's recommendations, but neither may it be made without due deference.

Capistrano, 59 F.3d at 892. Affording "deference to the hearing officer makes sense in a proceeding under the [IDEA] Act for the same reasons that it makes sense in the review of any other agency action—agency expertise, the decision of the political branches ... to vest the decision initially in an agency, and the costs imposed on all parties of having still another person redecide the matter from stratch." *Id.* at 891 (internal quotation marks and citation omitted).

District, as the party challenging the OAH Decision, bears the burden of proof. *Clyde K. v. Puyallup School District, No. 3*, 35 F.3d 1395, 1399 (9th Cir.1994).

III. *Discussion*

District challenges three aspects of the OAH Decision. First, District argues that the ALJ "ignored the express withdrawal/dismissal of several specific claims/issues" that were raised by Student but subsequently withdrawn. (Opening Br. 4.) Second, District claims that the ALJ failed to consider material evidence of Student's progress during the relevant time. (*Id.*) Third, District asserts that the ALJ awarded "duplicative remedies (both reimbursement and compensatory education for the same alleged violations)" and remedies based on issues Student voluntarily dismissed. (*Id.*) The Court considers each of the IEP meetings at issue and addresses District's arguments in turn.

As a threshold matter, the Court finds that the OAH Decision is thorough and careful. The hearing took place over the course of six days and involved substantial witness testimony. (AR 249.) The forty-eight page OAH Decision is exceptionally thorough, "careful, impartial, and sensitive to the complexities presented." *Ojai*, 4 F.3d at 1476. It is apparent from the record that the ALJ attentively marshaled the evidence and actively participated in the hearing by further questioning witnesses. *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1031 (9th Cir.2006) (finding that ALJ's decision was "thorough and careful," in part, because ALJ asked questions and provided a factual background and analysis to support the ultimate conclusion). Accordingly, the Court affords substantial deference to the factual findings and credibility determinations made by the ALJ.

A. Did the ALJ correctly find that the December 18, 2008 IEP Meeting denied Student a FAPE?

*7 The ALJ found that District denied Student a FAPE at the December 18, 2008 meeting because (1) District failed to assess Student to determine if he was eligible for special education under the category of autistic-like behaviors; (2) District did not offer Student appropriate behavior support therapy or appropriate speech and language services; [FN6] and (3) District failed to have a special education teacher present at the meeting, thereby impairing Parents' ability to

participate in the decision making process. (AR 290–291.)

> FN6. District does not appeal the OAH Decision regarding speech and language issues, and thus this Court does not consider them. (Opening Br. 15.)

The California Education Code provides that "[b]efore any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted." Cal. Educ.Code § 56320. The student must be assessed in all areas related to his or her suspected disability. § 56320(f). The threshold for suspicion of a disability is "relatively low"; the inquiry is not whether the student actually qualifies for special education services, but whether the student should be referred for an evaluation. *Dep't of Educ. v. Cari Rae S.*, 158 F.Supp.2d 1190, 1195 (D.Hawai'i 2001).

In this case, District argues that Parents did not adequately put District on notice that Student should be evaluated for autism at their initial meeting on October 23, 2008 because Parents indicated their primary concern was Student's "expressive language." (Opening Br. 11.) District selectively cites excerpts from the Parent Interview form, contending that Parents indicated Student functioned at the appropriate age level. (*Id.* 11–12.) However, Parents' responses to many questions indicated that Student displayed autistic-like symptoms. For example, Parents noted that Student was not toilet-trained, did not make eye contact, and had a vocabulary of zero to three words. (AR 515–16.) Moreover, during the initial interview, Parents told District they were concerned Student might be autistic, which is indicated in handwriting on the Parent Interview form. (*Id.*) Thus, District's argument that the answers on the Interview form "clearly support the District's initial view that Parents were not concerned with broader deficits that might have caused immediate expansion of the assessment into the area of autism" is demonstrably false. (Opening Br. 13.) Furthermore, during the initial interview, Ms. Franklin observed that Student was largely non-responsive, had poor attention and motivation, required frequent prompts, and avoided eye contact. (AR 518.) Ms. Franklin's observations, coupled with Parents' express concern that Student may suffer from autism, undoubtedly meets the "relatively low" threshold of suspicion that Student may be autistic. *Cari Rae S.*, 158 F.Supp.2d at 1195. Thus, as of the initial meeting, District was on notice that it was legally required to assess Student for autism before any initial placement. *See* Cal. Educ.Code § 56320.

*8 Though Ms. Franklin referred Student for a complete pysch-educational evaluation on November 21, 2008, which was to be arranged within 15 days of the referral, Parent did not receive the evaluation plan until two months later, on January 16, 2009. District argues that Student's assessment was timely because the day after the first IEP meeting, Ms. Franklin forwarded her assessment report and the Notice of Special Education referral to the District school psychologist, which ultimately resulted in Student's assessment and diagnosis. (Opening Br. 14–15.) However, District's point does not change the fact that the law required District to assess Student at the first warning sign of a potential disability and *before* any placement was offered. Cal. Educ.Code § 56320.

District's failure to conduct Students' evaluation before the initial IEP meeting on December 18, 2008 resulted in a placement that did not address Student's undiagnosed autism. Specifically, District failed to offer any behavioral support therapy to tackle his autistic-like behavior.[FN7] Thus, District's violation of California Education Code section 56320 resulted in the denial of Student's substantive rights under the IDEA. *See Target Range*, 960 F.2d at 1484 (holding that procedural violation denies FAPE if violation results in substantial harm, such as the loss of an educational opportunity). Accordingly, the ALJ correctly found that the failure to assess Student prior to

the December 18, 2008 meeting resulted in a denial of FAPE.

> FN7. Regarding District's failure to offer behavioral therapy in the initial IEP meeting, District contends that the ALJ misapplied the "snapshot rule," which states that the appropriateness of the District's actions must be assessed in viewed of the information they had at the time the offer was made. (Opening Br. 14 (quoting *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir.1999).) However, through Ms. Franklin's assessments of Student at the initial interview on October 23, 2008 and a follow up meeting on November 21, 2008, District was on notice that Student displayed autistic-like behavior and required a full assessment. Thus, by the December 18, 2008 IEP meeting, District knew that Student likely required behavioral therapy. District's failure to timely test Student for autism does not relieve it from its legal obligation to offer behavioral therapy when appropriate. The snapshot rule is not an ostrich defense.

The ALJ also found that District's failure to have a special education teacher present at the initial meeting denied FAPE because it impaired Parents' right to meaningfully participate in the IEP meeting. *Id.* (holding that procedural violation denies FAPE if it seriously infringes parents' opportunity to participate in the IEP formation process). California Education Code requires that at least one special education teacher attend "[e]ach meeting to develop, review, or revise the individualized education program of an individual with exceptional needs." § 56341(a), (b)(3). The ALJ found that District's violation of section 56341 deprived Parents of the opportunity to meaningfully participate in Student's IEP at the December 18, 2008 meeting. District argues that the ALJ employed hindsight reasoning rather than the "snapshot rule," claiming District did not know a special education teacher was required because it did not know about Student's "exceptional needs." However, as discussed *supra* note three, District's failure to timely assess Student does not insulate District from California Education Code violations. In other words, had District timely assessed Student for autism, it would have determined that the law required a special education teacher to participate in Student's IEP meeting. District's failure to timely assess Student, and consequently, its failure to include a special education teacher in the IEP team, deprived Parents of having a meaningful dialogue with the requisite IEP teammates. The ALJ determined that this deficiency resulted in a denial of FAPE. District, which bears the burden of proof, offers no evidence to the contrary. Accordingly, the Court concurs with the ALJ and finds that District's failure to include a special education teacher in the IEP team infringed Parents' right to meaningfully participate in Student's IEP formation process, thus constituting a denial of FAPE.

*9 In sum, the Court concurs with the ALJ's finding that District's failure to assess Student for autism prior to the initial IEP and District's failure to include a special education teacher in the IEP team resulted in a denial of FAPE.

B. Did the ALJ correctly find that the March 12, 2009 IEP Meeting denied Student a FAPE?

The ALJ found that District denied Student a FAPE at the March 12, 2009 meeting because (1) District did not offer Student appropriate behavior therapy services and appropriate speech and languages services; and (2) District failed to have a speech and language pathologist in attendance. (AR 291–92.) With respect to this IEP meeting, District appeals only the finding regarding behavior therapy services.

At the March 12, 2009 meeting, District changed Student's special education service eligibility to autism. (AR 665–666.) Student's eligibility changed as a result of District's three-day assessment of Student in January and February 2009. In the assessment, Student scored in the "Severely Autistic Range" on the

CARS. (AR 638.) Student was unable to complete any of the receptive, expressive, or academic/cognitive tasks in the assessment. (AR 643–644.) Student's assessment report noted that "it was very difficult to get [Student] to attend to activities, as he was easily distracted, noncompliant and active. He was observed to often need prompting and redirection back to the task at hand. (AR 636.) Additionally, Student had a difficult time following simple directions and completing tasks in the testing environment; he did not respond to positive praise. (*Id.*) Notwithstanding these findings, District's offer of FAPE placed Student in a "non-categorical, or generic" preschool SDC for 3 hours and 20 minutes per day, five days a week, and in two 30–minute sessions of small group speech and language therapy. (AR 681.) No component of Student's placement directly targeted his autism. (AR 891) (noting that the Student's SDC class was comprised of 17 students with "varying disabilities").

District argues that Student was not denied FAPE in this meeting because he made significant progress in his placement, as testified to by his SDC teacher, Ms. Bronson. (Opening Br. 18–19.) District contends that the ALJ did not give sufficient weight to Ms. Bronson's testimony. (*Id.*) However, Ms. Bronson's progress report was undermined at the hearing by other experts who interacted with Student. First, the ALJ relied on the testimony of Ms. Horvath, Student's group speech and language teacher, who testified that Student was the only child in the group who had autism and that he could not handle the full 90–minute sessions, so Student's mother had to pick him up 20 minutes early each session. (AR 2041–2042.) Second, the ALJ relied on a report prepared by Ms. Kessler, in which she concludes that Student's "deficits are impacting his ability to participate more independently in his current school placement." (AR 699.) Ms. Kessler recommended that Student receive ABA through an autism program. (AR 699.) Third, Ms. Zerby assessed Student and wrote a report dated April 21, 2010 in which she indicated that Student displayed a number of maladaptive and self-stimulatory behaviors. (AR 83–85.) Even Ms. Bronson testified that when Student was withdrawn from her class in June 2010, Student would resort to self-stimulatory behavior if he was not individually engaged. (AR 2524–2525.) Given that Ms. Kessler did not report any self-stimulatory behavior in her earlier assessment, one may infer that Student regressed. While there is some evidence that Student progressed in his SDC placement, (AR 418–428), the Court defers to the ALJ's credibility determinations regarding Student's conflicting progress reports. Moreover, contrary to District's assertion, even if Student showed progress, he did not necessarily receive a FAPE. Student's claim is not that he demonstrated no progress in his placement; his claims are that he was denied necessary services and requisite IEP team members at his meetings. The IDEA guarantees that a disabled child is afforded a FAPE that emphasizes "special education and related services *designed to meet their unique needs* ...." 20 U.S.C. § 1400(d)(1)(A). Here, Student was denied a FAPE because District did not offer a placement that met Student's "unique needs."

*10 Looking purely from District's perspective as of March 12, 2009, District had sufficient information to know that Student required behavioral therapy. Based on Students' CARS score of "Severely Autistic," Students' initial assessment with Ms. Franklin, and Students' poor performance in Ms. Horvath's speech classes to date,[FN8] the ALJ determined that it was apparent Student required behavioral intervention as of the March 12, 2009 IEP meeting. (AR 291.) This Court agrees.

> FN8. Student had been in Ms. Horvath's speech class for two months prior to the March 12, 2009 IEP Meeting. (AR 291.)

In sum, District denied Student a FAPE by failing to offer any behavioral therapy targeting Student's maladaptive behavior associated with autism.

C. Did the ALJ correctly find that the March 8, 2010 IEP Meeting denied Student a FAPE?

The ALJ found that District denied Student a FAPE at the March 8, 2010 IEP Meeting because (1) District failed to provide Student with appropriate behavior support therapy; and (2) District did not offer appropriate ESY services. (AR 293–94.) District's FAPE offer was to have Student continue in Ms. Bronson's SDC for the remainder of the school year five days per week, attend a kindergarten SDC for the next school year, attend three individual 30–minute speech and language therapy classes per week, and attend two 90–minute ABA therapy sessions per week. (AR 441.) District also offered some SDC classes, language and speech therapy, and occupational therapy for the ESY. (AR 442.) The ESY, however, did not include any behavioral therapy.

From the evidence presented, the ALJ determined Student had not made any progress in class participation during the year he spent in SDC. (AR 269.) This conclusion is largely supported by the minutes of the March 8, 2010 IEP Meeting. (*See* AR 418–454.) The ALJ concluded that Student could not learn unless he was "able to attend to class activities." (AR 293.) Given the constant individual prompting Student required to stay on task, Dr. Morris opined that the SDC class would be an appropriate placement provided that Student had the assistance of a one-to-one trained behavioral aide. (AR 907.) Both Dr. Morris and Ms. Zerby observed that Student failed to attend to class instruction and required maximum prompting by class staff. (AR 456–58; AR 893–95.) The ALJ concluded that District could not have met Student's unique needs without providing a one-to-one trained behavioral aide. (AR 293.)

District mischaracterizes the record by asserting that shortly after this IEP meeting Student's mother requested that the IEP team draft a revised proposal "removing *all* ABA services from [Student's] IEP." (Opening Br. 24.) However, the request for removal of services is accompanied by a letter dated September 16, 2009, in which Student's mother indicated that she was concerned Student was not seeing a certified ABA therapist and that there was no detailed plan of ABA therapy including short-and longterm goals in writing. (AR 453.) Contrary to District's assertion, Student's mother stated that "it is imperative for [Student] to receive ABA therapy as soon as possible." (*Id.*) Thus, District's failure to provide adequate ABA therapy was not somehow ratified by a request to properly adjust—not eliminate—Student's ABA therapy.

*11 The Court finds that the lack of individualized behavioral aide significantly impaired Student's ability to participation in the classroom. Accordingly, the Court concurs with the ALJ that District's failure to provide one-to-one aide resulted in a denial of FAPE at this IEP meeting.

Additionally, District denied Student a FAPE by failing to provide any behavioral services during the ESY. ESY services shall be provided to students with special needs that 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 view of his or her handicapping condition." Cal.Code Regs., tit. 5, § 3043. In this case, Student's autism is likely to continue indefinitely, and interruption of his behavioral program may have caused Student to regress. Given that Student's behavioral therapy (through CARD) had been essential to his progress thus far, District was obligated to continue behavioral therapy during the ESY. District's failure to do so resulted in a denial of FAPE.

D. Did the ALJ Award Appropriate Remedies?

The ALJ awarded Student remedies in the form of reimbursement and compensatory education. (AR 294–95.) The ALJ found Student's private placement at Salem and the assistance of a one-to-one trained

aide was appropriate in light of District's denial of FAPE. Thus, the ALJ determined that Parents were entitled to reimbursement for the expense of that private placement. (*Id.*) Further, the ALJ awarded compensatory education as follows: (1) services of an ABA-trained, "one-to-one" behavioral aid from CARD to accompany Student at school for the 2011–2012 school year and extended year 2012 "wherever he attends"; (2) one 30–minute individual speech therapy session per week to work on speech production until January 30, 2012, "in addition to any other speech and language services provided by Student's IEP"; and (3) an independent triennial assessment of Student's "academic levels, intellectual development and cognition, social/emotional/behavioral, and speech and language no later than December 1, 2011." (AR 295.) District challenges the reimbursement award, as well as the first and third compensatory education awards.

A parent may be entitled to reimbursement for placing a student in a private school without the agreement of the school district if the parents prove at a due process hearing that (1) the district had not made an offer of FAPE to the student prior to the placement; and (2) the private placement was appropriate. 20 U.S.C. § 1412(a) (10(C)(ii). For the reasons discussed *supra*, District did not make an offer of FAPE to Student prior to his private placement. Further, upon close examination of the evidence, the ALJ found that Student's placement at Salem with a one-to-one aide was appropriate. District has not presented any evidence to suggest otherwise. Accordingly, the ALJ properly awarded reimbursement for the cost of Student's private placement.

*12 District seems to argue that reimbursement and compensatory education are mutually exclusive remedies and that awarding both results in a windfall. (Opening Br. 26–27.) District reasons once an ALJ determines FAPE was denied, it either finds that the private placement was appropriate and awards reimbursement or finds that the private placement was inappropriate and awards compensatory education. (*Id.*) In other words, District argues that Student cannot require compensatory education if he was in an appropriate private placement. However, District's position does not account for the fact that Student was denied a FAPE from at least December 2008 until June 2010 when his Parents withdrew him from the District program. That private placement was appropriate does not mean Student has made up for lost time. Indeed, it is perfectly reasonable, and highly probable, that Student requires compensatory education to (attempt to) reverse the one-and-a-half years during which he was denied a FAPE prior to private placement. As the ALJ noted, "[c]ompensatory education is designed to compensate a student who was actually educated under an inadequate IEP, and it is a prospective award of educational services designed to catch-up the student to the level he should have been absent the denial of FAPE." (AR 40 (citing *Brennan v. Reg'l Sch. Dist. No. Bd. of Educ.*, 531 F.Supp.2d 245, 265 (D.Conn.2008).) Here, Students compensatory education is aimed at compensating him for the one-and-a-half years during which he had an inadequate IEP, and it is designed to help him catch-up to the level he would have achieved absent the FAPE violations.

District also takes issue with the specific provisions of the compensatory education. District argues that the ALJ did not carefully craft remedies that were linked to the specific violations before the Court. First, District argues that the ALJ did not have jurisdiction to award a one-to-one ABA aide because Student explicitly withdrew his claim that District denied Student a FAPE by "failing to place Student in the least restrictive environment with the support of a trained one-to-one aide." The Court rejected this precise argument in the order granting Student's motion for preliminary injunction. (Order 8, n. 6, Docket No. 27.) Withdrawing the "least restrictive environment" claim did not foreclose on the ALJ's jurisdiction to award funding for a one-to-one aide. The ALJ found that the failure to provide a one-to-one behavioral aide

constituted a "failure to provide Student with *appropriate behavior support therapy.*" (AR 293) (emphasis supplied). Nothing about the claim regarding "appropriate behavior support therapy" limits the potential recovery to at-home therapy; indeed, "behavior support therapy" contemplates a regimen that includes classroom and at-home therapy. This is true particularly in light of Dr. Morris' testimony that Student was benefitting from the support of a one-to-one behaviorally-trained aide in his placement at Salem. (AR 969.) That Student withdrew a claim mentioning the aide does not preclude the Court from finding that the aide was integral to providing "appropriate behavior support therapy." Thus, to compensate Student for District's failure to provide appropriate behavior support therapy, the ALJ was well-within his discretion to award an aide.

*13 Second, District suggests that the provision of a one-to-one aide "wherever [Student] attends" is "decidedly non-individualized" and shows the ALJ's failure to evaluate the placement under which an aide would be necessary. (Opening Br. 26–27.) However, that the ALJ ordered an aide to accompany Student "wherever he attends," does not reveal the ALJ's carelessness; rather, it suggests that the ALJ found that the aide was an essential component of offering Student a FAPE in any placement. This conclusion was reasonable in light of the evidence discussed *supra* and throughout the OAH Decision, which consistently showed that Student required individual attention and prompting to address his maladaptive behavioral issues. Accordingly, the Court finds that the award of a one-to-one aide wherever Student attends is an appropriate compensatory remedy linked to a deficiency in Student's previous IEPs.

Finally, District argues that there is no link between the award of a triennial assessment of Student and any injury suffered as a result of the FAPE denial. District contends that because Student withdrew his claim that he was denied FAPE based on District's failure to assess Student in all areas of suspected disability, the ALJ had no jurisdiction to award a triennial assessment. (Opening Br. 27–28.) However, the ALJ did not award the triennial assessment to compensate this withdrawn claim; rather, he awarded it in response to District's failure to provide Parents with a meaningful opportunity to participate in Student's March 12, 2009 IEP meeting. (AR 295.) As discussed *supra*, Parents were denied a meaningful opportunity to participate in that meeting because an essential member of the IEP team—the special education teacher—was not included. While District asserts that this injury and remedy are wholly unrelated, the Court disagrees because a triennial assessment is the type of remedy that would prevent this injury in the future. Had District timely evaluated Student, it would have diagnosed his autism before the March 12, 2009 meeting, and thus Student's IEP team would have included a special education teacher, as required by law. Had District involved a special education teacher at that early meeting, District likely could have shaped an IEP that effectively addressed Student's behavior issues. Implementing a triennial assessment will track Students progress, keeping Parents apprised of Student's development, and thereby allowing them to meaningfully participate in future IEP meetings. Accordingly, the triennial assessment is a reasonable provision of compensatory education linked to an injury resulting from the FAPE denial.

In sum, District has not met its burden of showing that the ALJ's remedies were inappropriate. The Court finds that the remedies in the OAH Decision are reasonable, measured, and responsive to the problems assessed in Student's previous IEPs. Accordingly, the Court upholds the remedies afforded in the OAH Decision.

IV. *Conclusion*

*14 For the foregoing reasons, the Court finds that the record supports the ALJ's decision in favor of Student. The OAH Decision is well-reasoned, thorough, and consistent with the evidence. The remedies are equitable and proportionate to the IDEA viola-

tions. Accordingly, the Court AFFIRMS the OAH Decision.

C.D.Cal.,2012.
Orange Unified School Dist. v. C.K. ex rel. A.Ki.
Not Reported in F.Supp.2d, 2012 WL 2478389 (C.D.Cal.)

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