

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2015071255

v.

SAN DIEGUITO UNION HIGH SCHOOL  
DISTRICT

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CORRECTED DECISION<sup>1</sup>

Parents, on behalf of Student, filed a due process hearing request (complaint) naming San Dieguito Union High School District (District) with the Office of Administrative Hearings, State of California, on July 21, 2015. District filed a complaint naming Student with OAH on October 15, 2015. Parents filed an amended complaint on October 23, 2015. The two cases were consolidated on November 24, 2015. Student's case was designated the primary case and the 45-day timeline for issuance of the decision is based upon Student's case. District withdrew its complaint on January 15, 2016.

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<sup>1</sup> The Decision issued March 15, 2016, is corrected on page one solely to reflect the attorney representing District was Justin R. Shinnefield. In all other respects the Decision is as issued.

Administrative Law Judge Marian H. Tully, Office of Administrative Hearings, State of California, heard this matter on January 19, 20, 21 and 22, 2016, in Encinitas California and via telephone from Van Nuys California on February 10, 2016.

Attorney Wendy Dumlao, and her assistant Diane Aiken, appeared on behalf of Student. Student's mother and father attended the hearing on January 19, 20, 21 and 22, 2016. Neither parent participated on February 10, 2016.

Attorney Justin R. Shinnefield appeared on behalf of District. Charles Adams, District Director of Special Education, attended the hearing on January 19, 20, 21, and 22, 2016, and was present via telephone on February 10, 2016.

The matter was continued to February 23, 2016, at the parties' request for time to file written closing briefs. The parties timely filed written closing briefs, the record was closed and the matter was submitted for decision on February 23, 2016.

## ISSUES<sup>2</sup>

1. Did District deny Student a free appropriate public education by failing to consider a continuum of placement options at the individualized educational program transition team meetings on April 17, 2015 and May 13, 2015?

2. Did District deny Student a FAPE for the 2015-2016 seventh grade school year by failing to offer an appropriate placement at the IEP transition team meetings on

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<sup>2</sup> The issues pled in the parties' complaints and stated in the prehearing conference order have been rephrased and reorganized for clarity. District abandoned its issue as to whether Student was entitled to independent educational evaluations when it dismissed its case. Students' claims as to a safe learning environment have been reorganized without any substantive change. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

April 17, 2015 and May 13, 2015, specifically, by failing to consider: Student's unique needs related to a safe learning environment; Student's social needs; and placement in the school closest to his home as the least restrictive environment?

3. Did District deny Student a FAPE from August 25, 2015, until October 7, 2015, by failing to provide a safe learning environment for Student?

## SUMMARY OF DECISION

Student attended sixth grade at Flora Vista Elementary School in Encinitas Unified School District as provided in an IEP dated March 5, 2015. Students from Flora Vista matriculated to a middle school within District for seventh grade. District convened transition IEP team meetings on April 17, 2015 and May 13, 2015, to prepare for Student's transition from sixth grade at Flora Vista to seventh grade within District. The transition IEP team included educators and staff from Encinitas and District, Parents, Student's educational advocate, and a representative from the Center for Autism and Related Disorders (CARD). The team discussed and addressed Student's needs and Parents' concerns about safety, social needs and the importance of the Student's community environment during both meetings. The team considered the continuum of placement options available in District. Parents contend the least restrictive environment for Student is the middle school closest to Student's home. District contends Student's educational needs cannot be met at that school. Student failed to prove, based upon what District knew at the time, that the placement offered in the IEP amendment offered on May 13, 2015 was not reasonably calculated to meet Student's needs for safety and social interaction and to provide meaningful educational benefit to Student in the least restrictive environment. Accordingly, Student did not prevail on the first or second issue.

Student prevailed on the third issue. When Student began seventh grade, the March 5, 2015 IEP from Encinitas was the operative IEP. The March 5, 2015 IEP called for a one to one aide throughout the day, addressed elopement behaviors, noted Student's

attraction to vehicles and machinery, and described Student's need for a gluten/casein-free diet along with his inability to restrain himself from restricted food. District offered the Transitional Alternative Program (TAP) at Oak Crest Middle School in the May 13, 2015 amendment. Student attended the TAP program from August 25, 2015, until October 7, 2015. During that time he did not have a one to one aide throughout the day, he climbed onto a custodian's vehicle and pretended to drive it, he fell off a yoga ball and injured himself and he was given pizza, a restricted food. Accordingly, Student demonstrated that the TAP program at Oak Crest was not a safe educational environment.

## FACTUAL FINDINGS

1. Student was 12 years old and lived with his Parents, sister, and twin brother within District boundaries at all relevant times. Encinitas Unified School District first determined Student eligible for special education on March 8, 2006, at the age of three. His primary eligibility is autism. Student has a secondary eligibility of orthopedic impairment due to mild cerebral palsy. Student also has apraxia, ataxia, and pica, and requires a gluten-free/casein-free diet.

2. Student attended Flora Vista Elementary School (Flora Vista) from preschool through sixth grade. Flora Vista was located within Encinitas Unified School District (Encinitas). Flora Vista was Student's neighborhood school. From pre-school through fourth grade Student's IEP's provided placement in a special day class with related services.

3. In fourth grade, during the 2012-13 school year, Encinitas moved the special day class program Student was attending to a different campus. Encinitas recommended Student attend the program at the new campus because Flora Vista no longer had a special day class that would meet Student's needs.

4. Parents objected to moving Student from the Flora Vista campus. Parents

wanted Student to remain at Flora Vista so that he could attend the same school as his twin brother and continue in the same positive community environment provided by Flora Vista. Encinitas and Parents entered into a settlement agreement which allowed Student to attend fifth and sixth grades at Flora Vista in a highly specialized program until he graduated from Flora Vista at the end of the 2014-15 sixth grade school year.

#### MARCH 10, 2014 TRIENNIAL ASSESSMENT

5. Encinitas conducted Student's triennial psychoeducational assessment while Student was in fifth grade and produced a report dated March 10, 2014. Student was almost 11 years old. He was a happy child with a good attitude. He was compliant, eager to communicate, and followed directions and nonverbal prompts. The report contained two or three short paragraphs in each of the following areas: behavior, social, emotional, cognitive functioning, adaptive functioning, academic functioning, speech and language, and fine motor/sensory processing. He had significant global delays in all areas. Student was very interested in workers around the school, particularly the custodian. He often lost focus and required redirection when workers were around. Encinitas did not conduct any standardized testing in the March 10, 2014 triennial assessment and had not conducted any standardized testing in the 2011 triennial assessment.

6. As of March 2014, Student had never eloped from school. However, he had a history of successfully running away at home. Student had the potential to elope or try to eat foods without permission if not closely supervised. At school, if he moved from his designated area without permission, he was successfully redirected to return. As of the time of the March 2014 assessment, this behavior occurred at school less than once per month.

## MARCH 5, 2015 ANNUAL IEP

7. Encinitas developed Student's annual IEP on March 5, 2015 IEP when Student was in sixth grade. The IEP addressed Student's needs in the areas of elopement and social development.<sup>3</sup>

8. The IEP included a behavior intervention plan and a goal to address elopement. Elopement was defined as being more than 20 feet from his designated work area without permission. Although Student had not eloped from school during the sixth grade, the goal was included because Student was distracted by things such as the microwave or custodial equipment. He was particularly attracted to vehicles and machinery.

9. Student was described by all as a loving, caring child. He was an integral part of his community. Student walked to Flora Vista with family and friends, his service dog and his twin. Encinitas documented Mother's concern about Student's transition to middle school in the IEP notes. Mother felt it was important for Student and his family that Student attend seventh grade at Diegueno Middle School with familiar peers and his brother.

10. Student had three social skills goals. These goals addressed needs in the areas of attention, answering questions, conversing with peers, turn taking and small group play. Student spent time in regular class and activities with typical peers and in extra-curricular activities such as the sixth grade dance, ice creams socials, beach parties, and bike rides.

11. The March 5, 2015 IEP provided placement in a moderate special day class

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<sup>3</sup> The March 5, 2015 IEP is not at issue in this case. The parties do not dispute the goals, objectives, accommodations, modifications, services or supports provided in that IEP.

with 1,090 minutes of specialized education instruction per week; 900 minutes of speech and language services per year; 300 minutes per year of occupational therapy consultation; 600 minutes of occupational therapy services (half individually and half group); 3,360 minutes of behavior intervention services per year by a non-public agency; 1,800 minutes per year of adapted physical education services; and a one-to-one aide throughout the day. The IEP provided for Student to spend 33 percent of his time in the classroom, and participating in extracurricular and non-academic activities and 67 percent outside of the regular classroom. Mother signed the IEP on April 7, 2015.

12. Encinitas did not determine the location of Student's placement for seventh grade in the March 5, 2015 IEP. Generally, students who attended Flora Vista matriculated to Diegueno Middle School. Diegueno is in District. Encinitas and District have a process for transitioning special education students from elementary to middle school. The districts meet together to plan each special education student's transition from Encinitas to District. District, with Flora Vista and Encinitas' participation, held IEP meetings on April 17, 2015 and May 13, 2015, to prepare for Student's transition to middle school for the 2015-16 seventh grade school year.

#### APRIL 17, 2015, IEP MEETING

13. The IEP team met on April 17, 2015. Mother, Student's educational advocate, Ms. Jernigan, Encinitas' Director of Student Services, a speech/language pathologist, an occupational therapist, District program specialist Dorothy Guinter, a general education teacher, an adaptive physical education teacher, TAP teacher Elizabeth Engelberg, a non-public agency supervisor from CARD, and District's special education teacher and special education department co-chair Elizabeth Anglin attended the meeting.

14. The team reviewed Student's then-current placement at Flora Vista. His academic program was provided in a separate cubicle, outside of the learning center,

where he was the only student. Student received 10 hours a week of discrete trial teaching using a modified curriculum delivered by a one to one aide under the supervision of his teacher. The program included adaptive physical education and both individual and group services for occupational therapy and language and speech. Student participated in general education during morning routine, yoga, music, art, plays and other activities. Student had a one to one aide throughout the day and supervision from the CARD supervisor.

15. The team discussed Student's academic skills. Student's reading and math skills were at the second grade level, with areas of strength nearer third grade. He was working on independently writing a sentence with prompts from and discussion with the aide. Ms. Anglin observed Student at Flora Vista. He was working one to one with an adult reading a book titled "Are You My Mother?". The reading level of the book was first or second grade. Every two words he received a small piece of candy. He worked with his aide matching opposites such as hot and cold. Ms. Anglin spoke to Student's case manager. Ms. Anglin reported her observations to the IEP team. In her opinion, the level of support he was receiving was the same as he would have received in a special day class.

16. Ms. Guintier, a former school psychologist, was familiar with Student. She reviewed the March 2014 assessment and the March 5, 2015 IEP. She was concerned about the level of adult support Student required due to his significant cognitive delays.

17. The team discussed how well Student was doing socially and Mother's concerns about removing him from the Flora Vista community. The team discussed the benefits other children received by learning to work with Student. Mother informed the team that the social component of the community was more important than academics.

18. The team discussed a continuum of educational placements including general education with supports, academic support classes, Learning Center, Academic



Success Class, Social Emotional Academic Success, Fundamental Classes, and the Transitional Alternative Program (TAP). District explained the different programs including the number of children in the programs, the teaching methods used, and the needs and academic levels of the children in the different programs.

19. The TAP program at Oak Crest Middle School provided academic instruction in one or more academic classes, and all students have a general education elective such as drama, art or leadership, and physical education or adaptive physical education. Parents and their advocate believed Student could make educational progress in general education at Diegueno in a program similar to fifth and sixth grade at Flora Vista. District recognized that Diegueno was Parents' preferred choice and that Student's community support was important to them. District took those concerns into consideration. However, Diegueno did not have a suitable program at that time and did not offer adaptive physical education. District encouraged Parents to visit the TAP program at Oak Crest.

20. District did not determine the location for Student's IEP placement at the meeting. The IEP team did not make any proposed changes to the March 5, 2015 IEP during the April 17, 2015 meeting. The team agreed to continue the meeting to a later date.

#### MAY 13, 2015, IEP MEETING

21. Student's IEP team met again on May 13, 2015. The participants were Parents, the advocate, Student's sixth grade special education teacher Kelly Jernigan, Ms. Ginter, and all other required members of the IEP team. District Director of Special Education Charles Adams, began the meeting by asking members to share new information about Student.

22. Parents informed the other members of the team that they had toured the Oak Crest TAP program and the Fundamental Class. Parents did not believe Oak Crest

was a good fit for Student. Mother felt that Student's math skills were higher than the students she observed in the Fundamental Class. Father felt that Oak Crest was old, outdated and lacked up to date technology. Parents were concerned that Oak Crest was close to a busy street and did not have good security. Father was especially concerned that there was open access to a parking lot and a construction project on site because of his son's attraction to vehicles and machinery.

23. Ms. Jernigan explained Student's highly specialized sixth grade program at Flora Vista. Student read at a second to third grade reading level; performed some addition, and subtraction and regrouping; and wrote seven to ten words independently. In her opinion the program was very restrictive because it was one to one instruction by an aide, instead of a teacher, delivered in an isolated environment outside the classroom and away from other students.

24. The team reviewed Student's March 5, 2015 IEP. District education specialists again explained a continuum of placements, including Academic Success Class, Learning Center, Social Emotional Academic Success, Fundamental Classes, TAP and other services such as team taught classes.

25. Ms. Engelberg, the TAP teacher at Oak Crest, explained the TAP program. The goals of the students in the TAP program were similar to Student's goals. The program is individualized based upon students' needs. The program includes community activities/life skills, mobility, academics, and reading groups, among other things. The TAP program had about 13 students with one or two aides and one teacher. TAP students may obtain a certificate of completion or a high school diploma.

26. Ms. Jernigan was familiar with the programs at Diegueno and at Oak Crest. In her opinion, Student required a small, structured classroom environment to benefit from his education. Diegueno did not offer an appropriate program because the programs at Diegueno included students that functioned at a much higher level than

Student. Ms. Jernigan was familiar with the TAP program and the Fundamental Class at Oak Crest. In her opinion, the Fundamental Class was too restrictive for Student. In her opinion, the TAP program was appropriate because it was a small class with specialized academic instruction taught by a credentialed special education teacher. She believed that the TAP program was the least restrictive environment that would meet Student's needs.

27. District explained their reasons for offering the TAP program, why District considered it the least restrictive environment, how the program complied with Student's IEP and the difference between a one to one aide and a program instructional aide. Program instructional aides worked with small groups, with individual students, and with the entire program. District did not assign program instructional aides to a particular student. District did not assign one to one aides because District wanted to increase independence and avoid singling out individual students.

#### DISTRICT'S MAY 13, 2015, IEP OFFER

28. The IEP team offered the following as an amendment to the March 5, 2015 IEP: 1,080 minutes of specialized education instruction per week and 240 minutes daily during the extended school year; 60 minutes twice a week group adaptive physical education services and 30 minutes per week collaborative during extended school year; 900 minutes of group and 900 minutes of individual speech and language services per year and 30 minutes group weekly during extended school year; 300 minutes per year of occupational therapy consultation; 300 minutes of group and 300 minutes of individual occupational therapy per year and 90 minutes monthly during extended school year; 3,360 minutes yearly of non-public agency behavior services; transportation; and six hours daily program instructional aide support. The offer did not include a one to one aide.

29. With the exception of the aide support, the May 13, 2015 IEP amendment

from District offered the same or increased the level of services provided by Encinitas in the March 5, 2015 IEP. At the time District offered the May 13, 2015 amendment, District team members believed Student's academic and social needs could be met in the TAP program. Diegueno did not have an appropriate special day class for Student and could not meet his educational goals.

30. Ms. Jernigan knew Student best of all the professionals who attended the meetings on April 17, and May 13, 2015. She worked with him for three years. Before she became his teacher in sixth grade, she was his one to one aide in fourth and fifth grade. Her testimony at the hearing was unbiased and sincere. She supported her opinions by explaining the ways in which the environment at Flora Vista was too restrictive and isolated. She explained the reasons she believed Student needed a small structured classroom taught by a credentialed special education teacher and why TAP was appropriate for Student. In her opinion Student could meet his goals in the TAP program at Oak Crest but not at Diegueno. Ms. Jernigan's testimony was credible and persuasive.

31. On May 29, 2015, Parents wrote to Mr. Adams informing District that Parents did not agree to the proposed amendments to Student's March 5, 2015 IEP. Parents wanted Student to attend Diegueno. Parents believed Diegueno was the least restrictive environment. They reiterated their feelings that the TAP program at Oak Crest was not a good fit and their concern about Student's safety at Oak Crest because it did not have security or gates. Parents informed Mr. Adams they would consider additional assessments and suggested a 60 day trial period at Diegueno.

32. Parents believed Student would benefit socially at Diegueno because Student could walk to school with his friends and family and be part of an environment that supported him. Mother passionately believed Student's potential benefit from the social environment at Diegueno was more important than academics and that Student

would obtain some educational if he attended Diegueno.

Father felt the Diegueno campus was safe because it was fenced and gated. The way in and out was through the administration office. Father also liked Diegueno better than Oak Crest because it had more access to integrated technology and Father believed Student learned faster when using technology.

33. Father walked the Oak Crest campus and was concerned for his son's safety because his son was a wanderer and attracted to vehicles and machinery. The Oak Crest campus had no gate and no "eyes on" the main entrance. In Father's opinion, the campus was not adequately fenced and was located on a busy street. The TAP class was about 20 yards from the vehicle drop off loop. A low split rail fence separated the walkway from the parking lot. The campus was under construction. A large, partially fenced, construction site was about 100 yards from the classroom.

34. District considered Parents' preference for Diegueno and Father's concerns about the Oak Crest Campus. District also considered the March 2014 assessment, the March 5, 2015 IEP, the information from Ms. Jernigan, and the observations of District staff. Based upon all these considerations, the TAP program was reasonably calculated to provide educational benefit to Student in the least restrictive environment at the time the May 13, 2015 IEP amendment was offered.

#### SEVENTH GRADE

35. Student began seventh grade in the TAP program at Oak Crest on August 25, 2015. Student attended Ms. Engleberg's TAP class. The classroom had 12 students, including Student, and two program aides. Although the March 5, 2015 IEP from Encinitas provided a one to one aide, District did not provide a one to one aide for Student.

36. During the five weeks Student attended Ms. Engleberg's class he made progress on his goals, socialized with the other students and was an integral part of the

class. He participated in group activities and seemed to enjoy class.

37. The custodian's room was about 40 feet from Ms. Engleberg's classroom. Student "loved" the custodian and his cart. Ms. Engleberg was aware of Student's elopement issues. She knew that supervision was very important. She instructed her program aides to have someone with him at all times.

38. On September 11, 2015, Student was walking from his classroom to the art room with a small group of students and an aide. The custodian's two-seat flatbed cart was parked off the pavement near the custodian's door. While passing the custodian's room Student got into the cart, sat on the seat and pretended to drive. Student got off the cart when redirected by the aide. Oak Crest Principal Ben Taylor was aware of the incident and spoke to the aide about it. In his opinion, the cart did not pose a danger to any student.

39. Two other safety incidents concerned Mother. In one instance Student came home with a head injury after falling off a yoga ball. In another instance, he was given pizza, a prohibited food, during a party while under the supervision of a substitute teacher.

40. Parents removed Student from District on October 7, 2015. On October 13, 2015, Parents gave District 10 day notice that they were privately placing Student due to safety concerns and District's failure to provide him a one to one aide. Parent's concerns were valid. These three incidents could have caused serious injury to Student, yet District did not do anything to make the environment safer for Student.

41. After Parents removed Student from Oak Crest, they hired a teacher and a coach to come to their home. Parents did not offer any evidence the teacher provided an appropriate educational program or credible expert testimony that Student made substantial progress with the teacher at home. There was no evidence of what the teacher did, the hours worked, rate charged, or the amount Parents paid for the

teacher's services. Student had not returned to school as of the due process hearing.

42. Student's expert, clinical psychologist Sharon Lerner-Baron, Ph.D., observed Student for an hour on November 21, 2015 in a community kid's workshop at a Home Depot, and for an hour on November 25, 2015, at a neighborhood park. On December 15, 2015, Dr. Lerner-Baron observed a seventh grade TAP classroom at Oak Crest for an hour. Student was not there. Dr. Lerner-Baron reviewed the March 10, 2014, triennial assessment prepared by Encinitas, Student's IEP's, report cards, and tape recordings and notes of two transition meetings. Dr. Lerner-Baron was critical of the triennial assessment because of the lack of any standardized testing, and other reasons. Dr. Lerner-Baron did not administer any standardized tests. Based upon her observations, her records review and 19 years of experience, in her opinion, Student could obtain some educational benefit if he attended Diegueno. Dr. Lerner-Baron recommended specific classes by name, suggested a class schedule including specific periods for a program and opined that a variety of services could be made available to Student.

43. Dr. Lerner-Baron was a knowledgeable, detailed, confident and experienced expert witness. However, she was unable to observe the classes and programs at Diegueno and she never observed Student in an academic environment. Her testimony in this case was the only time she had recommended a neighborhood school without visiting the school. Moreover, in light of her strong valid criticism of the lack of any standardized testing, considering her opinion that testing was necessary to understand what supports Student needed and how to modify his curriculum, and that she did not do any testing herself, her recommendations for Student's placement and academic program carried little weight.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>4</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)<sup>5</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v.*

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<sup>4</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>5</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.



*Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the

request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof.

#### ISSUE 1: CONTINUUM OF PLACEMENT OPTIONS

5. Student contends District failed to consider a continuum of placement options before offering the TAP program at Oak Creek at the May 13, 2015 IEP team meeting. Student argues District could have placed Student at Diegueno in a highly specialized program similar to the program at Flora Vista but District did not consider that option. District contends it held two IEP team meetings in which the IEP team considered a continuum of placement options, including Parents' preference. The evidence demonstrated the IEP team considered a continuum of options at meetings on April 17, 2015, and on May 13, 2015, before District offered placement at the TAP program on the Oak Crest campus.

#### Applicable Law

6. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring 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 could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) If an IEP team determines a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in

light of the continuum of program options. (*Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home or instruction in hospitals or institutions. (Ed. Code, § 56361.)

7. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

#### Analysis

8. In considering the factors enumerated in *Rachel H.*, Student did not prove Student could be placed full time in a regular education environment. Student was three and four years below grade level in reading, math and writing, and his operative IEP placed him in regular education or other activities for only 33 percent of his time. Student required a more restrictive environment. Therefore, District was required to consider the least restrictive environment in light of the range of program options considering Student's unique needs.

9. The evidence demonstrated that the IEP team, including Parents, Student's educational advocate, and knowledgeable staff and representatives from Encinitas and District met twice and thoroughly discussed a continuum of placement options. The

continuum of options the team considered included Parents' preferred placement in general education with a one to one aide, supports, modifications, accommodations and related services at Diegueno. Parents and their expert believed it was possible to create a program at Diegueno, similar to the program at Flora Vista. District explained that Diegueno did not have a similar program and explained a continuum of at least six other programs. District observed Student in his program at Flora Vista. Parents visited TAP and Fundamental Classes at Oak Crest. Student's sixth grade teacher, Ms. Jernigan, was Student's aide in fourth and fifth grade and knew Student well. She was familiar with the programs at Oak Crest and at Diegueno. She attended both meetings and was an active, unbiased participant in the discussion of the continuum of placement options.

10. District considered the positive benefits Student's presence had on other students and members of his Flora Vista community. District fully considered Parents' preference to keep Student in the same school as his brother and nearest to his home. The IEP team did not discuss cost. All placement options considered by the IEP team were District programs in District schools.

11. Student did not prove by a preponderance of the evidence that District failed to consider a continuum of placement options before offering the TAP program to Student in the May 13, 2015 amendment.

## ISSUE 2: SAFE LEARNING ENVIRONMENT, SOCIAL NEEDS, AND LEAST RESTRICTIVE ENVIRONMENT

12. Student contends that the May 13, 2015 IEP amendment offer of the TAP program at Oak Crest was not a safe learning environment, and that Student required a one to one aide. Student also contends that it was not the least restrictive environment and did not meet his social needs. District contends that it considered Student's safety, social needs and which program provided Student educational benefit in the least restrictive environment and made an appropriate offer.

## Applicable Law

13. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, the offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.)

14. Under *Rowley*, an IEP provides a FAPE if it offers a child access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204.) Educational benefit includes the pupil's mental health needs, social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's placement must include "educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from instruction." (*Rowley, supra*, 458 U.S. 176, 189.) An IEP must state how the child's disability affects "involvement and progress in the general curriculum," set goals for maintaining that progress and meet the child's "other educational needs" so that the child will benefit from the curriculum. (20 U.S.C. § 1415(d)(1)(A)(i) and (ii); see also 34 C.F.R. § 300.320; see also HR Report No. 105-95 at 85 [it is improved teaching and learning that lead to independent adult lives and employment.].) The purpose of the IDEA is to prepare disabled children for independent living and employment. For example; the IDEA defines transition services to require a focus "on improving the

academic and functional achievement of the disabled child to facilitate the child's movement from school to post-school activities." (20 U.S.C. §1401(34).) Under *Rowley*, access to specialized educational instruction is the foundation for developing these skills.

15. Districts have an obligation to consider safety concerns related to the student's qualifying disability when developing and implementing student's IEP. (*Lillbask v. Connecticut Department of Education* (2d Cir. 2005) 397 F.3d. 77, 93.) The "related services" that a district may be required to provide to assist a child in benefiting from special education include developmental, corrective and supportive services. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) These of necessity must include appropriate measures to ensure the child's safety.

16. The IDEA expresses a clear policy preference for inclusion to the maximum extent appropriate as an aspiration for all children with special needs, requiring that a child be educated in general education classes with typically-developing peers unless the nature or severity of a particular disability may require separate instruction in order to meet the equally important need for educational benefit. (See 20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. §§ 300.114 & 300.116.)

17. Federal law requires that the educational placement of a child with a disability is as close as possible to the child's home. (34 C.F.R. § 300.522(b)(3).) Federal law also requires that each public agency ensure that unless a child's IEP requires other arrangements, a child must be educated in the school the child would attend if the child was not disabled. (34 C.F.R. § 300.522(c).) Accordingly, a child with an IEP should be educated in the school the child would attend if not disabled unless the child's IEP requires a different location. If the IEP requires a different placement then the child should be placed as close to home as possible. (See *Murray v. Montrose County School Dist.* (10th Cir. 1995) 51 F. 3d. 921, 929.) Proximity to the child's neighborhood school is

one of many factors to be considered, it is not a presumption that the child should attend the neighborhood school. (*Flour Bluff Independent School Dist. v. Katherine M.* (5th Cir. 1996) 91 F.3d. 689, 693-694.)

18. The case law has consistently supported the concept that a school district is not required to place a child at her neighborhood school if there is no program available to meet the child's needs. (See, e.g. *McLaughlin v. Holt Public School Board of Education* (6th Cir.2003) 320 F.3d 663, 672 [Least restrictive requirement provisions and regulations do not mandate placement in neighborhood school]; *Hudson v. Bloomfield Hills Public School* (6th Cir.1997) 108 F.3d 112 [IDEA does not require placement in neighborhood school]; *Urban v. Jefferson Cnty. School Dist.* (10th Cir.1996) 89 F.3d 720, 727 [IDEA does not give student a right to placement at a neighborhood school]; *Schuldt ex rel. Schuldt v. Mankato Independent School Dist. No. 77* (8th Cir.1991) 937 F.2d 1357, 1361-63 [school may place student in non-neighborhood school rather than require physical modification of the neighborhood school to accommodate the child's disability]; *Wilson v. Marana Unified School Dist. No. 6 of Pima Cnty.* (9th Cir.1984) 735 F.2d 1178 [school district may assign the child to a school 30 minutes away because the teacher certified in the child's disability was assigned there, rather than move the service to the neighborhood school].)

19. An IEP is evaluated in light of the information available to the IEP team 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 (*Adams*).) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrman v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) Whether a student was denied a FAPE is ultimately evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Adams*, 195 F.3d at p. 1149.)

20. Parents, no matter how well motivated, do not have a right to compel a

school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 208.) The methodology used to implement an IEP is left to the school district's discretion so long as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley, supra*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Committee* (1st Cir. 2004) 361 F.3d 80, 84.) This rule is applied in situations involving disputes regarding choice among methodologies for educating children with autism. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141; *Pitchford v. Salem-Keizer School Dist.* (D. Ore. 2001) 155 F.Supp.2d 1213, 1230-32; *T. B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84.)

#### Analysis

#### SAFE LEARNING ENVIRONMENT

21. Student did not meet his burden of proof on this issue. Student offered no evidence that, at the time the May 13, 2015 amendment was offered, placement in the TAP program, a small class with a special education teacher and two aides, failed to provide a safe learning environment. The IEP team addressed Student's distractability behavior by developing behavior goals and a behavior support plan in the March 5, 2015 IEP. Student offered no evidence of elopement behavior in fifth or sixth grade.

22. The evidence established Student was compliant and easily redirected to return to task when he was distracted. All District members of the IEP team were familiar with the triennial assessment and the March 5, 2015 IEP from Encinitas. While it may seem so in hindsight after Student climbed on the custodian's cart in September 2015, there was no evidence that at the time the May 15, 2015 amendment was developed, Student's safety in middle school would require a one to one aide.



## SOCIAL NEEDS

23. Student did not meet his burden of proof on this issue. Student preferred Diegueno but the law requires analysis of whether District's offer constituted FAPE, even if not preferred by Parent.

24. The evidence did not support Student's argument. In Ms. Jernigan's opinion TAP offered a less restrictive environment, with specialized academic instruction by a credentialed special education teacher in a small class. While Parents understandably wanted Student to go to his neighborhood school with his twin and students he knew from Flora Vista, the IDEA does not contemplate prioritizing those social benefits over Student's educational needs. Student's March and May 2015 IEPs addressed his needs in the area of social skills by including three social skills goals. Student offered no evidence the TAP program could not meet these goals.

## LEAST RESTRICTIVE ENVIRONMENT

25. Student did not meet his burden of proof on this issue. Student argues that Diegueno is the least restrictive environment because it is the school nondisabled students would go to and Student could possibly obtain some educational benefit in a highly individualized program created for him on that campus. The undisputed evidence supported a finding that Diegueno did not have a suitable program at the time the May 13, 2015 amendment was offered. District was not required to create a highly individualized program for Student on the Diegueno campus when it had an appropriate educational program at Oak Crest.

## ISSUE 3: SAFE LEARNING ENVIRONMENT BETWEEN AUGUST 25, 2015, AND OCTOBER 7, 2015

26. Parents contend, for the first two months of the 2015-2016 school year, that District denied Student a FAPE because the Oak Crest campus was unsafe for

Student, and District did nothing to address Parents' legitimate concerns about multiple unsafe incidents. District contends it made a FAPE available in the least restrictive environment at all times from April 17, and May 13, 2015 through the date of hearing.

#### Applicable Law

27. The legal authorities in paragraph 15 are incorporated by reference in the analysis of this issue.

#### Analysis

28. Student met his burden of proof on this issue. Student was involved in three unsafe situations at school between the time Student began seventh grade in the TAP program at Oak Crest and when Parents notified District of their intent to remove Student from the TAP program. Each of these situations occurred while Student was, in some manner, under adult supervision.

29. The first incident occurred on September 11, 2015, when Student got into the custodian's cart and pretended to drive. Oak Crest Principal, Mr. Taylor, knew about the incident on September 15, 2015, as the result of a telephone call and email from Mother. Mr. Taylor spoke to the aide that was present when it happened but did not take action to increase Student's supervision, have the aide take an alternate route to the art room, or speak to Student's teacher. Two other safety incidents also occurred. In one instance Student came home with a head injury after falling off a yoga ball. In another instance, he was given pizza, a prohibited food, during a party while under the supervision of a substitute teacher. Each of these three incidents could have caused serious injury to Student, yet District did not do anything to make the environment safer for Student.

30. District did not take any steps to ensure Student's known behaviors would not put him at risk of harm. Considering the substantial difference between the

educational environment at Flora Vista and in the TAP program at Oak Crest, District's failure to take steps to ensure Student's safety at Oak Crest, particularly after the first incident, denied Student a FAPE by failing to provide Student with an environment where he could safely access his education.

## REMEDIES

31. Student prevailed on Issue 3. Student seeks reimbursement for a private teacher paid for by Parents. Student also seeks an order placing Student at Diegueno, with one to one aide support through the end of the 2015-2016 school year including the extended school year and for the 2016-2017 school year. District disagrees and contends, even if Student is entitled to some remedy, Student failed to provide any evidence to support compensatory education or reimbursement.

## REIMBURSEMENT

32. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed. 2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 14 [114 S.Ct. 36, 1126 L.Ed.2d 284] (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA

by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

33. In this case, Student offered no evidence that the private home teacher provided an appropriate educational program and no evidence to support reimbursement. There was no evidence Student made substantial progress with this instruction, the program substantially complied with the IDEA or the amount Parents paid for the program. Accordingly, Student is not entitled to reimbursement for the private teacher.

#### PLACEMENT

34. Administrative Law Judges have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Committee of Burlington, Mass. v. Department of Education*, (1985) 471 U.S. 359, 370; *Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

35. In this case, while Student proved Oak Crest was not a safe environment from September 11, 2015 until October 7, 2015, Student did not prove that Parents' preferred placement at Diegueno was an appropriate placement or that it would provide Student a safer environment. For this reason, the remedy Parents seek is denied.

36. However, as an equitable remedy, in the event Parents wish Student to attend school within District, District shall reassess Student in all areas of suspected disability, convene an IEP team meeting, and develop an IEP reasonably calculated to provide educational benefit for Student in a safe learning environment.

37. The IDEA provides for a school district to conduct periodic reevaluations to be not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).)

A reassessment may also be performed if warranted by the child's educational or related services needs. (20 U.S.C. §1414(a)(2)(A)(i); Ed. Code, § 56381, subd. (a)(1).)

38. At the beginning of the 2015-2016 school year, Student's most recent assessments were more than two years old and completed while Student was in sixth grade. Student spent his last two years in elementary school in a very restrictive academic environment. In at least the past five years no one administered standardized tests to assess Student's cognitive ability. His academic skills when he attended the TAP program were between four and five years below grade level. While the methodology used to implement Student's IEP is left to District, the need for current accurate information as to Student's cognitive ability, in light of Student's grade level skills, is warranted by the material change in Student's educational program.

39. Reassessment is also warranted to ensure a safe learning environment at the location of an appropriate program. In fifth and sixth grade Student did not elope while at Flora Vista in an isolated work area, with a one to one aide throughout the day, a behavior goal to address his tendency to be distracted by custodial equipment, vehicles and machinery, and a behavior plan. The only reported elopement occurred from home.

40. The seventh grade TAP program at Oak Crest was a very different environment than sixth grade at Flora Vista. Student attended a class with eleven other students, one teacher and one or two program aides. During Student's brief attendance at Oak Crest, while under general adult supervision, he climbed into the custodian's cart, was injured in yoga and was given a prohibited food under the supervision of a substitute teacher. The evidence demonstrated that, as an equitable remedy, reassessment is necessary to determine the appropriate supports and services to address Student's needs, including education and safety. Accordingly, if Parents wish Student to attend school within District, District shall assess Student in all areas of

suspected disability, convene an IEP team meeting to review the assessments, and develop an IEP as stated in the Order below.

## ORDER

1. Student's requests for relief in Issues 1 and 2 are denied.
2. If Parents reenroll Student within District, District shall assess Student in all areas of suspected disability. District shall start assessments within fifteen days of Student's return. The assessment shall include standardized testing as appropriate, and specifically in the area of cognitive ability. Parents shall cooperate with the assessment process in good faith. Parents shall promptly complete any forms, scales and questionnaires and return to District within 14 days after receiving them. Parents shall provide written consents reasonably necessary to allow District to have access to medical information about Student. Parents shall make Student available for observation, evaluation and testing on mutually agreeable dates and times at mutually agreeable locations. The assessments shall be completed within the statutory time period.
3. Upon completion of assessments, District shall convene an IEP team meeting within the relevant statutory period to review the assessments and develop an IEP that meets the legal requirements, including services and supports in a safe educational environment.
4. If Student returns to a District school before assessments are completed, District shall temporarily provide Student a one to one adult assistant throughout the school day to assure his safety until after the IEP team meets to review the assessments and develops a new IEP.

## 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. District prevailed on Issues One and Two. Student prevailed on Issue Three.

## RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: March 15, 2016

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MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings