BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. TORRANCE UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015100314

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on October 5, 2015, naming Torrance Unified School District. The matter was continued for good cause on November 10, 2015.

Administrative Law Judge Elsa H. Jones heard this matter in Torrance, California, on January 5-7, 2016, and January 19, 2016.

Jennifer Guze Campbell and Sarah A. Spacht, Attorneys at Law, represented Student. Mother attended the hearing on all days.

Sharon Watt, Attorney at Law, represented District. Victoria Estrada, Ed.D, Acting Director of Special Education for District, attended the hearing on all days.

Sworn testimony and documentary evidence were received at the hearing. A continuance was granted until February 8, 2016, for the parties to file written closing arguments. The parties filed their written closing arguments on February 8, 2016, at which time the record was closed and the matter was submitted for decision.

ISSUES[1]

1. Does OAH have jurisdiction to adjudicate issues number 2 and 3 below?[2]

2. Did District and Student enter into an enforceable settlement agreement pursuant to District's offer to settle dated August 19, 2015, pertaining to OAH Case No. 2015070848; and, if so

3. Did District fail to perform the settlement agreement, such that Student is entitled to its implementation?

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[1] For the sake of clarity, the issues have been restated compared to how they appeared in the prehearing conference order dated December 23, 2015. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*JAW. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

[2] Prior to hearing, Student contended that OAH did not have jurisdiction over this matter, as it involved recover of money for breach of the settlement agreement. This position was expressed in Student's Motion to Determine Jurisdiction filed on October 13, 2015. The motion was denied on the grounds that factual issues existed as to whether OAH had subject matter jurisdiction, and, in his closing brief, Student asserts that he is no longer contesting OAH's subject matter jurisdiction. District has consistently contended that OAH has subject matter jurisdiction. Notwithstanding that the parties no longer dispute this issue, since the issue of subject matter jurisdiction was raised, and since parties cannot, by agreement, confer subject matter when none exists or waive the issue of subject matter jurisdiction, the issue will be addressed in this Decision. (*Bender v. Williamsport Area School Dist.* (1986) 475 U.S. 534, 541 [106 S.Ct. 1326, 1331]; *People v. Nat'l Auto. and Cas. Ins. Co.* (2000) 82 Cal. App. 4th 120, 125 [97 Cal. Rptr. 2d 858, 862].)

SUMMARY OF DECISION

OAH has jurisdiction to determine whether a settlement agreement existed and whether it was breached and denied a student a free appropriate public education. This Decision finds that the parties did not enter into an enforceable settlement agreement, therefore the issue regarding breach and implementation of the agreement is moot.

FACTUAL FINDINGS

BACKGROUND

1. At the time of hearing, Student was a 13-year-old boy in eighth grade. At all relevant times, Student resided with Parents within District boundaries, and he was eligible for special education and related services under the primary category of other health impairment and the secondary category of autistic-like behaviors. Student had medical diagnoses of attention deficit disorder and anxiety, and a history of autistic-like behaviors, including social skills deficits. At the time of the hearing, he was not attending school. Rather, District provided Student home hospital instruction, at Parent's request, supported by documentation provided by Student's physician. Student received home hospital instruction for one hour per day, five days per week.

2. During the 2013-2014 school year, when Student was 12 years old and in sixth grade, Student attended Hull Middle School located in the District. His annual individualized education program in March 2014 noted he was working at grade level in all academic areas at school, and he had a positive attitude in the classroom. He was making progress on his goals. At that IEP team meeting Mother contributed that Student seemed to be able to handle the general education curriculum, but he had difficulty with common core questions. Student had difficulty explaining his thinking, especially in writing. He needed repetition to remember sequences in math, and he had other memory/attention issues. The IEP team agreed that Student would receive

resource services, individual counseling, and inclusion/consultation support services, including specialized services in a District program designed to serve students, such as those with autism, who have social and behavioral issues. Mother consented to this IEP.

3. At hearing, Mother offered a characterization of Student that was not reflected in the IEP. She asserted that he was anxious about school, and that he had difficulty completing homework, as he was unable to understand or apply the material that had been covered in class. Student had meltdowns while doing homework, and he could not write answers to analytical questions. Mother observed that Student had difficulty working at the middle school level, and his coping skills declined. She frequently visited him on campus at lunchtime as the school year proceeded, and observed that he had "mini" emotional breakdowns at school.

4. At the end of the 2013-2014 school year, Parents decided to transfer Student to Madrona Middle School for seventh grade, where his twin brother attended school. Madrona was also a school located in the District. Student attended school there for the first one and one-half days of the school year, during which time Mother believed Student's anxiety became so great that he could not continue there. Consequently, Parents removed Student from school. After Parents provided the appropriate documentation, District began to provide home hospital services to Student for one hour per day, five days per week, during the 2014-2015 school year. These services were provided by a teacher who was credentialed as a general education teacher, not a special education teacher. Student continued to have some emotional and academic issues during this time period.

5. District convened Student's triennial IEP team meeting on January 29, 2015. The team reviewed Student's triennial assessment results and developed present levels of performance, goals, and accommodations. The IEP notes reflected Mother's concerns regarding Student's school anxiety and mental health status, and that the

rigors of school- created anxiety at Hull Middle School. Mother reported that Student became suicidal at the beginning of the previous school year. He exhibited anxious behaviors at home, and she was concerned about his academic skills. Mother reported that Student had difficulty with memory, with writing comprehensive assignments, and with doing homework. She asserted that Student's grades were average because she did his homework for him. Mother also believed that Student had very limited social skills. Mother wanted Student to attend school in a smaller environment with one-to-one support, with access to general education classrooms, and requested District place Student at another school. In Mother's view, home hospital had been successful because Student could complete the work at his own pace and was in a smaller environment. In contrast, District teachers and staff reported that Student had done well academically when attending Hull Middle School, and that he had friends and good peer interactions. They reported that he was able to appropriately manage any anxiety he had regarding completing classwork. The IEP team meeting was continued to April 20, 2015.

6. Prior to the second session of the IEP team meeting, Mother visited The Help Group, an organization which, among other things, operates several nonpublic schools in the Los Angeles area for children with special needs. Mother briefly looked at some classrooms, but she did not observe instruction. Several weeks later, she accompanied Student to his admissions interview with The Help Group director. Based upon the information she received during these visits, she decided that a nonpublic school operated by The Help Group was an appropriate placement for Student.

7. District reconvened the IEP team meeting on April 20, 2015. During the meeting, Parents requested that Student be placed in a nonpublic school, such as The Help Group, where the staff was familiar with autism and behavioral issues. District offered placement in its Targeted Intervention Direct Education Services program, with counseling, behavior services, and specialized academic instruction, including

specialized instruction regarding social skills and behaviors, all as specified in the IEP. The Targeted Intervention program was a short-term program which used positive behavioral modification techniques to serve students who had internalizing behaviors such as depression, off-task behaviors, and anxiety. The program, which had a small class size, was located on a District high school campus, but was open to both high school and middle school students. District offered to convene another IEP team meeting within 30 days of this placement, to discuss placement and services. Parents did not consent to this IEP. Mother visited the Targeted Intervention program and did not believe it was suitable for Student.

8. District continued to provide home hospital services, one hour per day, five days per week, throughout the 2014-2015 school year, by a teacher who was only credentialed to provide general education.

JULY 8, 2015, DUE PROCESS COMPLAINT AND RESOLUTION MEETING

9. On July 8, 2015, Student filed a complaint with OAH against District, titled *Parent on Behalf of Student v. Torrance Unified School District,* OAH Case No. 2015070848. The July 2015 Complaint alleged that during the 2014-2015 school year District deprived Student of a free appropriate public education by reason of the following: (1) failing to timely assess Student and hold an IEP team meeting to review the assessment; (2) failing to respond to Student's requests for independent educational evaluations; (3) failing to hold an IEP team meeting to determine the appropriate level of services and instruction for Student's home/hospital placement; (4) failing to ensure that Student received special education and related services pursuant to his IEP; and (5) failing to offer Student a FAPE in the least restrictive environment in the April 2015 IEP. In particular, the complaint alleged that the placement in the Targeted Intervention program that District offered in the April 2015 IEP was not an appropriate program for him. Student's July 2015 Complaint sought resolutions to include independent

educational evaluations, compensatory education, and funding at a nonpublic school, such as one operated by The Help Group, with round-trip transportation and related services.

10. On August 4, 2015, subsequent to Student's service of the July 2015 Complaint upon District, the parties participated in a resolution meeting. At the resolution meeting, the parties discussed settlement terms to resolve the July 2015 Complaint, but no settlement agreement was reached at the meeting.

DRAFT SETTLEMENT AGREEMENTS

11. On August 4, 2015, following the resolution meeting, Sharon Watt, District's counsel, emailed a four-page, 25 paragraph draft document entitled "Settlement Agreement and General Release" to Jennifer Guze Campbell, Student's counsel, which incorporated the settlement terms that District had discussed at the resolution meeting. The cover email stated: "Attached, please find a settlement agreement for your review and signature in the matter of [Student.] Once signed, please forward a copy of the fully executed agreement to our office." The primary terms of the attached Settlement Agreement and General Release were:

A. District agreed to place Student at The Help Group nonpublic school for the 2015-2016 regular school year, and provide curb-to-curb transportation;
B. District would convene a 30-day review after the placement to determine what amendments to Student's April 20, 2015 IEP would be required;
C. The parties waived the right to object that the placement failed to provide a FAPE through the end of The Help Group's spring 2016 term;
D. Stay put placement would be that in Student's April 20, 2015 IEP;
E. Student would dismiss the July 2015 complaint with prejudice; and
F. District would pay Student's counsel $5,000 for attorney's fees.

12. District's proposed Settlement Agreement included a variety of other

terms, many of which are standard in settlement agreements pertaining to special education due process matters, and many of which were included in written settlement agreements that Student's counsel and District's counsel had negotiated between themselves in summer and fall 2015 regarding other special education due process matters filed by Student's counsel against District. Among these terms were: (1) Student would withdraw each complaint he had filed with the California Department of Education; (2) the Agreement settled all claims to the date of the Agreement on a variety of specified matters, including civil matters and the provision of a FAPE to Student by District; (3) a general release of all claims by Student, and a waiver of the provisions of Civil Code section 1542; (4) a provision that District's obligation to provide services to Student under the agreement were subject to Student continuously residing within District's boundaries; (5) Parent voluntarily agreed to the settlement, she had been advised by counsel as to it, and she understood it; (6) no party to the Agreement would be considered a prevailing party; (7) the Agreement was not an admission of liability by any party; (8) the written Agreement constituted the complete agreement between the parties and superseded all prior agreements between them regarding the Agreement's subject matter; (9) the Agreement would become effective immediately upon execution; (10) the Agreement would be enforced pursuant to the laws of the state of California, that any action to enforce the agreement would be brought in state or federal court, and that neither OAH nor the California Department of Education would have jurisdiction to enforce the Agreement; (11) a severability provision as to any provision that may be determined to be unenforceable; and (12) a confidentiality provision. The draft Settlement Agreement contained signature lines for Mother and Pamela Branch, District's special education director; as well as signature lines for Student's and District's counsel to signify their approval as to the form of the Agreement. The draft Settlement Agreement bore the signatures of Ms. Branch, District's

special education director, and Ms. Watt, and both signatures were dated August 4, 2015. Ms. Watt's signature was only an approval as to form.

13. On August 6, 2015, Ms. Guze Campbell returned the draft Settlement Agreement to Ms. Watt by email, with Student's proposed additions and corrections marked on the document. The proposed additions and corrections were: (1) a statement that the Agreement was the result of a resolution session; (2) the addition of the term "fully fund" to the statement that District would place Student at The Help Group; (3) District would provide the related services offered in the April 2015 IEP; (4) the parties would waive their right to complain that the Agreement failed to provide a FAPE through the end of The Help Group's summer program; (5) that District should pay $11,800 in attorney's fees; (6) that the general release should be made mutual instead of unilateral; and (7) instead of Student withdrawing his Department of Education complaints, Student would request that they be dismissed. Ms. Guze Campbell did not propose any change to the obligation of Student to dismiss the July 2015 Complaint with prejudice, propose that the parties should entirely dispense with a Settlement Agreement and General Release, or propose that Ms. Branch's signature was unnecessary. Since Ms. Guze Campbell was unsure as to whether Ms. Watt had received the proposed additions and corrections to the draft Settlement Agreement, Ms. Guze Campbell re-sent it by email later on August 6, 2015.

14. There was no evidence that the parties communicated further with each other regarding Student's July 2015 Complaint until August 19, 2015, when Ms. Watt emailed a letter to Ms. Guze Campbell. The letter, which was written on Ms. Watt's law firm's letterhead, was accompanied by an email cover letter from Marissa Quintero, a support staff member in Ms. Watt's law office. Ms. Quintero's cover letter stated, in pertinent part: "Attached, please find a letter regarding [District's] offer to settle in the matter of [Student]." The reference line in the attached letter from Ms. Watt referred to

Student's July 2015 Complaint, and stated, "Offer to Settle". The letter recited, in pertinent part:

"Torrance Unified School District . . . offers to settle the above-referenced manner [sic] without the need for hearing in accordance with the following terms:

"District agrees to place and fully fund the attendance of [Student] at The Help Group . . . for the 2015-2016 regular school year tuition and to provide curb-to-curb transportation.

"District agrees to convene a thirty-day review after [The Help Group] placement in order to determine what amendments of Student's April 20, 2015 individualized education program are required.

"District and Student's parents waive its/their right to complain that the foregoing placement fails to provide a free appropriate public education through the end of [The Help Group's] spring 2016 term.

"District agrees to pay $5,000 in attorney's fees."

15. The letter was signed by Ms. Watt, and was copied to Ms. Branch, District's special education director. The letter did not address all of the issues alleged in the July 2015 complaint, such as the assessment issues, the alleged failure of the District to provide special education services while Student was receiving home hospital services, and Student's request for compensatory education. Ms. Watt sent the letter in an

attempt to conform with the "10-day rule."[3]

16. On August 19, 2015, Ms. Guze Campbell sent an email to Ms. Watt stating that the email letter of August 19 was:

"[s]imply a repeat of the offer District made during the resolution session and does not respond to the comments we made on or about August 6, 2015 to your draft settlement agreement.

"Attached to this e-mail please find a second copy of District's draft settlement agreement with our comments shown in blue. Please respond with a revised settlement agreement.

"Our fees are $13,500; however we are willing to stay with the $11,800 figure in our draft of 8/6/15 provided this matter is concluded to Parent's satisfaction this week."

17. Ms. Guze Campbell attached to this email another copy of the marked-up draft Settlement Agreement she had sent to Ms. Watt on August 6, 2015.

18. By email on August 20, 2015, Ms. Watt, through Ms. Quintero, responded to Ms. Guze Campbell's August 19 email, stating, in pertinent part: "the District's August 19, 2015 letter regarding settlement was the District's offer and response to your August 6, 2015 comments. The offer has not changed since the resolution session."

19. On Friday, August 21, 2015, at 12:06 p.m., Ms. Guze Campbell sent to District's counsel's office an email stating, "Attached please find a fully executed

[3] The "10-day rule" refers to the procedure described in 34 C.F.R. part 300.517(c)(2)(i) (2006), which provides that a parent is not entitled to an award of attorney's fees after a due process hearing if a settlement offer is made at least 10 days before the hearing begins, the parent does not accept the offer, and the court finds that the relief obtained by the parents at hearing is not more favorable than the settlement offer.

settlement agreement [for the matter encompassed by the July 2015 Complaint]." Attached to the email was Ms. Watt's letter dated August 19, 2015. Underneath Ms. Watt's signature on the letter were the handwritten words, "I accept this offer," and Mother's signature and hand-printed name appeared below those words. Below Mother's signature was the handwritten notation, "date 08/20/2015." Also on August 21, 2015, Ms. Guze Campbell filed with OAH a Request for Dismissal of the July 2015 Complaint, to which was attached a redacted copy of District's counsel's August 19, 2015 letter with Mother's added signed and dated notation described above. The Request for Dismissal did not specify that it was a dismissal with prejudice, and therefore it was not a dismissal with prejudice.

20. District learned of Ms. Guze Campbell's August 21, 2015 email regarding "a fully executed settlement agreement" on the same day as the email was sent. On that day, Ms. Branch instructed Alicia Lugo-Gutierrez, a District special education program specialist, to make arrangements for Student to enroll at The Help Group as the matter had settled. By virtue of Ms. Branch's direction that Student was to enroll at The Help Group, Ms. Lugo-Gutierrez knew, as a matter of course, that the arrangements would include round-trip transportation and a 30-day review. Ms. Lugo-Gutierrez promptly followed Ms. Branch's directions. At 2:11 p.m. on August 21, Ms. Lugo-Gutierrez emailed Shawna Schmidt, a District staff secretary, that Student would be attending The Help Group "through settlement" and directed her, among other things, to arrange for The Help Group to have access to Student's files. At 2:27 p.m. on August 21, Ms. Lugo-Gutierrez emailed Patricia Johnson, an admissions manager at The Help Group, advised her that Student would be attending The Help Group "through settlement," provided additional information about Student, and requested that Ms. Johnson have the appropriate administrator contact Ms. Lugo-Gutierrez on Monday morning to discuss the matter further. Neither Ms. Lugo- Gutierrez nor Ms. Schmidt had been involved in

the settlement negotiations. Ms. Branch had forwarded to Ms. Lugo-Gutierrez the August 21, 2015 email from Ms. Guze Campbell, but there was no evidence that either Ms. Schmidt or Ms. Lugo-Gutierrez knew of the events and correspondence which had culminated in that email. Ms. Lugo-Gutierrez simply followed Ms. Branch's directions, and Ms. Schmidt simply followed Ms. Lugo-Gutierrez's directions. District customarily took such preliminary actions to facilitate a student's enrollment when it placed students in nonpublic schools.

21. On August 21, 2015, at approximately 2:09 p.m., Ms. Quintero emailed to Ms. Guze Campbell a Settlement Agreement and General Release, signed on August 21 by Ms. Watt, containing the same terms as were contained in the draft Settlement Agreement sent to Student's counsel on August 4, 2015.[4] The cover email to the Settlement Agreement requested that Student's counsel review and execute the Settlement Agreement, stated that District's signature would be obtained on it, and noted, "only upon full execution will District make placement arrangements and not before." Mother received this email on or about August 21. The evidence was unclear as to whether Ms. Guze Campbell received or was aware of this August 21 email before she filed Student's Request for Dismissal of Student's July 2015 Complaint on August 21.

[4] The August 21 version of the Settlement Agreement and General Release incorporated one change that had been inserted by Student's counsel in her August 6 mark- up of the original draft Settlement Agreement of August 4. The August 21 version of the Settlement Agreement and General Release added that District would "fully fund Student's attendance" at The Help Group. This language clarified the language in the District's original draft of the Settlement Agreement and General Release that District would "place" Student at The Help Group, by specifying the intention of the parties that District would fund this placement.

22. On August 24, 2015, Ms. Guze Campbell wrote to Ms. Watt in response to Ms. Quintero's email. Ms. Guze Campbell asserted that Mother's signed acceptance of District's offer on Ms. Watt's letter of August 19, 2015 created a valid and enforceable settlement agreement, and Mother's withdrawal of Student's July 2015 Complaint constituted consideration for the agreement. The letter further advised that Student's "stay put" placement would be The Help Group placement, as that was the last mutually agreed upon placement. The letter contended that Ms. Quintero's email providing that District would not place Student at The Help Group unless Mother signed the Settlement Agreement and General Release appeared to constitute a breach of the parties' settlement agreement formed by Mother's signed acceptance of the offer contained in the August 19, 2015 letter. The letter also stated that in exchange for additional consideration from District, Student would consider a proposal for a new agreement that would supersede the terms of the August 19, 2015 letter agreement.

SUBSEQUENT EVENTS

23. Commencing on August 24, 2015, Ms. Lugo-Gutierrez, Ms. Schmidt, staff at The Help Group, and Mother engaged in a series of communications between and among themselves involving arrangements to enroll Student in The Help Group, his start date there, his receipt of counseling services there, and the like. Ms. Schmidt's primary role during this time was to obtain and communicate information regarding Student's transportation to and from The Help Group. During this time period, Mother filled out transportation forms and enrollment forms for The Help Group and transmitted them to District or to The Help Group, as appropriate. There was no evidence that while Ms. Lugo-Gutierrez and Ms. Schmidt were performing these activities they had any knowledge of the dispute between the parties regarding the settlement documentation.

24. On Friday, August 28, 2015, Ms. Lugo-Gutierrez learned from Ms. Watt that there was no signed settlement agreement. Late in the afternoon of that same day,

she sent an email to Christina Policarpio, the Admission Office Manager at The Help Group, advising that she (Ms. Lugo-Gutierrez) had just been informed District did not have a signed settlement agreement, and that District would not be paying for Student's placement at The Help Group until District had a signed settlement agreement. In the email, Ms. Lugo- Gutierrez asked Ms. Policarpio to so notify Mother by telephone as soon as possible.

25. On Monday morning, August 31, 2015, Ms. Lugo-Gutierrez emailed Mother a Settlement Agreement and General Release, as had been previously sent by Ms. Quintero to Ms. Guze Campbell on August 21, 2015, and requested that she sign it. Also on the morning of Monday, August 31, 2015, Ms. Watt faxed a letter to Ms. Guze Campbell, asserting that Mother's notations and signature on District's counsel's August 19, 2015 letter did not constitute a fully executed settlement agreement, that there had been no meeting of the minds as to the settlement terms, and that the August 19, 2015 letter did not include a District signatory who could bind the District. The letter further advised that the matter would be settled if Mother signed the full Settlement Agreement and General Release which Ms. Watt had signed on August 21, 2015 and which Ms. Branch had signed subsequently on August 24, 2015.

26. Thereafter, counsel for the parties further corresponded, maintaining their respective positions as to whether the August 19, 2015 letter signed by Mother constituted the settlement agreement. As part of this correspondence, Ms. Guze Campbell stated that Mother would consider entering into a separate settlement agreement with District, which would include District providing compensatory education services to Student for the 2015-2016 school year. Ms. Watt re-asserted that the August 19, 2015 letter did not constitute a settlement agreement, re-sent the Settlement Agreement and General Release executed by Ms. Watt on August 21, 2015, and by Ms.

Branch on August 24, 2015, and reiterated that full execution of it would resolve the matter.

27. The parties did not resolve this impasse. On September 8, 2015, Student's counsel faxed to District a request for home hospital services through December 31, 2015, supported by a physician's certification. The physician's certification included diagnoses of anxiety, depression not otherwise specified, attention deficit hyperactivity disorder, and Asperger's syndrome. District approved the home hospital request, and has provided home hospital services to Student through the time of the hearing. These services were provided by a teacher who held a general education credential, not a special education credential. Besides home hospital services, District has provided no other services to Student during the 2015-2016 school year.

28. By Order dated September 9, 2015, OAH dismissed Student's July 2015 Complaint. The Order was silent as to whether the dismissal was with prejudice, therefore, the dismissal was without prejudice.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement the IDEA and its regulations. (20 U.SC. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.;[5] 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

[5] Unless otherwise stated, all citations to the Code of Federal Regulations are to the 2006 edition.

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).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. The IEP describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to [a child with special needs]." *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, the *Rowley* court decided that the

FAPE requirement of the IDEA was met when a child received access to an education that was 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 1997, 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, § 56502, 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 case, Student, as the petitioning party, has the burden of persuasion as to all issues.

ISSUE 1: SUBJECT MATTER JURISDICTION

5. As was stated above, the parties no longer contest subject matter jurisdiction. However, since subject matter jurisdiction was raised as an issue, and since the parties cannot stipulate that a tribunal exercise subject matter jurisdiction when it has none, this Decision will address the issue.

6. The IDEA and its regulations do not specifically address the authority of special education administrative law judges and hearing officers to review settlement agreements reached through the resolution or mediation processes, nor does it specifically address the authority of special education administrative law judges and hearing officers to enforce settlement agreements reached outside of these processes. Therefore, OAH's jurisdiction over these matters is governed by case law and state statutes.

7. Case authority supports that OAH has jurisdiction of issues involving the existence and breach of settlement agreements if the nature of petitioner's injuries can be redressed to any degree by the IDEA's administrative procedures and remedies, including when, as here, the alleged settlement agreement was reached outside of the IDEA resolution session or mediation procedures established in title 20 United States Code sections 1415(e) and (f)(B)(i). (*M.J. ex rel. G.J. v. Clovis Unified School Dist.* (E.D. CA, April 3, 2007, No. 1:05-CV-00927 OWWLJO) 2007 WL 1033444; *L.K. v. Burlingame School Dist.* (N.D. CA, June 23, 2008, No. C 08-02743 JSW) 2008 WL 2563155; *Pedraza v. Alameda Unified School Dist.* (N.D. CA, March 27, 2007, C 05-04977 VRW) 2007 WL 949603 [issue as to whether breach of settlement agreement deprived the student of a FAPE]; See also *S.L. v. Upland Unified School Dist., et al.* (9th Cir. 2013) 747 F.3d 1155, 1162 fn. 2 [noting that the District Court determined OAH had jurisdiction to review and enforce the settlement agreement in that matter.] Furthermore, whether the nature of petitioner's injuries can be redressed to any degree by the IDEA's remedies does not

depend upon the remedies prayed for in the Complaint. (*L.K. v. Burlingame School Dist., supra,* 2007 WL 2563155.)

8. The ALJ has broad authority to order equitable relief. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington Sch. Comm. v. Dep't of Ed.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 711].) For example, school districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party.

9. In this case, the remedy specifically sought by Student in the Complaint was the payment of $49,720 to Parent, which was an estimate of the tuition payment for The Help Group nonpublic school and transportation. However, the evidence at hearing reflected that, if Student prevailed, an appropriate remedy could include one or more of the following IDEA remedies: placement at The Help Group, compensatory education, assessments, and counseling and other behavior services.

10. Consequently, OAH has jurisdiction to hear the issues concerning the existence and enforceability of a settlement agreement in this matter.

ISSUE 2: WHETHER A SETTLEMENT AGREEMENT EXISTED

11. Student contends that Ms. Watt's letter of August 19, 2015, constituted an offer, that Student accepted the offer by her annotations and signature on the letter which was returned to District's counsel, thereby forming a contract, and that Student's dismissal of the July 2015 Complaint constituted consideration for the contract. Further, Student contends that District ratified the contract by commencing to make arrangements for Student's attendance at The Help Group nonpublic school. District contends that Ms. Watt had no authority to enter into a contract pursuant to the August 19, 2015, letter; that the circumstances surrounding Ms. Watt's letter were such that the

Student knew, or should have known, that the August 19, 2015, letter was not intended to constitute the entire contract between the parties; and the actions District personnel took following the contract did not signify that the District believed the August 19, 2015 letter constituted a contract. Moreover, District did nothing subsequent to its transmission of the August 19, 2015, letter to cause Student to dismiss the July 2015 Complaint two days later in reliance on the letter.

12. Well-established principles of contract law govern the interpretation and enforceability of settlement agreements. (*Miller v. Fairchild Indus.* (9th Cir. 1986) 797 F.2d 727 at 733.) A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §130, p. 168 [citing Rest., Contracts, § 26].) Similarly where it is understood that the agreement is incomplete until reduced to writing and signed by the parties, no contract results until this is done. (1 Witkin, *supra*, Contracts, § 134, p. 173.) Further, if there is evidence of an understanding that the signatures of all parties was a condition of a completed agreement, it is incomplete and not binding upon those who sign until the others sign. (1 Witkin*, id.,* § 135, p. 175.)

13. An attorney lacks implied authority, merely on the basis of employment, to compromise or settle the client's claim. (6 Witkin, Cal. Proc. (5th ed. (2008) Proceedings Without Trial, §485, p. 941); see also *Linsk v. Linsk* (1969) 70 Cal. 2d 272, 277-278 [74 Cal. Rptr. 544].) The burden is on opposing counsel to ascertain whether the other party has in fact authorized a proposed settlement. (6 Witkin, *supra,* §485, p. 941.) Moreover, Education Code section 17604 provides that a school board may delegate its power to contract, but that no contract entered into pursuant to such delegation of authority shall be valid or enforceable against the school district unless it is approved or ratified by

motion of the school board.

14. California law recognizes that a party may voluntarily dismiss its case before hearing under certain circumstances, and that such a dismissal may be with or without prejudice. (*See,* Code of Civil Procedure Code Civ. Proc., § 581, subd. (b)(1).) A dismissal without prejudice is not a determination on the merits, and does not result in claim preclusion, but rather permits a party to refile the case if the statute of limitations has not expired. (*Troche v. Daley* (1990) 217 Cal.App.3d 403, 412.) As a matter of practice, and by way of analogy to the Code of Civil Procedure, OAH permits parties to voluntarily dismiss or withdraw their cases, with or without prejudice, prior to hearing.

15. The August 19, 2015, letter, signed only by Ms. Watt and not by Ms. Branch, District's special education director, did not legally constitute a stand-alone offer isolated from the circumstances surrounding the parties' negotiations such that it ripened into a contract upon Mother's acceptance and signature. The undisputed evidence reflected that the August 19, 2015 letter was a response to Student's counter-offer, and simply reiterated some of the major deal points the parties had discussed at the August 4, 2015 resolution meeting. As of August 4, 2015, those deal points had already been embodied, along with other provisions, in a draft Settlement Agreement and General Release. The draft Settlement Agreement and General Release had been signed by Ms. Watt and Ms. Branch, but had yet to be signed by Parent and Ms. Guze Campbell. The draft settlement agreement was reviewed by Ms. Guze Campbell, who marked proposed changes on it and promptly transmitted it back to Ms. Watt. Ms. Guze Campbell's proposed revisions did not include discarding the terms of the Settlement Agreement and General Release, or reflect that Ms. Branch's signature was not necessary. Ms. Watt reviewed the proposed changes and sent the letter of August 19, 2015 to reassert that District was standing by the major terms of the draft Settlement Agreement and General Release sent on August 4, 2015. Ms. Guze Campbell responded

to that letter, also on August 19, 2015, by sending an email questioning whether District's counsel had received Ms. Guze Campbell's proposed revisions of the Settlement Agreement and General Release that Ms. Guze Campbell had previously sent to District's counsel on August 6, and she enclosed another copy of the proposed revised Settlement Agreement and General Release for counsel's review. The parties' conduct thereby demonstrated that they understood and intended that any contract between them would be documented by a Settlement Agreement and General Release that was signed by all parties.

16. The next day, August 20, 2015, Ms. Watt, through Ms. Quintero, emailed Ms. Guze Campbell advising her that the August 19 letter was a response to Student's counsel's proposed changes to the Settlement Agreement and General Release, and that the August 19 letter was a reiteration of the District's offer made at the resolution session. The evidence demonstrated that the District's offer made at the resolution session included the parties' understanding that the terms of the District's offer, or any counter-offer, or counter-counter-offer, would be documented in the form of a Settlement Agreement and General Release to be signed by all parties, and there was nothing in Ms. Watt's August 20, 2015 explanatory letter that reflected any contrary understanding. Again, at the time of the August 19, 2015 letter, a Settlement Agreement and General Release, which embodied the terms of the August 19, 2015 letter already existed, and had been transmitted to Student's counsel on August 4, 2015. In short, *both parties* contemplated, through *and beyond* the time Ms. Watt's office emailed the August 19, 2015 letter, that any settlement between the parties was to be documented in a full written Settlement Agreement and General Release signed by all parties, including Ms. Branch. There was no evidence that both parties understood that a settlement agreement would instead consist of a one-page letter with four deal points signed only by Ms. Watt, which did not contain a signature line for any other party until

Mother fashioned her own signature line on the letter.

17. Further, District and its counsel never wavered from their position that any agreement between the parties would be documented by a Settlement Agreement and General Release signed by all parties. Indeed, on August 21, 2015, upon receipt of the August 19, 2015, letter with the acceptance language and dated signature added by Mother, accompanied by a fax cover sheet from Student's counsel that proclaimed a "fully executed Settlement Agreement" was attached, District's counsel's office transmitted to Ms. Guze Campbell for execution another copy of the Settlement Agreement and General Release. This document was identical in every material respect to the Settlement Agreement and General Release Ms. Watt had sent to Student's counsel on August 4, and had been re-signed by Ms. Watt on August 21. This Settlement Agreement and General Release was accompanied by a cover letter that stated that District would only make placement arrangements for Student when the Settlement Agreement and General Release was fully executed, and also noted that District's special education director would sign the document.

18. Furthermore, Student did not demonstrate that Ms. Watt had any authority to bind District to any settlement agreement signed only by Ms. Watt. Unfortunately, both parties appear to confuse offers and contracts. Ms. Watt, as District's counsel, and based upon the course of dealing between the parties, had authority to transmit and receive settlement offers on behalf of District. This authority must be distinguished from her authority to enter into a binding contract on behalf of District. As was stated above, an attorney has no implicit authority by reason of their employment to settle or compromise a client's case, and Education Code section 17604 supports that District's attorney had no authority to enter into a binding settlement agreement in this matter unless specifically authorized to do so. Student offered no proof that Ms. Watt had any such specific authority.

19. Student contends that his August 21, 2015 filing of the Request for Dismissal of the July 2015 complaint constituted consideration for the agreement he alleged was formed by reason of Mother's signature on the August 19, 2015 letter. However, there can be no consideration for an agreement that did not exist. **(**See 1 Witkin, *supra*, Contracts, § 204, p. 238.) Additionally, as was noted above, the dismissal was a dismissal without prejudice, and OAH's order dismissing the case was similarly without prejudice. However, the consideration required by the District's August 4, 2015, offer was a dismissal with prejudice, and Student offered no evidence or argument as to why a dismissal without prejudice, which would still leave District exposed to at least some of the relief sought in Student's July 2015 Complaint, would be adequate consideration to support the settlement agreement he alleges. Therefore, even had an agreement existed, Student did not demonstrate that his alleged consideration was sufficient consideration to support the subject alleged agreement.

20. For the same reasons, Student's dismissal of the action without prejudice did not constitute any substitute for consideration such as reliance or estoppel. District did nothing between the time of the August 19, 2015 letter, and Student's August 21, 2015 filing of the Request for Dismissal, to induce Student to file the Request for Dismissal. Indeed, on August 21, 2015, District's counsel's office sent an email advising Ms. Guze Campbell that there was no settlement unless the parties signed a Settlement Agreement and General Release.

21. There was no evidence as to whether Ms. Guze Campbell was aware of this email prior to the filing of the Request for Dismissal. Assuming that she was unaware of the email prior to filing the Request for Dismissal, Student had at least two options if he wanted to avert any prejudice to him and to preserve his rights to pursue his claims against District as alleged in the July 2015 Complaint. First, when Ms. Guze Campbell

became aware of the email, Student could have forthwith moved OAH to set aside the Request for Dismissal and re-open the case. For example, California law permits a party to move to set aside a request for dismissal on the grounds of mistake, inadvertence, surprise, or excusable neglect under Code of Civil Procedure section 473, subdivision (b), and, OAH, as a matter of practice, considers motions to set aside a request for dismissal and reopen a case.[6] Alternatively, instead of moving to set aside its Request for Dismissal, Student could have immediately refiled the case, as it would not been barred by the two year statute of limitations contained in Education Code section 56505, subdivision (1). If he did the latter, and if he prevailed at hearing on the matter, he could have recovered compensatory education or reimbursement for any educational benefit that he did not receive by reason of any delay in the hearing due to his dismissal of the original July 2015 Complaint. Therefore, he could have been compensated for any harm he might have suffered by reason of his mistaken dismissal of the case. Student took neither of these actions. Regardless, under all of the circumstances discussed above, Student's filing of a Request for Dismissal without prejudice did not serve to create a settlement agreement between the parties.

22. Student contends that the conduct of District in commencing to make arrangements to place Student at The Help Group during between August 21, 2015, and August 28, 2015 constituted a ratification of the alleged settlement agreement formed by Mother's notations and signature on the August 19, 2015 letter. Student's contention

[6] As was stated above, there was no clear evidence as to the chronology of the events on August 21, 2015. If Ms. Guze Campbell was indeed aware of the August 21, 2015 email from District's counsel *before* she filed the Request for Dismissal, Student would have no basis to contend that reasonable reliance or estoppel existed to support any consideration for Student's alleged agreement.

is unmeritorious. First, as Education Code section 17604 states, a school district's contract entered into by a delegated person must be ratified by the school board. The school board did not ratify the alleged settlement agreement. Second, a party must act with full knowledge of the facts to ratify a contract or transaction. (*Fergus v. Songer* (2007) 140 Cal.App.4th 552, 571.) District's conduct during the week-long period between August 21 and August 28 did not constitute a ratification of the alleged settlement agreement, because there was no evidence that District acted with full knowledge of the facts. There was no evidence that on August 21, 2015, at the time Ms. Branch directed Ms. Lugo-Gutierrez to begin to make arrangements for Student's placement at The Help Group, and thereafter when Ms. Schmidt began to assist in that effort, any District personnel were aware that Student intended the August 19, 2015 letter signed only by Ms. Watt and by Mother, standing alone, to constitute a binding settlement agreement. There was no evidence that any District personnel knew that Student and his counsel did not intend to sign the Settlement Agreement and Release in the form that the parties transmitted between themselves during the previous month. There was no evidence that any District personnel had any information or belief as to the legal effect, if any, of the August 19, 2015 letter and Mother's and Ms. Guze Campbell's responses to it under the circumstances of the case. Indeed, until District received Ms. Guze Campbell's email to Ms. Watt on August 24, 2015, neither Mother nor Ms. Guze Campbell had specifically notified District that they would refuse to sign a Settlement Agreement and General Release in the form that *both* parties had contemplated as recently as August 19, 2015, and in the form that District continued to demand at all times *both before and after* August 19, 2015. The parties engaged in correspondence from August 21, 2015 and thereafter in an attempt to resolve this issue, while Ms. Lugo-Gutierrez and Ms. Schmidt continued to work with Mother and The Help Group regarding the preliminary steps to effectuate Student's enrollment there. Ms.

Lugo-Gutierrez and Ms. Schmidt ceased their efforts on August 28, 2015, when they learned that Mother and her counsel refused to sign the Settlement Agreement and General Release.

23. Under these circumstances, the conduct of District's staff did not serve to ratify the alleged settlement agreement represented by the August 19, 2015 letter, and Student has not demonstrated that District ratified the August 19, 2015 letter in any other manner, such as that prescribed by Education Code section 17604. Rather, as discussed above, the evidence demonstrated that no settlement agreement existed between the parties.

ISSUE 3: WHETHER DISTRICT BREACHED THE SETTLEMENT AGREEMENT

24. In view of the factual findings and legal conclusions set forth above, this issue is moot. There was no Settlement Agreement in existence to breach or to implement.

ORDER

All of the relief sought by Student is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all issues heard and decided in this matter.

RIGHT TO APPEAL

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATED: March 15, 2016

/s/

ELSA H. JONES

Administrative Law Judge

Office of Administrative Hearings