

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

ELK GROVE UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2016110439

DECISION

Elk Grove Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on November 11, 2016, naming Student. The matter was continued for good cause on November 29, 2016.

Administrative Law Judge B. Andrea Miles heard this matter in Elk Grove, California, on March 21, 22, 23, 28, and 29, 2017.

Cathy Holmes and Dina Harris, Attorneys at Law, represented Elk Grove Unified School District. Brooke Warren, Regional Program Specialist, attended the hearing on behalf of Elk Grove.

Robert Closson, Ed.D., represented Student as an advocate. Mother was present throughout the entire hearing. Student attended the hearing only while he testified.

At the parties' request, a continuance was granted on March 29, 2017, to allow the parties to file written closing arguments, and the record remained open until April 6, 2017. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

## ISSUE

Did Elk Grove's September 29, 2016 individualized education program offer Student a free appropriate public education so that Elk Grove may implement the offered IEP without parental consent?

## SUMMARY OF DECISION

This Decision finds Elk Grove met its burden of proving that the offered IEP was reasonably calculated to enable Student to make progress appropriate in light of the circumstances. The implementation of the offered IEP would change Student's placement from a fifth grade general education classroom to a self-contained classroom, nevertheless the change in placement is necessary because the severity of Student's disabilities prevents him from accessing the general education curriculum. The evidence shows that the negative effects of having Student placed in general education far outweigh any potential positive effects and that the offered placement is the least restrictive environment for Student. This Decision orders that Elk Grove may implement the September 29, 2016 IEP without parental consent.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is an eleven-year-old boy who attends fifth grade at Elk Grove's James McKee Elementary School. He has lived with Mother within the geographical boundaries of Elk Grove Unified School District at all times relevant to this Decision.
2. At the age of three, Student received a diagnosis of autism. As a result of his diagnosis, Student received occupational therapy and speech and language services from the local regional center. Student was found eligible for special education services in 2012, when he was six years old, under the category of autism.

## EDUCATIONAL HISTORY

3. Student attended kindergarten for two years in one of Elk Grove's self-contained classrooms for students diagnosed with autism. While in that program, Student received speech and language services and occupational therapy. During the 2012-2013 school year, Student attended first grade in a general education classroom at James McKee Elementary School, with inclusion supports, a classroom instructional assistant, speech and language therapy, and occupational therapy.

October 2, 2012 IEP

4. In October 2012, Parent consented to an IEP, which is still the effective IEP for Student. The IEP identified academics, speech and language, occupational therapy, and task initiation as areas of need for Student, and offered Student goals in those areas. At the time of the October 2, 2012 IEP team meeting, the IEP team discussed placing Student in a self-contained classroom for children at the same level of ability. Mother did not agree to placement in a self-contained classroom and instead believed that Student should be placed in general education with supports.

5. The IEP ultimately offered a placement for Student in a general education classroom, with 30 minutes monthly of specialized academic instruction in the general education classroom. Additionally, the IEP offered Student 30 individualized occupational therapy sessions of 30 minutes each per year, four occupational therapy consultation sessions of 30 minutes each per year, and 30 speech and language sessions of 30 minutes each per year. As Mother has not consented to an IEP since the October 2,

2012 IEP, Elk Grove has continued to implement the placement and services outlined in that IEP.<sup>1</sup>

## ASSESSMENTS OF STUDENT

### Psycho educational Assessments

6. Throughout the years, Elk Grove conducted and funded a number of assessments of Student in an effort to identify and address his needs. At hearing, Elk Grove relied on the findings from those assessments and testimony supporting the accuracy of those findings, as its primary evidence to show that the IEP was substantively appropriate for Student.

### INDEPENDENT PSYCHO EDUCATIONAL ASSESSMENT

7. Kristine E. Strong, Ph.D., a licensed educational psychologist conducted an independent psycho educational assessment. Although, Dr. Strong did not testify at the hearing, her assessment report dated February 26, 2013, was introduced as evidence and Maureen Makarowski, a school psychologist with Elk Grove, testified regarding the report's findings. Ms. Makarowski assessed Student in 2012 and 2013.

8. Dr. Strong assessed Student when he was seven years and four months old. She presented her assessment results at a subsequent IEP team meeting. Her assessment consisted of classroom observations, interviews of Mother and Student's first grade teacher, review of Student's work samples, testing observations, objective testing, and rating scales.

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<sup>1</sup> No issue was raised in this case regarding whether or not either party was obligated to request a due process hearing earlier than sought in this case.

9. According to Dr. Strong's report, Student repeatedly made comments during the testing that were off point and out of context. This observation is consistent with the observations of Ms. Makarowski and Student's current teacher, Traci Parker. Ms. Parker testified that when called on in class, Student provided answers that were random and unrelated to questions being asked. During the short time that Student testified at the hearing, he exhibited similar behavior when he responded to a question with an answer that was completely unrelated to the question.

10. Dr. Strong's report indicated she administered selected subtests of the Neuropsychological Development Assessment, 2nd Edition to Student, which were designed to assess cognitive functions. The results indicated that Student had deficits in cognitive processing, language processing, and memory processing. Those results were consistent with Ms. Makarowski's cognitive testing results of Student.

11. Dr. Strong noted in her report that Student was only able to participate in 10 to 25 percent of the classroom activities in his general education class, and that he had "considerable difficulty understanding verbal instruction and language based activities," which impacted his "ability to keep up with the pace of instruction as well as to learn and retain concepts being taught." She also noted that whole group instruction was particularly challenging for Student, as the pace and conceptual level was far higher than that to which he was able to respond.

12. Dr. Strong stated that Student would benefit from an educational program that provided high levels of small group instruction and one to one instruction that incorporated "high levels of structure, use of visual supports, and opportunities for practice and increased teacher feedback while learning academic concepts." She also recommended that Student's instruction be "utilizing curriculum and materials that are within the instructional range of his skill development." These observations and findings

are consistent with recommendations of Ms. Makarowski and Diana Thomas-Garner, a school psychologist with Elk Grove who assessed Student in spring of 2016.

#### ELK GROVE'S OCTOBER 2013 PSYCHO EDUCATIONAL ASSESSMENT

13. Ms. Makarowski, a school psychologist who currently has 28 years of experience, conducted a psycho educational assessment of Student in October 2013. Her assessment of Student consisted of formal testing, informal testing, observational data, review of prior testing, and interviews of Mother, Student's teachers, and Student's home-based service provider.<sup>2</sup>

14. Ms. Makarowski administered the Wechsler Intelligence Scale for Children, Fourth Edition, a norm-referenced comprehensive test designed to assess a student's intellectual functioning. The Wechsler measured Student's verbal comprehension, perceptual reasoning, working memory, and processing speed. Student scored in the "deficient" range on all of these areas, except in the area of perceptual reasoning, in which he scored just above the deficient range, in the borderline range. Student scored in the average range on the block design subtest, one of the subtests used to measure perceptual reasoning, indicating that Student had a unique relative strength in visual-spatial reasoning. However, Student's ability in this area existed in isolation and did not generalize to other similar reasoning tasks. Overall, Student's performance on the Wechsler indicated that he had a full-scale intelligence quotient of 47, placing him in the second percentile compared to peers his own age, or in the deficient range.

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<sup>2</sup> Student received home-based behavioral services from the provider Advance Kids Inc., which were funded by the local regional center.

15. Ms. Makarowski also administered the Kaufman Brief Intelligence Test-2, a norm-referenced test designed to assess a student's verbal linguistic reasoning and his visual or non-verbal reasoning. Student scored in the lower extreme in both of these areas. This test indicated that Student's overall measure of intellectual ability was 40, which placed Student below the first percentile compared to peers his own age. The results of the Wechsler and the Kaufman were consistent in identifying significant deficits in Student's intellectual ability.

16. Ms. Makarowski also administered the Berry-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition. This test was designed to determine a student's visual-motor integration ability. The test results indicated that Student's ability in that area was in the average range and a relative strength for Student.

17. Ms. Makarowski asked Mother, Student's teacher, and a service provider from Advance Kids, Inc. to complete the Gilliam Autism Rating Scale-2, a brief rating scale used to assist in identifying individuals who may be on the autism spectrum. The results of the rating scales varied considerably between the raters. The results from Advance Kids, Inc. provider's rating scale and Student's teacher's rating scale indicated that the probability that Student had autism was "very likely," whereas the results from Mother's rating scale indicated that Student was "unlikely" to have autism.

18. To assess Student's adaptive behavior skills, Ms. Makarowski asked Student's first and second grade teachers to complete the Vineland Adaptive Behavior Scales-2, Classroom Edition. She asked Student's first grade teacher to complete the rating scale because Student had just recently begun the second grade and Ms. Makarowski wanted the opinion of a teacher who had spent an entire academic year with Student. Mother also completed the Vineland Adaptive Behavior Scales-2, Parent/Caregiver Edition. The results of the scales again varied considerably between Mother and Student's teachers. The results from the teachers' rating scales showed that

Student's adaptive behavior skills fell in the low range in all but two categories, in which Student scored in the moderately low range. The results from Mother's rating scale showed that Student's adaptive behavior skills fell in the moderate low to average range in all areas. The results from the teachers' rating scales were consistent with Student's measured cognitive abilities, while the results from Mother's rating scale were not.

19. Ms. Makarowski reviewed and interpreted the results of the academic testing of Student administered by Student's inclusive education teacher. Those results indicated that Student's skills in the areas of reading, math, written expression, math information processing, and writing information processing fell significantly below grade level expectations. Scores at the 15 percentile are considered the lower end of average for students in the general education classroom. Student's highest score was the fourth percentile, with many of his skills falling in the first percentile. Student's academic scores were consistent with his measured intellectual ability.

20. Based on her assessment results and observations, Ms. Makarowski reached the opinion that Student met the criteria for qualifying for special education under the categories of autistic-like<sup>3</sup> and intellectual disability. Additionally, Ms. Makarowski's assessment showed that Student had deficits in his ability to process and express language. These deficits caused Student to struggle with understating instructions, directions, and conversations.

#### ELK GROVE'S 2016 PSYCHO EDUCATIONAL ASSESSMENT

21. In May 2016, Diana Thomas-Garner, a nationally certified and state credentialed school psychologist with Elk Grove, conducted a psycho educational

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<sup>3</sup> Since the time of Ms. Makarowski's report, the name of the eligibility category was changed from autistic-like to autism.



assessment of Student. Ms. Thomas-Garner has been a school psychologist for approximately 17 years and has considerable experience assessing children with autism and intellectual disabilities. Her assessment consisted of a review of educational records and prior assessments, formal testing, rating scales, observational data, and interviews of Erika Hepworth, Student's fourth grade teacher, the classroom instructional aide, and Mother.

22. Ms. Thomas-Garner administered the Kaufman Assessment Battery for Children, Second Edition, a nationally standardized, norm-referenced measure of the processing and cognitive abilities of children.<sup>4</sup> The testing results indicated that Student demonstrated cognitive abilities in the lower extreme range, with weaknesses in the areas of sequential processing, simultaneous processing, learning, and planning. On the composite portion of the test, which focuses on measuring a student's general mental processing ability with a focus on process rather than content, Student scored 61, or the lower extreme. Although this score is somewhat higher than Student's prior psycho educational testing in 2013, the results were consistent in that they evidenced overall delayed cognitive abilities. Additionally, the testing indicated that Student had normative weaknesses in the areas of sequential processing, simultaneous processing, learning, and planning, which is consistent with previous assessment results.

23. Ms. Thomas-Garner assessed Student's adaptive skills with the Adaptive Behavior Assessment System, Third Edition, a rating scale that measures a student's adaptive skills that are used during everyday life. Mother and Ms. Hepworth completed the rating scales. The composite scores indicated that Mother rated Student's adaptive

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<sup>4</sup> The Kaufman Assessment Battery for Children, Second Edition is a different test than the Kaufman Brief Intelligence Test-2, administered to Student by Ms. Makarowski in 2013. It provides a more detailed assessment of a student's cognitive abilities.

living skills in the below average range, while Ms. Hepworth rated Student's adaptive living skills in the extremely low range. This disparity between Mother's and Ms. Hepworth's interpretation of Student's adaptive living skills is consistent with that found in Elk Grove's 2013 psycho educational assessment. This disparity in the rating scales could result from Student functioning at a higher level in the home and community, Mother overestimating his abilities, or Ms. Hepworth underestimating his abilities. However, the evidence showed that it is unlikely that Ms. Hepworth underestimated Student's adaptive living skills because, during the hearing, Elk Grove's witnesses consistently identified similar deficits in his adaptive living skills in the classroom.

24. Mother and Ms. Hepworth also completed the Autism Spectrum Rating Scale, a rating scale used for identifying symptoms and behaviors associated with autism. The results from the rating scale completed by Mother indicated that Student has symptoms consistent with the criteria for autism spectrum disorder as detailed in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition.<sup>5</sup> Overall, the results of both Mother's and Ms. Hepworth's rating scale indicated that Student's behavioral characteristics were similar to those of a child diagnosed with autism.

25. To assess Student's behavioral and emotional functioning, Ms. Thomas-Garner asked Mother and Ms. Hepworth to complete the rating scales from the Behavior Assessment System for Children, Third Edition. The results from the teacher's rating scale indicated that learning problems and functional communication were two "clinically significant" areas concerns. Clinically significant areas of concern require intervention.

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<sup>5</sup> Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition is a manual by the American Psychiatric Association which defines the symptoms and characteristics of mental health disorders.

26. Based on her assessment results and Student's significant academic delays, Ms. Thomas-Garner found that Student met the eligibility requirements for special education under both autism and intellectual disability.

#### Academic Assessment

27. In spring 2016, Sara Zettel, an inclusion specialist with Elk Grove, conducted an academic assessment of Student to determine Student's present levels of performance and to develop potential IEP goals for Student. Ms. Zettel provided Student with inclusion services in his general education classroom. Ms. Zettel compiled her findings in a written report. To assess Student, Ms. Zettel administered the Brigance Comprehensive Inventory of Basic Skills II and the Comprehensive Test of Phonological Processing, Second Edition.

28. The Brigance measures a student's academic skills compared to his same age peers. The results of the Brigance showed that Student's skills in the areas of basic reading, reading comprehension, math, written expression, and listening comprehension were at a level equivalent to those of a first grader.

29. The Comprehensive Test of Phonological Processing assessed Student's phonological awareness, the ability to access phonological structure of oral language; phonological memory, the ability to code information for temporary storage in the working memory; and rapid naming, the ability to retrieve efficiently phonological information from the long-term or permanent memory. Student scored in the very poor range in the area of phonological awareness and in the poor range in the areas of phonological memory and rapid symbolic naming. Deficits in all three of these areas are common in children with reading disabilities.

## Speech and Language Assessment

30. In April and May 2016, Robyn Pollero, a speech and language pathologist with Elk Grove, conducted a speech and language assessment of Student. Ms. Pollero has worked as a speech and language pathologist since 1985 and has assessed over 500 students, including students with autism and students who have developmental delays.

31. Beginning in August 2016, Ms. Pollero provided Student the speech and language services required by his IEP, and therefore when preparing her report and in testimony she was familiar with Student's skill level and deficits. Ms. Pollero administered several language tests to Student, including the Language Processing Test-R. This test begins with the simple task of giving the name of an associated item after hearing the name of an item verbally. Student was able to complete that portion of the test with average results. However, as the difficulty of the test increased Student's test scores showed significant delays in his ability to process information.

32. Ms. Pollero tested Student's receptive language skills by administering the Peabody Picture Vocabulary Test-4. Receptive language is a person's ability to understand language. The test showed that Student's receptive language skills were at the level of a five year and five months old child. At the time, Student was 10 years and 10 months old.

33. Ms. Pollero administered the Clinical Evaluation of Language Fundamentals to evaluate Student's language skills in the areas of form and content. Student's test results indicated that Student's overall language skills were extremely low, putting Student below the first percentile among his same age peers. The testing also showed Student had significant deficits in receptive and expressive language skills.<sup>6</sup>

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<sup>6</sup> Expressive language is a person's ability to express his thoughts and needs.

Deficits in the areas of expressive and receptive language made it difficult for Student to take in and process language during class.

34. Due to Student's diagnosis of autism, Ms. Pollero tested Student's pragmatic language<sup>7</sup> and social skills using the Test of Pragmatic Language. Student was only able to answer nine out of the 44 questions on the test, showing that pragmatic language continued to be an area of deficit for Student. In the classroom and during therapy, Student continued to require prompting to use and respond to greetings and leave taking.

35. As part of the assessment, Ms. Pollero determined that Student's vocal quality and pitch were appropriate for his age. Student had a tendency to speak at a slower pace as he processed language, but it was not excessively slow pace. Student's articulation skills were age appropriate.

#### Occupational Therapy Assessment

36. In late April 2016, Stephanie Young-Gunning, a registered and licensed occupational therapist with It Takes the Village, a non-public agency, conducted an occupational therapy assessment of Student. During the 2015-2016 school year, Ms. Young-Gunning provided Student with occupational therapy services as required by his IEP. Elk Grove contracted with It Takes the Village to provide occupational therapy services to students in the district.

37. Ms. Young-Gunning has training and experience working with students who have autism. In her current position as Head of Occupational Therapy at Land Park

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<sup>7</sup> Pragmatic language, often described as social communication, is the use of language in social contexts and the ways in which people produce and comprehend meaning through language.

Academy, she works solely with autistic students. While providing contract occupational therapy services for Elk Grove, she worked with approximately 100 students with autism.

38. Ms. Young-Gunning worked with Student weekly on his occupational therapy goals. At the time of the assessment, Student had met those goals. The goals focused on independently printing all capitals and lower case letters and accurately copying sentences.

39. Ms. Young-Gunning's assessment consisted of standardized and criterion-referenced measures, interviews of Mother and school staff, questionnaires, rating scales, and clinical observations. The assessment focused on assessing Student's gross motor skills, fine motor skills, visual-motor integration skills, handwriting skills, and sensory processing. Student demonstrated adequate gross motor skills to navigate the educational setting. The fine motor skills testing and the visual integration testing results indicated that Student had deficits in those areas. However, those testing results were skewed by Student's difficulty performing timed tasks and understanding and following directions, which contributed to his low test scores.

40. Ms. Young-Gunning administered the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition, a standardized test consisting of eight subtests, which measures a student's fine motor skills. Student scored in the below average to well below average range on the fine motor integration and manual dexterity portion of this test. The related subtests required Student to copy designs and perform a variety of timed, fine motor tasks. Student exhibited difficulty copying more complex designs and with the sizing of some drawing. However, Student did not appear to understand the time pressures required of the test. When he performed the test without time restrictions, Student was able to perform all of the required tasks successfully.

41. Ms. Young-Gunning administered the Beery-Buktenica Test of Visual Motor Integration to Student. As in 2013, when Student was administered the Beery-

Buktenica as part of Elk Grove's psycho educational assessment, Student scored in the average range in the area of visual motor integration subtest. Ms. Young-Gunning administered two additional subtests of the Beery-Buktenica that measure a student's visual perception and motor coordination. On those subtests, Student scored in the very low range due to his inability to understand the directions and his inability to understand the time pressures of the testing.

42. Ms. Young-Gunning administered to Student the Evaluation Tool of Children's Handwriting, a non-timed test that assesses legibility of handwriting. Student performed very well on the test, with scores ranging from 96 percent to a 100 percent, showing Student possessed "very good functional fine motor ability."

43. In class, Student was able to write words and short sentences. However, when copying from the white board in class, Student required the assistance of the aide due his slow writing speed. During their occupational therapy sessions, Ms. Young-Gunning worked with Student on copying sentences from the white board. When copying the sentences, instead of copying each word of the sentence, Student would copy each of the letters of the words, looking up at the board after writing down each letter. In one work example, Student took eight minutes to copy two sentences from the white board. Ms. Young-Gunning does not believe that Student's difficulty copying from the board was an occupational therapy issue, but instead it was a processing issue.

44. Overall, Ms. Young-Gunning found that Student's functional abilities far exceed his abilities to follow new directions for completing novel, timed tasks. Ultimately, Ms. Young-Gunning reached the conclusion that his low test scores were not the result of delays in his fine motor development, but the result of difficulty understanding directions and performing at a fast pace.

45. To assess Student's sensory processing, Ms. Young-Gunning had Mother, Student's fourth grade teacher, Erika Hepworth, and the classroom instructional aide

complete the Sensory Processing Measures, a questionnaire that asks raters to identify the frequency of the listed behaviors in a particular setting. The results of the questionnaires indicated that Student experienced more problems with processing at home than he did at school. The results of the instructional aide's questionnaire indicated that Student experienced some problems processing and modulating visual, auditory, and vestibular<sup>8</sup> input at school. Ms. Young-Gunning recommended that Student's IEP include nine, 30-minute occupational therapy consultation sessions a year to monitor Student's sensory regulation needs and to educate classroom staff on supporting Student's continuing fine motor development. Ms. Young-Gunning did not believe that Student required direct occupational therapy services and believed that his sensory needs could be met with accommodations.

#### Behavior Assessment

46. In April and May 2016, Charlie Hill, a board certified behavior analyst with Elk Grove since March 2015, conducted a functional behavior assessment of Student. Prior to working for Elk Grove, Mr. Hill worked for Advance Kids, Inc. as a supervising behavior consultant, behavior consultant, and tutor. While working as a tutor for Advance Kids, Inc. in 2010, Mr. Hill worked with Student in his home-based program.

47. The functional behavior assessment consisted of data collection; interviews of the classroom instructional assistant, Mother, and Ms. Hepworth; review of records;

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<sup>8</sup> Vestibular input is the sensory input from the inner ear canals regarding body position in relationship to gravity. Students who have difficult processing information with their vestibular systems may have difficulty with sequencing and bilateral coordination.



and direct observations. Mr. Hill found that Student was calm and compliant in the classroom, but that he demonstrated significant deficits in his ability to independently respond to instructions, sustain attention, complete assignments, and transition in a timely manner. Student required much of the class instruction to be repeated or modified by the instructional aide. Many ordinary tasks such as taking out his materials or turning his book to the correct page had to be performed by the aide, who stayed seated by Student. Student intermittently displayed the ability to follow classroom routines and basic instruction, such as leaving his seat according to routine or holding up a book to be collected.

48. During the course of his observations, Mr. Hill told the aide he was concerned that her assistance during ordinary instruction was reducing Student's independence. The aide explained to Mr. Hill that, without such assistance, Student would take such a long time to complete ordinary tasks that he would be left behind during the classroom instruction. When the aide followed Mr. Hill's direction to reduce her assistance with those types of tasks, Mr. Hill observed that the substantial time that Student took to take out his book and turn to the correct page caused him to miss whole class instruction. After seeing the effects of reducing the assistance, Mr. Hill reversed his instruction to the aide.

49. Based on his assessment, Mr. Hill did not believe that Student's behaviors required the creation and implementation of a behavior intervention plan. Instead, he made recommendations in his written report regarding supports and strategies to address Student's off-task and prompt-dependent behavior. Mr. Hill recommended that Student be provided with whole-class visual timers, schedules, and reinforcement system so as to not separate him from the rest of the class. He also recommended reducing the number of transitions, the duration of class activities, and periods of passive learning; while increasing small group instruction to provide greater

opportunities for teacher interaction. He also recommended class-wide instruction on communication and social skills and access to peers modelling completion of the same activities, expectations, routines, and social behavior. Student's heavy reliance on a modified curriculum and the assistance of the aide prevented him from learning from the model of peers who were engaged in the same activities.

#### 2015-2016 SCHOOL YEAR

50. During the 2015-2016 school year, Student attended fourth grade at James McKee Elementary in a general education class with occupational therapy, speech and language therapy, and inclusive education supports. Student also received support from the class's instructional aide. Although Student was placed in the general education setting, most of his assignments were modified to some extent. The classroom instructional aide assisted Student with completion of his work by reiterating instruction, explaining instructions, and prompting Student to stay on task. Student's academic skills were far lower than the rest of the class, preventing him from participating in the whole classroom instruction. Instead, Student worked in parallel with the class with the aide assisting Student with his modified work.

51. Student did not exhibit behavioral problems that caused disruption to the class. To the contrary, Student had a sweet and kind demeanor and was compliant during class. Student's behavioral issues were limited to lack of focus and off-task behaviors. Student's behavior issues impeded his own learning process but not those of the other students.

#### May 25, 2016 IEP Team Meeting

52. On May 25, 2016, Elk Grove held an IEP team meeting to review the most recent assessments, determine Student's eligibility, and develop an IEP offer. The IEP team was comprised of Mother, two representatives from the local regional center,

Ms. Thomas-Garner, Mr. Hill, Ms. Gunning-Thomas, Ms. Pollero, Ms. Zettel, Ms. Hepworth, and Ms. Warren, a program specialist with Elk Grove. Ms. Warren acted as the meeting's facilitator.

53. Each of the assessors reviewed and explained their findings from their assessments and Student's progress on his IEP goals. Mother repeatedly interrupted the assessors and questioned them aggressively during the course of their presentations. At times, she insulted the presenting assessors and repeatedly questioned their qualifications. Due to Mother's difficult behavior, Ms. Warren asked Mother to allow the assessors to present their reports so the IEP team would have an opportunity to hear the results of the assessments. The assessors did their best to address the questions asked by Mother.

54. Mother disagreed with the findings that Student had receptive language, expressive language, and social skills deficits. She also disagreed strongly with the finding that Student fit the eligibility criteria for intellectually disabled.

55. The IEP team discussed proposed academic goals that were designed to allow Student to make realistic progress. Mother was concerned that proposed goals did not allow Student to catch up to fifth grade standards since this was the end of Student's fourth grade year. Mother requested that the IEP team write the goals to a fifth grade level. Mother disagreed with the assessors' opinions that Student's ability and skills level was so low that fifth grade goals would not be realistic. Proposed goals in other areas were also presented during the meeting.

56. During the IEP team meeting, the placement option of a self-contained special education classroom was raised. Mother adamantly opposed even discussing that option. She became very upset and loud while expressing her disagreement. Mother asked whether Elk Grove's Learning Center at McKee Elementary would be an appropriate placement option for Student. The Learning Center is not the same as the

self-contained classroom and the staff provides academic assistance both in and out of class to students who are a grade or two below their current grade level in language arts or math. The Learning Center is not designed to support students who are behind in all academic areas.

57. The IEP team was not able to finish developing the IEP during the meeting, so the meeting was adjourned with the understanding that it would be reconvened at a later date. The meeting had been held on the last day of school, so the team's understanding was that it would be reconvened during the next school year. On June 9, 2016, Ms. Zettel emailed Mother a copy of a draft IEP so that she would have ample time to review it over the summer. The IEP was not considered final and the word "draft" was written on each page. At the end of the May 25, 2016 IEP meeting, Ms. Warren invited Mother to write her notes and suggestions directly on the draft IEP so that the IEP team could discuss them at the next meeting. Ms. Zettel reiterated that invitation in her June 9, 2016 email. She also invited Mother to contact with them with any questions.

58. At some point after the May 25, 2016 IEP team meeting, Mr. Hill, Ms. Pollero, and Ms. Zettel, discussed adding two proposed goals to address some of Mother's concerns. The three of them worked together to construct the new proposed goals. Those two proposed goals were emailed to Mother for her review.

#### 2016-2017 SCHOOL YEAR

59. At the beginning of the 2016-2017 school year, Student was placed in a fifth grade general education class with Traci Parker as his teacher. The fifth grade class had an instructional aide, who spent most of her time supporting Student's needs. Since a new IEP had not been agreed upon, Elk Grove continued to implement the IEP from 2012.

60. Ms. Parker, a certified general education teacher with 26 years of experience, employed a collaborative learning model in her classroom. Collaborative

learning required the students to form groups for interactive problem solving. During interactive problem solving sessions, the class functioned in a very fluid manner with informal groups and the students moving from group to group. Although Student was included in a group, he did not participate in the group discussion because the curriculum was far above his skill and ability level. Instead, he would quietly wait for the other members of the group to solve the problem.

61. Ms. Parker believed that Student was unable to access the core subjects of the fifth grade curriculum due to his limited abilities and skills. At the beginning of the year, Ms. Parker tested the students to gauge their academic levels. Student tested in the first grade range in reading. The Common Core standards are based heavily on critical thinking and problem solving. Fifth grade Common Core math problems are language-based and often require three to four steps of problem solving. They are designed to encourage students to struggle to solve them. The collaborative learning model allowed the students to struggle and work together to solve the math problems. Student's inability to participate actively in the group problem solving prevented Student from accessing the curriculum.

62. During the hearing, Ms. Parker provided her opinion that student would be able to make academic progress if he were taught at a level commensurate with his skill level and abilities. She explained that during 20 minutes of the day, Student was provided with a modified curriculum for math, which focused on basic math skills. Since Student began the modified curriculum, he had made progress in developing his basic math skills.

63. Student did not participate in the whole class discussions by raising his hand and answering questions. Ms. Parker used a random system to call on students during class. When she called on Student, not only was he unable to answer the question, he would say things that were completely unrelated to the question asked.

The aide sat next to Student during whole class discussions to prompt him to stay on task.

64. Student had several peers in his class with whom he would play during recess and lunch. However, Student engaged more often in parallel play, in which he would play near other students, but not with them. Student's limited social skills still required him to be prompted to engage his peers. In class, the other students were kind and patient with Student when working in groups. They attempted to help him by explaining the curriculum to him. However, the time that the other students spent trying to help Student with the curriculum caused them not to attend to their own work.

#### September 29, 2016 IEP Team Meeting

65. Ms. Warren sent Mother a notice of meeting to notify her that an IEP team meeting was being scheduled for September 15, 2016. When Mother did not confirm, Ms. Warren sent her a letter dated September 1, 2016 and another notice regarding the proposed September 15, 2016 IEP team meeting. Included with the letter and notice was a revised draft IEP so that Mother could have an opportunity to review it prior to the scheduled IEP team meeting.

66. On September 14, 2016, Mother spoke with Ms. Warren by telephone. During the conversation, she indicated that she did not know if she would be able to attend the IEP team meeting scheduled for the following day. Ms. Warren rescheduled the meeting for September 29, 2016. On September 19, 2016, she sent Mother a letter regarding the newly scheduled meeting and another notice of meeting.

67. On September 29, 2016, the IEP team reconvened to complete the drafting of Student's IEP that it had begun on May 25, 2016. The IEP team members included Mother; Student; Ms. Warren, local education agency representative; Ms. Parker, general education teacher; Ms. Zettel, special education teacher and inclusion specialist; Mr. Hill; Ms. Pollero; Ms. Thomas-Garner, school psychologist; Kim McVean, Student's

occupational therapist; Steven Looper, principal of McKee Elementary; and Diana Welsh, a resource program specialist who worked in the Learning Center at McKee Elementary. Ms. Warren invited Ms. Welsh to the meeting, because Mother had previously inquired about the Learning Center as a possible service and placement option for Student.

68. Ms. Thomas-Garner summarized the findings of her assessment, which had been reviewed at the previous meeting. Mother continued to disagree with the finding that Student met the criteria for intellectual disability. The Elk Grove members of the IEP team agreed that Student was eligible for special education under the primary category of autism and the secondary category of intellectual disability. The Elk Grove team members' determination of eligibility was appropriate in light of the findings of Ms. Thomas-Garner's assessment and prior assessments.

69. The IEP team reviewed the new proposed goals. Mother disagreed with goals because she felt that they were not challenging enough for Student. The team also reviewed the previously proposed goals along with any changes to those goals and baselines. Mother believed that the academic goals needed to be written to fifth grade standards so that Student could meet grade level expectations during the next year.

70. At the meeting, Ms. Parker was able to provide information on Student's present levels of academic performance, which had not changed since the prior IEP team meeting. She expressed concern that the academic rigor of the fifth grade curriculum was very difficult for Student even with the support of the instructional aide. She also explained that the instructional aide needed to continuously prompt Student to remain on task and that he was missing a large amount of the direct instruction because he was distracted by his dependence upon the aide.

71. Ms. Parker believed that Student's off-task, distracted behavior was a result of the curriculum being too difficult for Student. She explained that Student

required instruction delivered at his own level and pace. She expressed her opinion that the substantial support that Student received from the instructional assistant was isolating him from the rest of the class. These observations and opinions are consistent with the observations and opinions of Ms. Zettel, Mr. Hill, Ms. Thomas-Garner, and Student's fourth grade teacher.

72. Ms. McVean began providing Student direct services at the beginning of the 2016-2017 school year. She has substantial experience working with students with autism as well as the personal experience of raising two children who have autism. At hearing, she concurred with Ms. Young-Gunning's assessment results and her recommendation that Student no longer needed direct occupational therapy services. She agreed with Ms. Young-Gunning's findings that consultative services and accommodations would meet Student's sensory needs.

73. The IEP team discussed a variety of placement options, such as general education with supports, the Learning Center, and different self-contained classroom programs. The team (except for Mother) believed Student was unable to make appropriate progress in the general education environment despite having the support of an instructional aide. Since Student's academic skills were so far below those of his peers, he required the constant assistance of the instructional aide and a separate curriculum. The level of support that he required from the aide was isolating him from his peers.

74. Some of the Elk Grove's members of the IEP team proposed placing Student in a Transitional Academic Classroom, a district-run self-contained special education classroom program. A description of the program was provided to Mother during the meeting. Mother became very upset and angry when the topic was raised.



She indicated that she was leaving the meeting, but then elected to stay to continue to voice her disagreement with the proposed placement. The IEP team completed the drafting of the IEP during the meeting. During the meeting, Mother made it clear that she rejected the IEP offer and that she would reject any IEP offer that included placement outside of general education.

#### The IEP Offered on September 29, 2016

##### NEEDS, PRESENT LEVEL OF PERFORMANCE, AND GOALS

75. The IEP proposed accurately described Student's areas of need as pragmatics, expressive language, receptive language, reading, mathematics, behavior, reading comprehension, mechanics of writing, and social skills. The IEP team determined Student's needs based on the assessors' reports and the information from Student's current teacher, his current services providers, and Mother.

76. The IEP contained accurate present levels of performance, which were based on the psycho educational, speech and language, occupational therapy and academic assessments, and on information from Student's service providers, Student's fourth and fifth grade teachers, and Mother. Student did not present any evidence that contradicted the accuracy of the IEP's present levels of performance. At the meetings on May 25 and September 29, 2016, the team discussed Student's needs and present levels of performance. At the September 29, 2016 IEP team meeting, both Ms. McVean and Ms. Parker, who had not attended the earlier meeting, were able to add their perspectives and provide updates on Student's performance levels, which had not changed since the prior IEP team meeting.

77. The IEP offered Student 11 goals that addressed all of his areas of need. The goals were tied directly to Student's present levels of performance. Each goal contained baseline information and a method of measurement to allow the person

tracking the goal to measure Student's progress. The goals also contained short-term objectives to help track Student's progress. The evidence established that the goals addressed Student's needs and that the goals were measurable.

78. Student's limited attention span and need for frequent redirection and repetition of instructions impeded his learning. To address those needs, the IEP provided Student with behavior goals and accommodations. Student's behaviors did not rise to the level of requiring the creation and implementation of a behavior intervention plan. Student does not argue otherwise.

#### ACCOMMODATIONS AND MODIFICATIONS

79. Due to his cognitive and academic deficits, Student required significant modifications to the curriculum. The IEP offered the modification of his instruction to his academic level. This would allow Student to build his academic skills at a rate commensurate with his cognitive abilities. The IEP also offered to modify the number of math problems and length of writing assignments.

80. The IEP also offered a series of accommodations, including small group instruction and additional time to complete assignments. To address Student's short attention span and difficulty following direction without multiple prompts, the IEP offered Student the accommodation of repeating and rephrasing instructions, checking for understanding, breaking down math assignments into smaller tasks, and allowing Student to answer questions verbally. All of the accommodations addressed Student's needs and would allow him to progress academically.

81. At one of the IEP team meetings, Mother stated that Student liked to listen to recorded books. As an accommodation, the IEP offered Student audio versions of books to assist in language arts.

## SERVICES AND PLACEMENT

82. The IEP offered Student 360 minutes of specialized academic instruction, five times a week (1,800 minutes weekly), in the Transitional Academic Classroom at Elliot Ranch Elementary School. The Transitional Academic Classroom is a self-contained classroom designed for special education students in fourth through sixth grade<sup>9</sup> whose academic skills levels are multiple years behind those of their peers. The class is comprised of a mixture of student who are eligible for special education under the categories of specific learning disabilities, autism, intellectual disability, and other health impairment.

83. Several of the sixth grade students in the Transitional Academic Classroom are mainstreamed into a general education physical education class. The rest of the class participated in physical education together. The physical education provided by the Transitional Academic Classroom focused on activities to improve hand-eye coordination. Academic mainstreaming opportunities were also available for students if appropriate for their skill level.

84. The classroom is staffed by a certified special education teacher and two instructional assistants. The teacher and one of the instructional assistants have worked together in the Transitional Academic Classroom for 16 years. The class size does not exceed 16 students. At the time the placement was offered to Student, there was room in the program for an additional student. Elliot Ranch Elementary is located

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<sup>9</sup> A Transitional Academic Classroom for second through fourth grade students was next door to the fourth through sixth grade classroom offered to Student. The offered placement had one fourth grader in the program because that student's academic skill level was above those of the students in the second through fourth grade class.

approximately six miles from Student's home. Feickert Elementary, which is located approximately a mile from Student's home, also had a Transitional Academic Classroom program for fifth and sixth graders, but that program did not have space available for another student at the time of the September 2016 IEP team meeting.

85. The Transitional Academic Classroom uses the district's reading and math core curriculum, but the students work at their own skill level. Students of the same skill level are grouped together in the class to work in small groups. The students receive direct instruction from the special education teacher and the instructional assistants provide instruction under the direction of the special education teacher. The classroom staff utilize language arts and math intervention programs to remediate the students' deficits. On Fridays, the classroom staff assesses and tracks the students' progress. Students' behavior and social skill goals were tracked on tally sheets throughout the school week.

86. The Transitional Academic Classroom has integrated language speech and language services. Once a week, the assigned speech and language pathologist provides speech and language services to the whole class. The IEP offered whole class integrated language services to Student, including consultation, collaboration, and coaching with the classroom staff. In the whole class, the speech and language therapist works on social thinking and expanding the students' language skills. Additionally, the class works on language skills and social skills every day the classroom. The IEP offered Student a goal designed to improve his ability to use greetings and manage leave taking without prompting. As part of the normal classroom activities, that goal would be worked on every day with Student. In addition to the whole class integrated language services, the IEP offered Student 30 minutes weekly of individual speech and language services in the classroom each week to support and address Student's social goals.

87. An occupational therapist assigned to the Transitional Academic Classroom comes into the classroom two times a week to consult with the classroom staff and students. The occupational therapist works with students to address any sensory concerns as they arose. The IEP offered Student nine, 30 minute consultative occupational therapy sessions during the period beginning May 25, 2016 and ending May 25, 2017, as recommended by Ms. McVean and Ms. Young-Gunning.

88. One of the objectives of the Transitional Academic Classroom is to increase the students' levels of independence. The class runs a student enterprise which sells popcorn in the classroom to students, staff members, and parents every Wednesday to raise funds to help pay for a field trip. The activity allows students to work with money and use their communication skills. The students of the Transitional Academic Class participate in the same field trips as the general education students at Elliot Ranch, allowing them to spend time with typically developing peers.

89. All of Student's 11 offered goals could be supported by the curriculum and activities of the Transitional Academic Classroom in conjunction with the other offered services. The Transitional Academic Classroom was an appropriate placement for Student because it would address his needs and allow him to progress both academically and functionally.

#### TRANSPORTATION

90. The IEP offered Student door-to-door transportation services, since Elliot Ranch Elementary is located six miles from his home. No credible evidence was presented to support Student's argument that he would have difficulty riding the school bus to and from Elliot Ranch. Most of the students in the Transitional Academic Classroom ride the school bus to Elliot Ranch because they live in different areas around the district.

## EXTENDED SCHOOL YEAR SERVICES

91. The September 29, 2016 IEP offered Student extended school year services based on the IEP team's finding that Student's skill regression during the summer break merited academic instruction during the extended school year. The IEP indicated that services would be provided in accordance with the district's calendar. Since the IEP was designed to end on May 26, 2017, and Student's annual IEP team meeting would be scheduled before May 25, 2017, the IEP team intended on further discussing the extended school year services before the 2017 extended school year.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>10</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), 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>11</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 free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment, higher education, 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).)

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<sup>10</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>11</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

2. A FAPE means that special education and related services 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; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "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 California, related services are also called designated instruction and services].) 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 that 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)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District 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, *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 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. (*Id.* at p. 951, fn. 10.)

4. In *Andrew F. ex rel., Joseph F. v. Douglas County School Dist.* (March 22, 2017) No. 15-827, 2017 WL 1066260, at \*6 (*Andrew F.*), the Supreme Court clarified that “for children receiving instruction in the regular classroom, [the IDEA’s guarantee of a substantively adequate program of education to all eligible children] would generally require an IEP ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” Put another way, “[f]or a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be ‘reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.’” (*Id.* at \*10 (citing *Rowley*, at pgs. 203-04).) The Court went on to say that the *Rowley* opinion did not “need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level.” (*Id.* at \*11.) For a case in which the Student cannot be reasonably expected to “progress[] smoothly through the regular curriculum,” the child’s educational program must be “appropriately ambitious in light of [the child’s] circumstances . . . .” (*Ibid.*) The IDEA requires “an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.* at \*12.) Importantly, “[t]he



adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." (*Ibid.*)

5. 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) & (f); 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); Ed. Code, § 56505, subd. (l).) 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. 49, 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, Elk Grove filed the complaint, thus it bears the burden of proof on all issues.

#### ANALYSIS OF THE SEPTEMBER 29, 2016 IEP OFFER

6. There are two parts to the legal analysis of a school district's IEP offer to determine if it complied with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

## Procedural Compliance

7. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Id.* at 205-206.) However, a procedural error does not automatically result in a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

## NECESSARY TEAM MEMBERS

8. An IEP team must include the following: at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results; and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district; and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).)

9. At both of the IEP team meetings, the parent, a representative of the local educational agency, Student's general education teacher, Student's special education teacher, the inclusion specialist, and Student's providers and assessors were present. Thus, the necessary IEP team members were present and the procedural requirement was met. Despite Student's assertion during the hearing, a person from Elk Grove's transportation department was not a necessary IEP team member.

## CLARITY OF PLACEMENT OFFER

10. Clarity is a necessary component of an offer of FAPE. In *Union School Dist. v. Smith* ((1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*)), the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement:

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school District will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child."  
20 U.S.C. § 1415(b)(1)(E).

(*Union*, *supra*, 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified School Dist.* (E.D. Cal. 2009) 626 F.3d 431, 459-461; *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.)

11. *Union* involved a district's failure to produce any formal written offer. However, numerous judicial decisions invalidate IEP's that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *A.K. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School*

*Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine School Dist. v. K.H.* (D.Ore., June 2, 2005, No. 04-1468) 2005 WL 1587241, p. 10; *Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108; *Mill Valley Elem. School Dist. v. Eastin* (N.D.Cal., Oct. 1, 1999, No. 98-03812) 32 IDELR 140, 32 LRP 6047; see also *Marcus I. v. Department of Educ.* (D. Hawaii, May 9, 2011, No. 10-00381) 2011 WL 1833207, pp. 1, 7-8.)

12. One district court described the requirement of a clear offer succinctly: *Union* requires “a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal.” (*Glendale Unified School Dist. v. Almasi, supra*, 122 F.Supp.2d at p. 1108.)

13. Student argues that the IEP lacked clarity regarding the offer of transportation services because it did not provide more detail regarding the offer of transportation. Nonetheless, the IEP was clear on its face that it offered Student door-to-door transportation services. The offered placement was only six miles away from Student’s home. The IEP offer of transportation services and the other components of the IEP were sufficiently clear to allow Mother to evaluate and decide whether to accept or appeal.

14. Other than in the two arguments above, Student does not identify any procedural flaw in the creation or offering of the September 29, 2016 IEP. Independent examination of the evidence does not suggest any such procedural failing. Elk Grove therefore established that it complied with the procedural requirements of the IDEA regarding Student’s September 29, 2016. With the procedural requirements satisfied, the IEP offer must be analyzed to determine whether it substantively offered Student a FAPE.

## Substantive Appropriateness of the IEP Offer

15. The IEP is the “centerpiece of the [IDEA’s] education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.)

16. The IEP is the “modus operandi” of the IDEA; it is “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” (*School Comm. of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].)

17. Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

## NEEDS, PRESENT LEVELS OF PERFORMANCE, AND GOALS

18. Student has intellectual delays, autism, pragmatic language, and social skills deficits, which manifest in a constellation of academic, social, behavioral, and communicative needs. The IEP identified and addressed all of Student’s needs. The present levels were developed based on the psycho educational assessment, speech and language assessment, functional behavior assessment, academic assessment, and IEP team members’ input. Student’s September 29, 2016 IEP accurately and completely listed Student’s present levels of performance.

19. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of parents for enhancing the education of their child, the results of

the initial evaluation or most recent evaluation of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d) (3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

20. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).)

21. Student's IEP includes 11 measurable annual goals designed to meet each of Student's identified areas of need. The goals addressed Student's needs in the areas of pragmatics, expressive language, receptive language, reading, mathematics, behavior, reading comprehension, mechanics of writing, and social skills. The IEP included a detailed description of the manner in which Student's progress toward meeting the annual goals would be measured. The goals were appropriate and met all statutory requirements. Student did not present any evidence to contradict those findings.

#### ACCOMMODATIONS AND MODIFICATIONS

22. The IEP shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular

activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

23. The accommodations contained in Student's IEP are substantively appropriate and would enable him to advance appropriately toward attaining his annual goals and to be involved in and make progress in the general education curriculum. The modifications offered by the IEP were appropriate in light of Student's cognitive and skill based deficits. Student did not present any evidence that the accommodations and modifications were not substantively appropriate for Student.

#### RELATED SERVICES AND PLACEMENT

24. The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

25. Related services must be provided if they are required to assist the child in benefiting from special education. (Ed. Code, 56363, subd. (a).) The term "related services" (designated instruction and services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.)

26. Student's cognitive, language, and skill deficits prevented him from progressing smoothly through the general education curriculum. Student was not making appropriate progress in general education, despite having a classroom instructional aide to assist him constantly. The goals offered in the IEP would allow Student to make appropriately ambitious academic and functional progress in light of his deficits. However, those offered goals could not be supported in a general education

classroom. Instead, Student required specialized academic instruction and supports for the implementation of the IEP goals and for Student to benefit from his education.

27. The offered placement of the Transitional Academic Classroom would provide Student the opportunity to receive academic instruction at a level commiserate with his skill and ability level. The large gap between Student's skill level and those of his classmates was so significant that Student was being left behind. The classroom aide attempted to support Student in accessing his education, but the necessary level of support was far too great for the aide to provide in the general education setting. Each day Student struggled in class to follow even the most simple of instructions and each day the gap between Student's skill levels and grade level standards widened.

28. In the Transitional Academic Classroom Student would be provided with individualized and small group instruction. Student would be learning with other students, whose skills were at Student's level, thus allowing him to participate in group instruction instead of being alienated from it. The offered placement also provided Student with embedded speech and language services that would allow him to develop his social skills and work towards achieving the offered pragmatic and social skill goals.

29. When the offer of related services and placement are analyzed as a whole, the 30 minutes weekly of individualized speech and language services, and the occupational consultation services combined with the supports, services and placement provided by the Transitional Academic Classroom addressed Student's needs and assisted him in benefiting from special education. The question then remains as to whether the offered placement of the Transitional Academic Classroom at Elliot Ranch was the least restrictive environment for Student to receive special education services.

#### LEAST RESTRICTIVE ENVIRONMENT

30. Both federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20



U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403; *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

31. In *Sacramento City Unified Sch. Dist. v. Rachel H.*, *supra*, 14 F.3d 1398, the Ninth Circuit Court of Appeal set forth four factors that must be evaluated and balanced in determining whether a placement is in the least restrictive environment: (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. (*Id.*, 14 F.3d at p. 1404.)

32. In this case, Student's disabilities were of such a severe nature that he could not achieve satisfactory progress in the general education environment, even with the use of supplementary aids and services. When evaluating and balancing the four factors from *Rachel H.*, the overwhelming conclusion is that general education is not appropriate for Student and that the offered placement is the least restrictive environment. The first factor addresses whether Student was receiving educational benefit in the general education classroom. The evidence showed that Student was not receiving educational benefit in the general education classroom, nor could he, due to the disparity between his academic skill level and the skill level required to access the

fifth grade curriculum. Even with modification of the curriculum, the difficulty level of the fifth grade curriculum far exceeded Student's ability level.

33. The second factor requires evaluation of the non-educational benefits Student receives in the general education classroom. Although, Student received some non-education benefits, such as socialization with typical peers, that non-educational benefit was diminishing with time. Even though Student had some peers in class with whom he was friendly, and his classmates were nice to him, his inability to participate in class discussions and group activities, combined with his dependence on the aide, were causing Student to become isolated from the rest of the class. That isolation had been increasing as Student fell further and further behind his classmates both academically and developmentally.

34. The third factor addresses whether Student's presence in class has an effect on the teacher and the other students in class. Student's presence had the positive effect of causing other students to want to help Student while he was having difficulty with the curriculum. However, this assistance often caused the helpful students to fail to attend to their own work. Additionally, due to Student's cognitive deficits, language processing deficits, and skill deficits, he was unable to contribute meaningfully during group problem solving sessions, thus denying the other members of the group from having the opportunity of a full group experience.<sup>12</sup>

35. In evaluating and balancing the factors, the evidence is clear that the negative effects of having Student placed in general education far outweigh any potential positive effects. Placement in the Transitional Academic Program would allow Student to benefit from a curriculum that he can understand and from which he can

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<sup>12</sup> The fourth factor required assessing the financial costs of having Student placed in general education. Neither party presented any evidence of financial costs.

derive educational benefit, provide him with opportunities to more fully participate in classroom and group instruction, allow him to develop new friendships with peers who are functioning at his developmental level, and give him the opportunity to contribute to class through his participation and learn from the participation of other students. The evidence established the Transitional Academic Program is Student's least restrictive environment.

#### TRANSPORTATION SERVICES

36. The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) travel in and around school buildings; and (iii) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16).) The IDEA does not explicitly define transportation as door-to-door services. Decisions regarding such services are left to the discretion of the IEP team. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed.Reg. 46576 (August 14, 2006).)

37. In this case, transportation services were necessary for Student to benefit from special education because the closest available Transitional Academic Classroom program was located six miles from Student's home at Elliot Ranch Elementary. As such, the IEP offered Student door-to-door transportation services. Student spent considerable time both during the hearing and in his closing brief arguing the dangers and the risks of transporting student. However, Student did not present any evidence that established that the offered transportation services actually posed a danger or risk to Student and that they were not appropriate to meet Student's needs. To the contrary, the evidence affirmatively established that the offered transportation was adequate for Student's transportation needs.

## EXTENDED SCHOOL YEAR

38. Extended school year services must be offered if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106 (2006); Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, title 5, section 3043, provides that extended school year services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Pupils to whom extended school year services must be offered under section 3043 “. . . shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil’s educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.” (See also 34 C.F.R. § 300.106 (2006); Ed. Code, § 56345, subd. (b)(3).)

39. Elk Grove offered Student extended school year services due to Student’s regression in skills during summer breaks. This offer of extended school year services was supported by Elk Grove’s and Dr. Strong’s assessment findings that Student exhibited memory processing deficits, which make it highly likely that he would suffer regression during the summer break and have difficulty fully recouping from it. The offer of extended school year was therefore substantively appropriate as part of Student’s IEP.

## Conclusion

40. Elk Grove met its burden of proving that the offered IEP was reasonably calculated to enable Student to make progress appropriate in light of the his circumstances. Therefore, Elk Grove established that its IEP was both procedurally and substantively in compliance with the IDEA. Accordingly, Elk Grove’s September 29, 2016 IEP offered Student a FAPE in the least restrictive environment.

## ORDER

1. Elk Grove's September 29, 2016 IEP offered Student a free appropriate public education in the least restrictive environment.
2. Elk Grove may implement the September 29, 2016 IEP without parental consent.

## PREVAILING PARTY

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

## 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: April 14, 2017

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/s/

B. ANDREA MILES

Administrative Law Judge

Office of Administrative Hearings