

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

BIG PINE UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2017030727

DECISION

Big Pine Unified School District filed a Request for Due Process Hearing with the Office of Administrative Hearings, State of California, on March 15, 2017, naming Student. On March 22, 2017, OAH granted, for good cause, the parties' joint request to continue the due process hearing.

Administrative Law Judge Vernon Bogy heard this matter in Big Pine, California, on April 25, 26 and 27, 2017.

Darren Bogié and Christina Oleson, Attorneys at Law, represented District. Pamela Jones, District Superintendent, attended the hearing on April 25, 26 and 27, 2017. Student's Mother represented Student and attended each day of the hearing.

At the conclusion of the hearing, the matter was continued until May 15, 2017, to allow the parties to file written closing arguments. The record was closed and the matter was submitted for decision on May 15, 2017.

ISSUE

Did District's February 7, 2017 individualized education program offer Student a free appropriate public education in the least restrictive environment, such that District may implement the IEP without Mother's consent?¹

SUMMARY OF DECISION

The February 7, 2017 IEP offered Student a FAPE in the least restrictive environment. District proved that Student cannot be satisfactorily educated in general education academic classes, and that its proposed placement in an out-of-state residential treatment facility program which includes Native American cultural components, academic classes and mental health and behavioral supports, would be the least restrictive environment in light of Student's circumstances. If Student is enrolled in District, District may implement the February 7, 2017 IEP without parental consent.

FACTUAL FINDINGS

1. At the time of hearing, Student was a twelve-year-boy, who resided with Mother within the geographical boundaries of District, and was in sixth grade.
2. Student was first found eligible for special education and related services in 2013 and has been receiving special education and related services under the primary eligibility category of other health impairment, based on a diagnosis of attention-deficit/hyperactivity disorder, and a secondary eligibility category of emotional disturbance.

¹ The issue has been rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

3. A triennial IEP team meeting was convened on November 12, 2015, but was continued on several occasions to February 5, 2016, March 15, 2016, March 21, 2016, April 27, 2016, May 17, 2016, June 6, 2016, August 25, 2016, and September 27, 2016. The IEP was finally concluded on October 17, 2016. Mother did not consent to that IEP. Eventually, District made another IEP offer on February 7, 2017, which is the subject of this hearing, which Mother also did not provide consent for District to implement.

STUDENT'S JANUARY 19, 2016 PSYCHOLOGICAL EVALUATION

4. On January 19, 2016, as part of the ongoing IEP process, Student underwent an independent psychological evaluation performed by Dr. Jacob Eide. Dr. Eide is a clinical psychologist licensed to practice in California and Washington State. He earned his bachelor of science degree in psychology from Centre College, and his master of science in clinical psychology from the University of Indianapolis. He received his doctorate in psychology from the University of Indianapolis in 2004, with a specialty in children and adolescents.

5. Dr. Eide assessed Student in all relevant areas including intellectual, academic, behavioral, socio-economical, and attention and executive functioning. Information for the evaluation² was provided by Mother, Student's general education and special education teachers, and his one-to-one teacher aides. The evaluation was carried out in Student's speech room at school.

6. Dr. Eide interviewed Student, who told him that he enjoyed math and playing with his friends, but was challenged by spelling, because he did not study. Student also reported that he enjoyed playing football, basketball and video games.

² The term assessment under California law has the same meaning as the term "evaluation" in the IDEA, as provided in Section 1414 of Title 20 of the United States Code. (Ed. Code, § 56302.5.)

7. Student's teachers and aides informed Dr. Eide that Student had difficulties with attention and concentration, initiating tasks, non-compliance, disruptive behaviors, perfectionism, low self-esteem, low frustration tolerance and managing his emotions, and performing academic tasks which he found challenging. The teachers reported that Student had made progress and significant improvements since the beginning of the year, and was meeting his reading goals.

8. Dr. Eide interviewed Mother, who told him she was worried about Student's inability to follow directions, difficulty with emotional regulation and anger management, attention seeking behavior, and self-esteem. She expressed concerns regarding problems with communication and discrimination at school, which she believed contributed to his problems, and related that Student felt beaten down at school and believed that he needed to protect himself, and as a result his self-esteem was adversely impacted. She also told Dr. Eide that Student had limited male role models in his life. On the positive side, Mother related that Student was bright, a good athlete, and enjoyed helping out.

9. Dr. Eide also reviewed records as part of his evaluation, including emails sent by Student's teacher to Mother, Student's February 26, 2015 IEP, and his November 12, 2015 behavioral plan. The emails reflected that Student had difficulties with initiating work, sitting in his seat, controlling his impulses and emotional regulation. Student was also reported to have engaged in verbal and physical aggression against his peers.

10. The February 26, 2015 IEP reported that Student's behaviors included becoming easily distracted and off-task, disturbing his peers, low frustration tolerance with new or difficult tasks, emotional outbursts and refusal to complete his work, and verbal and physical aggression both in and outside the classroom. Mother reported concerns regarding cultural differences in behavioral strategies, and difficulty in

communicating with the school. The IEP identified academic concerns with reading and completing math tasks.

11. The November 12, 2015 behavior plan included goals for disruptive behavior, noncompliance, and verbal and physical aggression. Student's disruptive behaviors included calling out, wandering in the classroom, rolling on the floor, making noises, and tilting his desk and chair. These behaviors occurred 10 times each day on average. Student's noncompliance consisted of refusing to complete work or follow directions, and running away from or refusing to speak to adults. The noncompliant behavior occurred on average one to two times each day. Student's verbal aggression, which occurred one time each week, consisted of making insulting and hurtful comments to peers, calling people names, yelling at others and using profanity. His physical aggression included hitting walls, throwing chairs and other objects, kicking balls at others, kicking and hitting others, and grabbing others and throwing them to the ground.

12. During his observation of Student in the classroom, Dr. Eide observed that Student became angry and aggressive when upset, was easily distracted, sought attention, and lacked self-control both emotionally and behaviorally. Dr. Eide recommended small group or individualized instruction because the evaluation showed spelling in the low to below average range and academic concerns were also noted with reading and completing math tasks. He concluded that Student's behaviors were caused by several factors, including difficulty in executive functioning, impulse control, frustration tolerance, initiation of activity, and general emotional difficulties.

13. Following his January 19, 2016 evaluation, Dr. Eide continued to observe Student in the classroom every three to four weeks, and also began regular counseling sessions with Student, one to two times each week.

OCTOBER 17, 2016 IEP TEAM MEETING

14. The IEP team met on October 17, 2016. Student and Mother were represented by counsel at the meeting. Mother did not attend. District proposed an updated behavior plan with related behavioral goals, and specialized academic instruction for the following subjects: Crew, which is a regular group meeting of students designed to allow them to come together and set mutual goals, develop character, and build relationships with one another; English; Language Arts; Reading and Writing Instruction. District also proposed behavior intervention for 30 minutes per week as direct services; behavior intervention for 30 minutes per week as consult services; and related accommodations, modifications, class assigned instructional aides and supports.

15. District's October 17, 2016 offer of FAPE included a regular classroom public day school placement, but with the more restrictive setting of a behavior intervention classroom during certain class times, and various services to support his academics and to implement strategies from the behavior intervention plan. The offer of FAPE was based on Dr. Eide's psychological evaluation, his observations of Student in the classroom, the IEP team members' observations and recommendations, and other information presented in the numerous IEP team meetings which began in November 2015. Mother did not consent to the October 17, 2016 IEP.

16. Dr. Eide agreed with the placement of Student in a regular classroom public day school placement, with a more restrictive setting of a behavior intervention classroom during certain class times, because at the time of the IEP team meeting, even though he had evaluated Student and had conducted observations, there had not yet been sufficient data collection to formally establish the frequency of Student's behaviors. Dr. Eide also had not yet determined whether Student could recognize his own behavior triggers.

17. Based on his observations and the observations reported by Student's teachers, Dr. Eide recommended that Student spend more time in small group or individual instruction, as his performance was more successful in a small group or individual setting. Dr. Eide determined that the increased support and attention of a small group would help Student stay engaged in the learning process and allow the teacher to intervene more quickly if Student exhibited a behavioral issue. Dr. Eide noted that Student could not predict or recognize his own triggers. Dr. Eide concluded that Student did not benefit socially in a general education environment because his behavior was more attention seeking than sensory driven.

18. Despite the support of a one-to-one aide and a small class size, Student's behaviors continued, but occurred most frequently during the morning subjects of reading and language arts. On cold winter mornings, Student often appeared for school without a jacket and complained of being cold. On other mornings, Student arrived at school in multiple layers of clothing, appearing disheveled, and with bloodshot eyes. His behavior included outbursts in which he threatened both self-harm and harm to others, and he bullied his fellow students. His conduct continued to include calling out, wandering in the classroom, rolling on the floor, making noises, tilting his chair and desk, and disturbing his peers which hindered their meaningful participation in classroom activities. Student began blurting out random nonsense words and phrases such as "deez nuts" and "stintz" during the middle of classroom lessons. The school's principal, Ed Dardenne-Ankringa, was called into Student's class on several occasions as a result of Student's disruptive behavior, and observed that Student considered his fellow students to be, in essence, an audience, and his behavior appeared to be an attempt play to that audience.

STUDENT'S CONTINUING BEHAVIORAL ISSUES AND DR. EIDE'S COLLECTION OF BEHAVIORAL FREQUENCY DATA

19. Because Student continued to exhibit multiple behavioral issues, Dr. Eide collected behavioral data in the classroom on September 19, 2016, November 1, 2016, November 10, 2016, December 20, 2016, and February 2, 2017.

20. The behavioral data was collected in the categories of overall frequency of behavior; behavior by subject; disruptive behavior; noncompliance; verbal aggression; physical aggression; interventions; time in class; total behaviors by location; average behaviors per hour by location; and, frequency of behavior by location.

21. The data showed that on the dates of observation, Student engaged in disruptive behavior between approximately 50 and 250 times per day. He was noncompliant between approximately 10 and 75 times. He was verbally aggressive between approximately 10 to 25 times, and physically aggressive between approximately 10 to 20 times.

22. Student's disruptive behaviors included calling out, wandering around the classroom, rolling on the floor or under his desk; making noises; tilting back in his chair; and tipping his desk or playing with objects. His noncompliant behaviors included refusing to complete classwork; refusing to follow directions; running away from adults; and arguing with or refusing to speak with adults. His verbal aggression included saying mean things to himself or others; calling people names; yelling at others; and using profanity or other inappropriate language. Student's physical aggression included kicking chairs; banging desks or other objects; and throwing paper or other objects.

23. As intervention to prevent Student's behaviors, his teachers used redirection; validation of feelings; coping cards; problem solving; sending Student out of the classroom; and moving on or giving Student points for his behavior.

FEBRUARY 7, 2017 IEP

24. After several unsuccessful attempts to obtain Mother's consent to the October 17, 2016 IEP, and because Student's disruptive behaviors were ongoing and continuous, an IEP team meeting was held on February 7, 2017 to further address Student's behavior and discuss District's offer of FAPE.

25. The meeting was attended by Mother; Ed Dardenne-Ankringa; Pamela Jones, the school superintendent; Dr. Eide; Karen Watson, the school's special education director; Karen Mike, Title VII Liaison; Lauren Zieier, resource specialist teacher and Student's IEP case manager; and Alison Amberg, Student's sixth grade general education teacher. Ms. Mike attended because Student and Mother identify as Native Americans. Pursuant to Title VII of the Civil Rights Act of 1964, Indian, Native Hawaiian, and Alaska Native Education (20 U.S.C. §§ 7401 et seq.), the federal government works with local educational agencies and Native American tribes and organizations to ensure that programs serving Native American children are of the highest quality and provide for not only the basic elementary and secondary educational needs, but also the unique educational and culturally related academic needs of these children.

26. District's IEP team reviewed Student's behavioral data, and concluded that Student's emotional and behavioral needs could not be met in a general education setting, because despite appropriate related services including a one-to-one aide, reduced class size, and a behavior intervention plan, Student was unable to access his general education curriculum, or perform his classroom assignments due to his behavioral issues.

27. Ms. Amberg earned both bachelor of arts and bachelor of science degrees from the University of California at Berkeley. She earned her master of education degree from Stanford University. She holds a multiple subject teaching credential. She observed that Student frequently disrupted the other students in the class and could spend only

approximately one hour in his general education classroom before it became necessary to send him to the CARE classroom. The CARE Classroom was a regular classroom in which the CARE intervention teacher held response to intervention classes in small group setting. The classroom also included students who needed a break before returning to their regular classroom. While the CARE class size was typically 12 to 15 students, ultimately the class size decreased to only five to six students at any given time, because the CARE teacher had to focus on one student, that is, Student in this case, which prevented her from handling a larger class size.

28. Ms. Amberg reported that Student's behaviors disrupted his fellow students in class and adversely affected their ability to engage in classroom activities and lessons. Student often shouted gibberish and mumbled to himself during class, rolled over in his chair and fell over, and made rude noises. He kicked his chair and threw books. Student bullied other students by making demeaning comments to them, taking money and personal items from other students and refusing to return them, and calling other students rude names. He was consistently off-task. Student's conduct adversely affected his ability to engage in the classroom lessons, and prevented his fellow students from doing so as well. Because of his behavior, Ms. Amberg was unable to implement Student's behavior plan. Ms. Amberg concluded that Student did not come to school emotionally ready to learn, and because of his behavior issues, was unable to work up to his academic potential.

29. Because of his ongoing disruptive behavior in the general education classroom, Student spent approximately 75 percent of his time in the CARE classroom. While in the CARE classroom, Student completed very little classwork and spent the majority of his time negotiating and taking breaks. The work which Student did complete, whether in the general education classroom or CARE classroom, was at a "D"

level, despite Ms. Amberg's belief that Student had the potential to perform at grade level or higher if his needs were met.

30. The IEP team identified Student's present levels of academic achievement and functional performance. Academically, Student was found to perform at an average level in reading, written language written expression and brief writing, oral language skills, fluency with academic tasks and ability to apply academic skills. He scored in the high average range in math calculation skills. From a functional social and emotional standpoint, while Student's disruptive behavior was found to have improved since the prior school year, he still engaged in physical and verbal aggression, noncompliance, and frequent disruptive behavior in the classroom, requiring repeated redirection by his teachers.

31. The IEP team developed a series of accommodations, strategies, supports and supplementary aides and services to support Student's core curriculum, which included access to technology at school; additional adult and staff assistance in all academic subjects as necessary; use of assignment notebook planners; access to a separate study area with a one-to-one aide; supervision during unstructured time; and implementation of the behavior intervention plan. Other support strategies included giving homework less weight in determining Student's grades; providing additional time to complete assignments; and presenting him with just a single task or assignment at a time.

32. The IEP team developed a series of behavior goals for Student, which included completion of 90 percent of his assignments and homework on a consistent basis; improvement in his reading ability to a sixth grade level with 95 percent accuracy; developing his ability to read and spell multi-syllabic words in and out of context with 95 percent accuracy; strengthening his writing by planning, revising editing, rewriting or trying a new approach with 85 percent accuracy; setting daily goals and utilizing coping

skills to display on-task and scholarly behaviors; utilizing strategies to maintain respectful and on-task scholarly behavior and reducing noncompliance to no more than two times each week; and, increasing responsible and respectful conduct towards others with no more than one verbal or physical incident in a six month period.

33. District members of the team also developed a behavior intervention plan to address Student's ongoing behaviors which impeded his learning. Mother participated and significantly contributed to the development of the plan.

34. District members of the team concluded, however, that Student's behavior intervention plan could not be successfully implemented in the general education setting, because they felt that the level of involvement necessary to implement the plan would require that the remainder of the class be run entirely according to Student's needs, disrupting lessons and class time for his classmates. They found that to meet his educational and behavioral needs, Student required a specialized program specific to his identified eligibilities which provided an appropriate cultural component, and that his needs could best be effected in a special day class or residential treatment facility which offered support to Native American students, where the increased level of daily behavioral, mental and emotional support available would be the most appropriate, and ultimately the least restrictive learning environment.

35. Dr. Eide agreed with the proposed placement, because after conducting his comprehensive data collection, and based on his observations of and working directly with Student, he concluded that no meaningful or effective progress was being made to change Student's behaviors. He believed that the level of support which Student needed to change his behaviors was daily support by trained mental health professionals to assist Student in recognizing and processing his emotional and behavioral triggers, to allow him to manage his behavior. Dr. Eide concluded that the most appropriate setting for Student would be a small and very structured environment,

with a significant amount of one-to-one interaction, and daily intensive counseling. He also believed that group therapy with peers would be very important to allow Student to both learn from and learn to interact with others.

36. Dr. Eide believed that Student was not ready to learn at school, and that a residential facility would provide the daily and nightly structure to allow Student to be ready the next day to continue in that structured setting. He concluded that to prevent Student's behavioral outbursts and to provide the daily interventions necessary, Student required highly trained staff, including behavioral specialists, therapists, and supervising care staff and aides to provide consistent and daily consultation and oversight. Dr. Eide felt that it was critical that Student have proximity to such mental health staff to allow him to control his emotional outbursts, and if his behavior escalated, staff would be present to immediately respond and provide assistance to him.

37. District members of the team determined that there were no such residential programs, day programs, or specific emotional disturbance programs within the county. District is located in the central Owens Valley of California, and is separated from much of the rest of the state by the Sierra Nevada mountain range. The counties in which such programs were offered are on the other side of mountains. The nearest such programs would require round trip car rides of eight to twelve hours each day. Such lengthy commutes would cause Student to miss valuable opportunities to socialize and to engage in extracurricular activities.

38. District members of the team found two residential treatment facilities, both located in Colorado, which offered cultural programs for Native American students. Both programs provide highly structured and therapeutic settings for adolescent males who have significant mental health and behavioral needs, and require an intensive level of care. Both programs offer individual and group therapy, educational instruction, social skills training, and psychological and behavioral support. Both programs offer

Native American cultural programs. One of the programs had previously been recommended by Mother.

39. Mother refused to consent to the February 7, 2017 IEP. Thereafter, District filed the instant due process complaint seeking an order to allow it to implement the February 7, 2017 IEP without Mother's consent.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.⁴; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their Mothers 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 Parents or guardian, which 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

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis below.

⁴ All references to the Code of Federal Regulations are to the 2006 version.

services” are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School 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, *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.) Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. (*Id.* at pp. 206-207.) 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. 951, fn. 10.) The Supreme Court’s recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ___, [137 S. Ct. 988] (*Endrew F.*) reaffirmed that to meet its substantive obligation under the IDEA, a school must offer an

IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Andrew F.* does not create a new legal standard for what constitutes a FAPE, but is a clarification of *Rowley*. (*K.M. v. Tehachapi Unified School Dist.* (E.D. Cal. Apr. 5, 2017, 1:15-cv-001835 LJO JLT) 2017 WL 1348807, **16-18.)

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), (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.)

5. 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 matter, District, as the complaining party, bears the burden of proof.

DID DISTRICT'S FEBRUARY 7, 2017 IEP OFFER STUDENT A FAPE ?

6. District contends that the February 7, 2017 IEP offered Student a FAPE in the least restrictive environment such that District should be allowed to implement the IEP without Mother's consent. Mother disagrees, and contends that Student should be placed in a regular general educational environment with appropriate Native American cultural supports.

General Requirements for IEP's

7. There are two parts to the legal analysis of a school district's compliance 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.*)

8. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Accordingly, at the meeting parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1.)

9. An IEP team must include 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, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)

10. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has

participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

11. In formulating the February 7, 2017 IEP District provided Mother all of the procedural protections to which she was entitled, and she actively participated in the meeting, engaged in dialogue with the other team members, and offered her insights, thoughts and suggestions for Student's educational program. While she disagreed with District's offer, she was nevertheless thoroughly involved in the process of formulating Student's program.

Contents of IEP's

12. 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); Ed. Code, §§ 56032.)

13. 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.) It is the "modus operandi" of the IDEA, "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].)

14. An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).) 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.

15. 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).)

16. In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional,

communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.

17. If a child's behavior interferes with his learning or the learning of others, the IDEA requires the IEP team, in developing the IEP, to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

18. The February 7, 2017 IEP included all the content required by law. It identified accurately Student's present level of academic performance as average in most subjects and above average in math skills, and described his present level of functional performance which continued to include physical and verbal aggression, noncompliance, and frequent disruptive behavior in the classroom, requiring repeated redirection by his teachers. The IEP established various accommodations, modifications, supports and related services necessary to adequately address Student's needs and academic performance, which included access to technology at school, adult and staff assistance in all academic subjects, use of assignment notebook planners, access to a separate study area with a one-to-one aide; supervision during unstructured time, and implementation of the behavior intervention plan. It set forth measurable annual goals designed to meet Student's unique needs, which included completion of 90 percent of his assignments and homework on a consistent basis; improvement in his reading ability to a sixth grade level with 95 percent accuracy; developing his ability to read and spell multi-syllabic words in and out of context with 95 percent accuracy; and strengthening his writing by planning, revising editing, rewriting or trying a new approach with 85 percent accuracy, and established the services and supports which would be provided to achieve those goals. The IEP appropriately determined the extent to which Student could participate in regular educational programs, and concluded that because of his ongoing behaviors, participation in regular educational programs was limited.

Requirement of FAPE

19. District contends that the February 7, 2017 IEP offers Student a FAPE in the least restrictive environment and that it should be allowed to implement the IEP over parental objection. Mother disagrees, and contends that the least restrictive environment is a general education setting at Student's current school, with appropriate Native American cultural components. While the February 7, 2017 IEP may not, in Mother's eyes be ideal, the IEP nevertheless is reasonably calculated to allow Student to make appropriate progress, and the offered placement, given the daily academic, behavioral, mental and emotional supports, along with a Native American cultural component, is the least restrictive environment for Student in the circumstances.

20. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program, not parent's preferred program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, comported with the student's IEP, and was in the least restrictive environment, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*) School districts need to "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Andrew F.*, *supra*, (2017) 580 U.S. __ , [137 S. Ct. 988].)

21. In *Rowley*, *supra*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities, which was reaffirmed in *Andrew F.* (*Rowley*, *supra*, 458 U.S. at p. 198; *Andrew F.*, *supra*, (2017) 580 U.S. __ , [137

S. Ct. 988].) In determining the validity of an IEP, a tribunal must focus on the placement offered by the school district, not on the alternative preferred by the parents. Even if a placement was better for a student than a District's proposed placement that would not necessarily mean that the placement was inappropriate. The appropriateness of a district's placement must be upheld if it was reasonably calculated to provide a student with educational benefits. (*Gregory K. v. Longview School Dist.* (9th Cir.1987) 811 F.2d 1307, 1314.)

Least Restrictive Environment

22. 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.)

23. Placement in the least restrictive environment is not an absolute. In an appropriate case, it must yield to the necessity that a student receive a FAPE: The IDEA does not require mainstreaming to the maximum extent possible or to the maximum extent conceivable. It requires mainstreaming to the maximum extent appropriate. Mainstreaming is an important element of education for disabled children, but the IDEA does not permit, let alone require, a school district to mainstream a student where the student is unlikely to make significant educational and non-academic progress. (*D.F. v. Western School Corp.* (S.D.Ind. 1996) 921 F.Supp. 559, 571 [citation omitted].)

24. The IDEA recognizes that some students should not be placed in general education. Despite this preference for “mainstreaming” handicapped children, that is, educating them with nonhandicapped children Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that “the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” § 1412(5). The Act thus provides for the education of some handicapped children in separate classes or institutional settings. (*Rowley, supra*, 458 U.S. at p. 181, fn. 4[citation omitted].)

25. Consequently, in appropriate cases, courts have approved placements outside of general education. When it is clear that a student cannot benefit academically or socially from general education, the Ninth Circuit has interpreted its decision in *Rachel H., supra*, 14 F.3d 1398, to approve placements for all or part of a school day in other than general education settings. (See *Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1118, 1136-1138 [approving temporary placement of student with Down syndrome and IQ between 50 and 70 in self-contained special education classroom]; *Clyde K. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 35 F.3d 1396, 1398, 1400-1402 [approving placement of student with Tourette’s Syndrome in private school for disabled].)

26. 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 to determine whether a student is placed 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.)

27. Here, the evidence established that District thoroughly evaluated the *Rachel H.* factors in developing the February 17, 2017 IEP, and properly determined that Student's behavioral issues prevented him from benefitting academically from placement in a regular classroom, that he was unable to benefit non-academically in a regular classroom, and that his consistent disruptive conduct disrupted other students and teachers in his regular classroom.⁵ Moreover, District established that the daily academic, behavioral, emotional and mental supports offered by a residential treatment facility program was better calculated to provide Student educational benefit. Student arrived at school unprepared to learn. He engaged in disruptive, noncompliant, and aggressive behavior on a continual and ongoing basis, which prevented Student from receiving meaningful educational benefits. Despite the efforts and supports of Student's teachers and aides, and ongoing counseling by Dr. Eide, no meaningful progress was being made to change Student's behaviors. Dr. Eide, his educational mental health professional and counselor for more than a year, determined that Student required daily support by trained mental health professionals to assist him in learning how to manage his behavior, that the most appropriate setting for Student would be a small and very structured environment, with daily intensive counseling, and support from group therapy with peers in a day class or residential facility so that Student can effectively manage his behaviors and receive educational benefits. The evidence establishes that Student cannot benefit academically or socially from his present educational setting. In

⁵ Neither party presented any evidence or made any argument concerning the fourth *Rachel H.* factor, the cost of the proposed placement, so that factor is not addressed here.

his present setting, Student is unlikely to make any significant educational or non-academic progress, and requires a more restrictive educational setting to make meaningful educational progress. Accordingly, a residential treatment facility is the most appropriate manner in which Student can receive a FAPE.

Clarity of Placement Offer

28. In *Union, supra*, 15 F.3d 1519, the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that Parents can understand. *Union* emphasized the need for rigorous compliance with this requirement, finding that the requirement of a formal, written offer creates a clear record which helps to eliminate subsequent factual disputes regarding when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any.

29. The issue of placement was thoroughly addressed at the IEP team meeting. Alternative placements were discussed and rejected as inappropriate due to the requirements of lengthy commutes and the effect of such commutes on Student's academic and non-academic success. Mother was presented with two out-of-state placements, was provided with an informational brochure for those programs, and was in fact already familiar with one of the programs. Both programs offered Native American cultural components, which Mother had requested for Student.

Analysis

30. The February 7, 2017 IEP was based upon the personal observations of experienced District staff and service providers, including Student's educational mental health expert, behavioral data collected over several sessions and several months, and psychological evaluations of Student.

31. District's proposal to change Student's placement was based on reliable and valid data, assessments and information relating to Student's cognitive abilities, academics, social/emotional skills, and behaviors, which represented all areas of suspected disability related to his education. The IEP identified Student's present levels of academic achievement and functional performance, established goals which addressed Student's needs, and offered services and supports which were appropriate.

32. District contends that the February 7, 2017 IEP offers Student a FAPE in the least restrictive environment and that it should be allowed to implement the IEP over parental objection. Mother disagrees, and contends that the least restrictive environment is a general education setting at Student's current school, with appropriate Native American cultural components.

33. The weight of the evidence demonstrated that Student required a more restrictive environment and more services than could be accomplished satisfactorily in a general education environment, or even a mix of general education and special education classes. In this case, Student would receive no educational benefit from full-time placement in a regular classroom, or special education classroom at a regular education campus. He required a highly structured program, with appropriate intensive and daily mental, emotional and behavioral supports to obtain educational benefit from his program. Student's unique needs required the more restrictive environment of a residential treatment facility with individualized related services.

34. The clarification of the *Rowley* standard by the decision in *Endrew F.* does not affect the outcome of this case. District proved the October 2016 IEP was reasonably calculated to provide educational benefit to Student and allow him to make progress on his goals. Moreover, the evidence demonstrated that District members of the IEP team carefully considered Student's needs and multiple disabilities when preparing goals, offering accommodations and related services, and in his classroom placement. As a

result, the February 7, 2017 IEP was also reasonably calculated to enable Student to make progress appropriate in light of his circumstances.

35. Accordingly, District offered Student a FAPE in the least restrictive environment.

ORDER

1. The February 7, 2017 IEP offered Student a FAPE in the least restrictive environment.

2. District may implement the February 7, 2017 IEP without parental consent if Student is enrolled in a District school and continues to receive special education and related services.

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 as to the only issue that was heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

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.

DATE: June 12, 2017

/s/

VERNON BOGY

Administrative Law Judge

Office of Administrative Hearings