

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

HAYWARD UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017020096

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on February 1, 2017, naming the Hayward Unified School District. Administrative Law Judge Penelope Pahl heard this matter on March 29, and 30, 2017, and on April 4, 2017, in Hayward, California,

Natashe Washington, Attorney at Law, represented Student. Father attended the hearing throughout and Mother attended parts of each day. Chan Kim, Legal Assistant to Ms. Washington, also attended the hearing each day.

Shawn Olson Brown, Attorney at Law, represented Hayward accompanied by Sterling Elmore, Attorney at Law, who attended the hearing on March 29 and 30, 2017. Karen Mates, Hayward's Compliance Officer, attended throughout the hearing as the representative of Hayward.

At the parties' request, a continuance was granted until April 24, 2017 for submission of closing briefs, which were timely received from both parties. Upon receipt of the briefs, the matter was submitted.

PRELIMINARY MATTERS

Prior to the beginning of testimony, Student notified the ALJ and Hayward that he was withdrawing the issue of whether Hayward denied Student a FAPE by failing to offer him appropriate occupational therapy services during the 2016-2017 school year. The issue was dismissed.

ISSUE

Does Hayward Unified School District's December 5, 2016 Individual Education Program fail to provide Student a free appropriate public education because the offer of a moderate/severe day class for 90 percent of the day was not appropriate?

SUMMARY OF DECISION

Student is a three-year-old boy with Down syndrome, limited verbal capabilities and the need to be fed with a feeding tube. Student seeks an order that his placement into a moderate-severe preschool day class for 90 percent of the day was not the least restrictive environment and therefore denied Student a FAPE. During the course of the IEP process, only one type of preschool placement was discussed: a special day class. No other options were presented. Student proved by a preponderance of the evidence that he received educational benefit in an inclusion classroom and that he received additional non-academic benefits from his placement in a class with typically developing peers. Evidence showed that he would not have been unduly disruptive or required such a disproportionate amount of the teacher's time that other students in the class would suffer. No evidence was presented that the cost of educating Student would have been burdensome to the district in a less restrictive placement. Hayward failed to offer and

provide Student a free appropriate public education by failing to place Student in the least restrictive environment.

Student also proved by a preponderance of the evidence that his current general education, private school preschool provides an appropriate program from which Student is gaining educational benefit. Student was denied FAPE from December 5, 2016. Student is entitled to compensatory education for the time period from December 5, 2016 to March 1, 2017. Parents are entitled to reimbursement for their expenditures for a unilateral private placement from March 1, 2017, through the end of May 2017.

FACTUAL FINDINGS

JURISDICTION

1. Student is a three-year-old boy who has resided within the geographical boundaries of Hayward Unified School District at all relevant time periods. His last placement in Hayward was at the Student Information and Assessment Center (SIAC) campus in the special day class intended for the preschool students that had the most severe disabilities. This class met for three and a half hours in the afternoon. Student attended SIAC from January 5, 2017 to January 24, 2017. He was ill for approximately a week after that date and did not return to the class except for a short (approximately 10 minute) visit to say goodbye. In February 2017, Parents moved him to a private preschool. He continued to attend this private preschool as of the date of the hearing. The parties dispute whether Hayward's offer of the special day class preschool program for 90 percent of his school day was the least restrictive environment for Student and, therefore, denied Student a free appropriate public education (FAPE).

STUDENT'S UNIQUE NEEDS

2. Student was born with congenital heart and breathing problems as well as Down syndrome. Down syndrome is a chromosomal condition that is associated with mild to moderate intellectual disability and which often includes delayed development and later than typical speech and language development. People with Down syndrome may have a variety of birth defects including heart and digestive abnormalities.¹ Although his health problems have resolved, Student remains dependent on a gastrostomy tube ("g-tube") for receiving nutrition. His family and therapists are working to wean him from the feeding tube and Student eats some foods by mouth. Parents have previously assisted with Student's feeding tube when he was in preschool programs; however, personnel at his current private preschool feed Student using the g-tube. The process is straightforward, is done at the table with other students during lunch or snack breaks and takes approximately 10 minutes. Student is offered the foods provided to other students each day in addition to his feeding tube nutrition.

3. Student has limited verbal abilities. He communicates with a combination of simple American Sign Language signs, of which he has mastered only a few, as well as gestures and some words. His verbal communication is improving but is still quite minimal.

4. Student is not toilet trained and wears a diaper. Due to his limited ability to communicate, he does not tell people when his diaper needs to be changed. Student requires toileting assistance throughout the day.

¹Official notice is taken of the description of Down syndrome by the National Institute of Health. (<https://ghr.nlm.nih.gov/condition/down-syndrome>.)

EARLY INTERVENTION SERVICES

Home Based Services

5. Student qualified for Early Intervention Educational Services managed by the Regional Center of the East Bay. Student received speech therapy and occupational therapy, which were provided through the regional center, as well as physical therapy which he received from Kaiser. Student also received early learning educational support from Kidango, initially at home and then at the Fremont Kidango Center.²A report from Kidango was dated January 19, 2016. This document reported Student's progress at the time he was two years, one-month old and was still receiving early intervention services at home.

Kidango Preschool Center

6. At age two, Student moved from his home based program to Kidango's center in Fremont where he was enrolled in a class that had both disabled and typically developing students. There were up to 16 children in the class on any given day. Up to eight of the children had special needs and the rest were typically developing children. The population fluctuated, as not all students attended five days per week.

7. Student attended the Kidango center four days a week for three hours per day. His days began with 30 minutes of outdoor play, after which, the class split into two groups of eight with two developmental specialists assigned to each class. Each class of eight has three early intervention students and five typically developing students. One group stayed outside for additional outdoor play and one

²Early intervention services are provided to children from birth to age three pursuant to Gov. Code section 9500 et seq.

went inside for directed activity. That activity consisted of circle time, an adult directed activity, "chewy" time which is an oral developmental snack, diaper changing and hand washing. The classes then switched. After the second hour, both classes came together for a family style meal of about 30 minutes from 12:00 -12:30 after which the early intervention students left and the typically developing students took a nap.

8. This was Student's first classroom experience and first experience with being separated from his parents for an extended period of time. Student had a difficult time transitioning to the Kidango center. For the first few months, he was extremely anxious and scared of the other children. He vomited several days due to stress until Kidango staff suggested that the G-tube feeding he received just before his class began be rescheduled.

9. Initially, Student would not join circle time. Student's Kidango developmental specialist put a chair near the circle instead of within to ease Student into the group. After several weeks, Student was able to join the circle. Student loves music and was particularly enthusiastic about joining any music and dancing activities. He stated initiating the dancing during circle time towards the end of his time in the class. While he attended Kidango, he was fed through his g-tube during snack time. Other students were curious about the feeding method and asked questions about the process but none were scared. Student engaged in adult-directed activities in small break-out groups of three students led by Ms. Sherwood, one of the developmental specialists. By the end of his time there, he started to identify some colors and initiate some interactions with other children in the form of waving to them and smiling at them. He would also walk up to other children to see what they were doing. He had a friend with whom he would roll a ball back and forth.

10. Testimony conflicted regarding whether a Kidango report from November 2016 was made available to the IEP team at the time of the December 5, 2016 IEP meeting. Development Specialist Alexandra Sherwood, who worked closely with Student in his class at Kidango, credibly testified that she handed out copies of the updated report to all members of the IEP team during the December 5, 2016 meeting and described his progress. Her recollections were specific and detailed. Hayward staff members who testified on this topic variously stated that they could not recall or did not know whether the report had been distributed at the meeting. Given the number of meetings most district employees are called upon to attend, it is not surprising that the details of each are not subject to immediate recall. It is more likely than not that the report was distributed during the meeting. In any event, information about Student's present levels of performance in the Kidango classroom was available to the IEP team and more information was provided by Ms. Sherwood verbally during the meeting.

ASSESSMENT FOR PLACEMENT IN HAYWARD UNIFIED SCHOOL DISTRICT

11. Shortly before Student turned three years old, Parents began to explore placement for Student in a Hayward preschool. Regional Center staff assisted with the transition by providing reports regarding Student's assessments by their agency and Student's Individual Family Services Plan.³ Included with the information from regional center was a January 2016 report from Kidango regarding

³This plan is equivalent to an Individualized Education Plan (IEP) and is provided to all children who qualify for early intervention educational services through the regional center.

Student's home based services.

12. An assessment plan was prepared for Student which was signed by his Parents. Questionnaires were sent to Parents for completion. No questionnaires were sent to Student's current preschool teacher.

13. Student was assessed for self-help capabilities, cognitive and academic levels, social-emotional issues and speech and language needs by Shalini Verma, a credentialed special education teacher and Hayward's inclusion specialist; Maria Vacca, Hayward's school psychologist; and Stephanie Markovich, Hayward's speech pathologist. At the time of the assessment, Student was two-years, 10-months old. Ms. Verma used modified testing instruments on a very limited basis to assess academics due to his restricted verbal capabilities and the difficulty in getting Student to sit down and attend to testing tasks. Ms. Vacca administered the Cognitive Assessment for Young Children which resulted in an overall cognitive ability index score of 70, which is in the poor range. He had extremely low adaptive skill ratings. Ms. Markovich administered the Preschool Language Scale-5 to evaluate expressive and receptive language skills. This confirmed that Student's communication skills were significantly below average. Student was also assessed for related service needs in the areas of occupational and physical therapy.

14. Hayward's assessors reported that Student arrived and immediately felt comfortable in the preschool assessment center; he made good eye contact and initiated play by handing toys to the assessor. He demonstrated interest in a variety of activities and cooperated for over an hour of structured testing. It was noted he did get up to look at himself in the mirror and walk around the room holding preferred toys frequently but was easily redirected. The occupational therapy assessor and the physical therapy assessor also noted Student's enthusiasm and cooperation in the assessments they conducted.

15. Student's motor skills were noted to be an area of strength. Student was able to independently complete a three-piece matching puzzle, to match shapes in a shape sorter and to build a 5-block tower. He was also able to imitate simple body movements like clapping and giving a high five on request. He showed pretend play ability by feeding a doll with a bottle. Student was also able to hold a crayon in his left hand and make marks on paper. He identified four body parts when requested. When given a board book, Student handled it carefully and turned the pages, although he did hold it upside down. Student was not able to count to five, perform two-step commands, identify and name three shapes or answer who, what or where questions.

16. Ms. Verma testified that, in evaluating placement options, she needed to know that a preschool student could sit quietly and cooperate during circle time for at least 20 seconds. She felt that, with that, she could build to 20 minutes. During Student's assessment, he was observed to prefer to stand up and work on tasks that were offered as opposed to sit down and work. He was noted to be able to take two turns back and forth and to transition to new activities with ease. There were no opportunities during the assessment for Student to demonstrate his ability to interact in an environment with other children.

17. No one from Hayward observed Student in his Kidango placement. Hayward assessors stated that they were familiar with what was offered by the Kidango program and did not believe they needed to observe Student in that placement for purposes of his assessment because they had enough information with the combination of their assessments, the input from the parents and the regional center early intervention file. None of the Hayward assessors who testified knew that the Kidango class in which Student took part was an inclusion classroom. They believed that Student's inclusion opportunities were limited to playing with

typically developing children at recess. Nothing prevented any of the Hayward assessors from observing Student's class at Kidango.

DECEMBER 5, 2016 IEP TEAM MEETING

18. Following the assessments, an IEP team meeting was held on December 5, 2016. All required Hayward personnel attended the meeting. Mother and Father were accompanied by Ms. Sherwood, Student's speech therapist and his occupational therapist.

19. During the IEP Team meeting, it was determined that Student was eligible for special education and related services pursuant to the categories of established medical disability and speech or language impairment. Goals were developed in the areas of communicating with words and phrases, producing age appropriate sounds, social compliance/participation, transitioning behavior activities, social interaction/group participation, self –help/toileting, grasping and gross motor skills, specifically riding a tricycle and kicking a ball. No goal for addressing concerns about anxiety had been developed during the course of the IEP team meeting. All Hayward IEP team members testified that the goals covered all areas of need. Based on the goals written, Student was offered speech and language services, specialized physical health care services, occupational and physical therapy and 720 minutes a week of specialized academic instruction.

20. Following the discussion of Student's goals, a long discussion regarding Student's needs took place at the IEP team meeting which lasted approximately two and a half hours. All of Hayward's assessors believed that, based on Student's present abilities, a low student to teacher ratio was necessary. They were very concerned about his anxiety when he began at Kidango especially the vomiting and nervousness around other children. They did not, however, consider the fact that he had overcome that level of anxiety. They were also concerned about

his needs for toileting assistance, his communication limitations, especially as it related to toileting, his penchant for walking away if he was not interested in what he was being asked to do and his inability to transition without assistance.

21. Mother raised concerns about the afternoon program interfering with Student's usual nap routine and asked if he could be placed in the morning class. Although Hayward staff denied it during their testimony, Mother credibly testified that she was informed in the meeting that the morning class was full. Ms. Sherwood's testimony corroborated Mother's. Mother also testified that she felt the IEP meeting was not a discussion of options, but rather an explanation of what was going to happen.

22. Despite the length of the meeting, the only placement option discussed was the afternoon session of the early childhood program, the special day class. No other preschool programs offered in the District were described nor were the aspects of Student's goals that Hayward assessors did not believe could be implemented in a less restrictive setting discussed. Discussion centered on Student's need for a small group setting. Hayward's assessors all testified that everyone agreed on the placement recommendation; however, Ms. Sherwood recalled suggesting to Mother that she try it out and did so because it was the only offer being made. Ms. Sherwood did not feel that it was her place to question the placement being offered by the District. Being new to the process of securing special education for her child, Mother did not know she could question a placement offer.

23. Student was offered a place in the afternoon session of the early childhood special day class at the SIAC campus. Two of the eight different preschool offerings Hayward operates are "Early Childhood" programs that have no more than nine students in each class, all of whom are children with disabilities. The morning

session has one special education teacher and two special education para-educators. The afternoon session has three para-educators in addition to the special education teacher. While formal labels of mild-moderate and moderate to severe are not attached to each class, all Hayward employees acknowledged that the afternoon class is considered the moderate to severe classroom and students who need the most support are placed there while students who need less support are placed in the morning class which has a lower level of staffing. The afternoon session is kept at three to five students despite having a maximum capacity of nine.

24. Student's IEP specified that Student would not participate in mainstreaming opportunities during the times he was receiving specialized academic instruction. The IEP stated that, "Due to [Student's] disability and learning style he will benefit from specialized academic instruction –the use of visuals to facilitate transitions, a smaller student to staff ratio and a modified curriculum."The IEP did not explain why this prevented Student from being educated with typical peers. The 10 percent inclusion time designated was to be fulfilled during outdoor play when students from the co-teaching classes and the migrant program would also be outside playing. However, the co-teaching and migrant classes do not consistently come out to play at the same as the Early Childhood class, so the amount of inclusion time provided was not reliable.

25. Student was also to have the opportunity to have "play dates" with children from other classes that would be arranged by the teachers at SIAC. However, no evidence of efforts to have Student interact with typically developing peers was presented. No evidence of how introductions to typically developing peers were accomplished was presented nor was evidence of efforts to mingle the special education students with their typically developing peers offered. There was evidence that one and perhaps two "playdates" with another special education

student who was more verbal than Student and with whom Student liked to play outdoors were arranged during Student's 11 days in the Hayward program; however, there was no evidence of efforts to provide additional opportunities for Student to interact with his typically developing peers through playdates.

26. During the hearing, Ms. Verma spoke of her role as inclusion specialist being placing children in inclusion programs "when they were ready".

Ms. Markovich testified that "the whole point of goals was to start with a high level of prompting and scaffold it down." She defined scaffolding as providing prompts and cues with decreasing frequency. Ms. Vacca testified that "there was always a goal to get exposure to typical peers." None of the Hayward assessors testified to reasons why Student's disabilities prevented him from being included in a classroom with typically developing peers with additional aids and supports. They testified as to concerns but there was no evidence presented as to any effort made to resolve those concerns in a manner that would have allowed for inclusionary placement

Preschool Programs Available in the Hayward Unified School District

27. Hayward does not provide preschool to students generally. However, it does have a variety of preschool placement options available within the district. Hayward's eight preschool programs include a migrant program which is a general education preschool program for students from migrant worker families. There was no evidence that the migrant program included any special education students.

28. Special education students with simple support needs and who have had prior preschool experience in Head start or through a California program similar to the Federal Head start program ("State preschool") are placed in a general education Head start classroom by Hayward with support by an inclusion specialist. Hayward does this when a student needs simple support like visual schedules.

Those are created and provided by the inclusion specialist who also trains the Headstart staff regarding structures that would work for the students being placed in the class. As of the date of the hearing, Hayward was supporting two students in this way.

29. Hayward also has two "Co-teaching" programs that combine the skills of a special education teacher and a general education teacher in a classroom that includes both children with disabilities and typically developing children. The typically developing students qualify for the class through State preschool or Headstart. These classrooms have a maximum of 24 students (State preschool) or 17 students (Headstart) with five to seven of those students having IEPs. These co-teaching programs also have at a special education para-educator and a general education teacher's aide resulting in a student to teacher ratio of at least 1:6.

30. In addition to the two co-teaching programs, Hayward also has four additional inclusion classes run with Headstart, all of which have a maximum of 17 students. Out of 17 students, five-eight slots are for Hayward special education students. These classes have a general education teacher, a general education aide and a special education para-educator who are in the class for the entire session. Additionally, the inclusion specialist checks in two-three times per week as needed and provides additional support as required to help meet the goals in the special education students' IEPs.

31. Hayward's assessors believed the co-teaching and inclusion programs would be overwhelming for Student because of the number of children in the classes. They thought that it would be too noisy for him, that he would not be able to ask for help if he needed it because of his limited verbal capabilities and that he would feel left out. No testimony was presented linking these concerns to any evidence. Contrary to the assessors opinions that they did not need to observe

Student in the Kidango program, this is exactly why a classroom observation would have given them valuable information about Student's ability to function outside a special education environment.

32. Parents were new to the world of special education and had limited information about services available to Student or how to navigate the procedures required to secure special education and related services for their child. Mother credibly testified that she knew she could negotiate services such as occupational and speech therapy but was not aware that she could question a placement offer.

STUDENT'S PLACEMENT IN THE EARLY CHILDHOOD PROGRAM

33. Student began attending the afternoon, moderate to severe program on January 5, 2017. There were a total of four students in the class including Student. The class had one teacher, Ms. Abraham, and three aides. Mother returned daily to feed Student using the G-tube feeding process. Student also participated in the scheduled snack time sometimes by tasting foods that were offered; sometimes by playing with the foods. Student's toileting needs were attended to by Hayward staff. All of the other students in the class required toileting assistance as well.

34. There is no required curriculum for a preschool program. The early childhood program started its day with table top activities for about 30 minutes. The class then transitioned to circle time for music and movement. After this, the class washed hands and had snack for about 15-20 minutes. After snack, they had some time for free play before returning to circle for some kind of pre-academic activity such as a story or identifying shapes and/or colors. At about 2:00 p.m. the class went outside to play for approximately 30 minutes. They returned to class after outdoor play to engage in a "sensory" activity such as playing with rice or beans or Playdough. Sometimes, they had another story. The class finished their day with another circle for their "goodbye" song.

35. When he attended Hayward's early childhood program, Student sat next to his peers during circle time but did not engage with them. Ms. Abraham did not see him imitate other students. He loved music and would participate for the whole 10 minutes if she played a song he liked. If it was not a favored song, he would listen but would not participate in the body movements. Ms. Abraham said Student would consistently sit in circle for five to 10 minutes and was able to sit for five to 10 minutes for other activities. His attention span improved during his short time in the class. Student required "hand over hand" assistance with transitions meaning that an aide would take him from an activity, point out a visual prompt for the next activity and then take him to that activity to get him started. Student was generally compliant with instructions. No evidence was presented that Student had any difficulties with vomiting or anxiety in the early childhood classroom.

36. No evidence of lesson plans or class time organization for other district preschool programs was presented. Hayward assessors described a typically developing preschool student as being more ready to interact with peers and more comfortable approaching peers. They can sit for five to 10 or even 20-40 minutes for adult directed activity and are either already toilet trained or show readiness to work toward toilet training by communicating when their diaper is wet. No evidence was presented regarding the abilities of students with disabilities who were placed in inclusion programs.

37. Mother credibly testified that Student's sleep cycle was disrupted due to missing his naps. His behavior at home deteriorated and he exhibited a higher degree of stress generally. Mother expressed her concerns about Student's disrupted schedule to Ms. Abraham several times while Student was in the early childhood program as well as her concerns about the limited opportunities Student had to socialize due to the small size of the afternoon class.

38. Student missed class for approximately a week following his first 11 days of attendance due to illness. Mother brought Student back for one last day to say goodbye to Ms. Abraham. Mother mentioned to Ms. Abraham that Student was struggling due to the interference with his nap schedule. The teacher raised the matter with Ms. Verma who authorized Ms. Abraham to offer Mother a spot in the morning session of the early childhood program. However, Parents moved Student to Happy Days Preschool.

STUDENT'S PLACEMENT IN HAPPY DAYS PRESCHOOL

39. Parents removed Student from District's early childhood program and placed him at Happy Days Preschool. Happy Days is a general education, developmental preschool that bases every student's program on their current skill levels. Student is in a class of two to three year-olds and is the only child with special needs in the class. There are up to eight students in the class. The number fluctuates because not all students attend five days per week. The class runs from 7:00 a.m. to approximately 6 p.m. but Student's usual school hours are 8:30 a.m. to 5:30 or 5:45 p.m. three days per week. The class has nap time in the afternoon.

40. Student's class is taught by Joellen Blair who teaches the class of six to eight students without any aides. Ms. Blair's observations after three weeks of having Student in her class were that he started as an observer and has warmed to the routine, joining into activities with minimal prompting. Although Student exhibited some anxiety the first "couple of days" when Father left, Student never cried. The other children in the class like to show Student around. They ask Ms. Blair about his G-tube and his glasses. One peer asked about his limited communication at which time it was explained that Student was still learning to talk. The peer who asked offered to help teach Student to talk. Ms. Blair credibly testified that Student functioned well despite the long day, that he was not a disruption, did not take a

disproportionate amount of her time and had no behavioral issues.

41. The Happy Days class has a planned structure that is flexibly applied. Students have free time while waiting for everyone to arrive followed by planned activities such as colors or a game. Each activity the teacher plans has a purpose such as fine motor development, or teaching colors or numbers. The length of each activity depends on the response of the children as two to three year olds have differing attention spans from day to day. Mid-morning, a second staff member comes in and they take turns monitoring the children and assisting with the children's toileting needs. A typical diversion would be a story or a puppet show. After the toileting break, they have a snack and then go outside or have another activity such as art or puzzles. Lunch follows then naptime with the post-nap afternoon period structured much like the morning.

42. Student is usually assisted with his feeding tube by the Happy Days' school director; however, Ms. Blair has taken over when the director has not been available, even in instances when she had no other assistance with the children. Student is fed while he sits with the others who are eating their lunch. He also gets finger food which he may taste or may play with. Student is not toilet trained. She also has another child in the class in diapers. Toilet training is part of the curriculum in her class.

43. Student is demonstrating a love of music and singing at Happy Days. He is moving from parallel play to interaction, especially during music time when he loves to be silly and laugh while he dances, trying to imitate the others and make the other children laugh. Ms. Blair described Student as wanting to be "part of the moment". He participates readily in activities including painting, and circle time. He is at the one-step direction stage but is moving toward two-step directions. He engages in the class routine although he sometimes says "no". When he is reluctant

to participate, he responds if the next activity is explained at which point he complies. Student "scribble colors". Ms. Blair explained that several of her students were still learning to move their bodies and learning to hold scissors and crayons as is Student.

44. Ms. Blair credibly testified that Student's communication skills are improving at Happy Days. She provided specific descriptions of Student's communications through words, sounds and signs. He can say some colors, and Ms. Blair heard him say "let's go" approximately a week after he started in her class. He is very interested in speaking and is trying to make many sounds. He is making a number of sounds that are understandable even if they are not quite words. He recognizes colors about 50 percent of the time and can make sounds similar to "black" and "white". He knows about four to five different color names. It is not unusual for children entering the two to three- year-old class to know only one to two colors.

45. Student does not have a one-to-one aide and is not segregated from the group at any time. Ms. Blair has seen Student benefit from inclusion with typically developing peers in improvement in his confidence, help with wanting to speak and motivation to communicate with others. Student imitates the other children, specifically their speech and play methods. In addition to the dancing, Student also watched other children ride the tricycle outside for a few days and then tried it himself, kicking with his feet instead of peddling, as several of her students do. Inclusion with the typically developing peers has not proven a problem in the class or on the playground. Student is aware of his body and what he is comfortable doing. He has no more difficulty navigating the classroom or the playground than his peers. He makes adjustments for himself; for instance, Student might look for something to hold onto and then step up. Student has been seen playing with a

ball, as well as the trike, and is currently very interested in the slide. Ms. Blair believes the inclusion with typical peers will help Student learn to deal with different kinds of personalities and different kinds of people.

46. Ms. Blair testified that she believes a one-to-one aide would be beneficial to Student though she did not see an aide as an “emergent” need. She thought a one-to-one aide could help Student build verbal skills, help with focused effort on holding a pencil correctly and developing other motor skills so that, as Student progressed, he was not too far behind the other students in the class. She believed a one-to-one aide would be more important as Student advanced into more difficult learning levels and larger schools.

47. Hayward’s Inclusion Specialist, Shalini Verma; School Psychologist Maria Vacca; and Speech Pathologist, Stephanie Markovich, all testified that the gap between Student’s abilities and the abilities of other students would only increase if he was placed in a co-teaching or inclusion program. Ms. Verma was aware from regional center records that Student was involved in an inclusion program at Kidango. Ms. Markovich and Ms. Vacca were not. Each of the assessors further testified to the belief that a one-to-one aide for Student in a general education or co-teaching classroom was a more restrictive option than the special day class offered. Each Hayward assessor stated that they thought a one-to-one aide was the “most restrictive” option because Student would become dependent on the aide for prompts and direction instead of developing independence and would cling to the aide rather than having social interactions with peers. No evidence regarding options other than a one-to-one aide for possible support systems in a co-teaching or inclusion classroom was presented.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

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)⁵ 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 that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; 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 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

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

⁵ All references to the Code of Federal Regulations are to the 2006 version.

school personnel; that describes the child's needs, academic and functional goals related to those needs; and that contains 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 nondisabled 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.) Recently, the U.S. Supreme Court elaborated on that standard declaring 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." (*Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, (2017) 137 S. Ct. 988, 999.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party

requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20U.S.C. § 1415(f)(3)(B);Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request.(20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49,56-62.) In this case, Student, as the complaining party, bears the burden of proof of proving that the placement offered by Hayward did not offer the least restrictive environment.

DUTY TO EDUCATE DISABLED CHILDREN AGES THREE THROUGH FIVE

5. Under the IDEA and California special education law, school districts must offer an IEP to a pupil who turns three years of age. (20 U.S.C. §1412(A)(1); 34 C.F.R. § 300.101(a); Ed. Code, §§ 56001, subd. (b); 56026, subd. (c)(2).) For the period between three and six years of age, California does not mandate compulsory education for typically developing preschool children. (Ed. Code, § 48200.) However, if a preschool child requires special education and related services in order to receive a FAPE, school districts must offer the child an appropriate program. (20 U.S.C. § 1414(d)(1)(A)(I)(bb); Ed. Code, § 56345, subd. (a)(1)(B).) A private, nonsectarian, preschool program can be an appropriate setting for a district to provide such a student. (Ed. Code, § 56441.4, subd. (a).) If a public agency determines that placement in a private preschool program is necessary for a child to receive a FAPE, the public agency must make that program available at no cost to the parent. (*Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education and Ryan B* (7th Cir. 1999) 184 F. 3d 912, 917.)

DUTY TO EDUCATE IN THE LEAST RESTRICTIVE ENVIRONMENT

6. Children with disabilities must be educated with typically developing children to the maximum extent possible. Congress' preference for educating children with disabilities in regular classrooms with their peers is specified in statutes which declare that special classes, separate schools, or other removal of children with disabilities from the regular educational environment should occur only when the nature or severity of the disability of a child is such that education in regular 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); *Sacramento City Unified v. Rachel H. by and through Holland*(9th Cir. 1994) 14 F. 3d 1398, 1403.(*Rachel H.*))

7. Hayward argues that Student did not have the capabilities to obtain educational benefit in a preschool class that included typical peers. The district maintains that preschool is more academic than the Kidango program in which Student was previously enrolled and, therefore, required that he start in the special day class with all disabled peers and work to demonstrate greater abilities in order to be included with typically developing peers. This, however, is exactly the opposite analysis required by state and federal law, both of which require that "mainstreaming" be the default and adequate justification be made for recommending a placement that did not include the education with typical peers. It bears repeating that both Congress and the courts have consistently emphasized that children with disabilities must be educated with typically developing children to the maximum extent possible and that the choice to segregate a disabled child from his typically developing peers should be made *only* if the nature or severity of the disability of a child is such that education in regular 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); *Sacramento City Unified v. Rachel H. by*

and through Holland (9th Cir. 1994) 14 F. 3d 1398, 1403. (*Rachel H.*), emphasis added.)

8. Hayward focused on their fears about Student's deficits rather than his demonstrated potential and, as a result, denied him a FAPE by placing him in a more restrictive setting than was necessary. Hayward failed to thoroughly evaluate Student's abilities in a classroom setting. Indeed, two of the assessors were not even aware that Student was already in an inclusion classroom at the time of their assessment. They assumed, based on what they believed was a thorough knowledge of Kidango programs, rather than current information gathering, that Student's only mainstreaming opportunities at Kidango occurred during recess similar to Hayward's early childhood class. This was an erroneous assumption. Had Hayward's assessors gone to the Kidango class to observe Student and learned more about the 16 student class he had grown used to, they may not have concluded that a class of 17 students would be overwhelming for Student.

9. Student did have a rocky start at Kidango. He went through five months of anxiety that caused vomiting. However, that had ended. This information is included in the November 2016 Kidango report and was conveyed by Ms. Sherwood at the IEP meeting. The conclusion that Student had overcome his extreme anxiety is also supported by the fact that Hayward did not recommend a goal related to anxiety remediation for Student. Student's social goals were primarily directed to teaching him to follow directions and classroom routines. Hayward assessors devoted significant focus to the fact that Student did not sit down for extended periods of time but rather preferred to stand up when engaging in activities. While Student is not on a par with his typically developing peers, the discussion pertained to a preschool program and Student is only three years old. There is time to learn the skills he needs to acquire for kindergarten readiness.

Evidence was presented that Student imitates his typically developing peers, so it is likely he will learn to engage in class structures more quickly with peers who are following the routines as desired than he would without those examples around him. Moreover, the hallmark of special education is that it is to be tailored to the unique needs of each child. *Andrew F., supra*, 137 S. Ct. at p. 1000. The fact that Student does not have all of the skills of his typically developing preschool peers simply means appropriate supplementary aids and services are needed, not that Student should be segregated until he acquires them.

Inclusion is the Starting Point

10. The case of *Board of Education of LaGrange School District v. Illinois State Board of Education and Ryan B.* (7th Cir. 1999) 184 F.3d 912 addressed the question of preschool placement in the least restrictive alternative for a three-year-old boy with Down syndrome. The student in question was offered placement in two programs: one was a program limited to disabled children and one was a program for children at risk of academic failure. Neither program offered the student the opportunity to be educated with typically developing peers. The LaGrange court declared that an offer of FAPE must allow a student to share a classroom with typically developing children to the maximum extent possible. *LaGrange, supra*, 184 F.3d at p. 916. The court pointed out that the evidence demonstrated that neither the student's disability nor his IEP prevented him from benefitting from a more inclusive setting. *Ibid.*

11. As in *LaGrange*, there was no evidence in this matter that Hayward's IEP team ever considered whether an inclusion classroom was an appropriate placement for Student. based on his individual needs. Here, the Hayward assessors had no evidence that Student was unable to obtain educational benefit in an inclusion classroom. They focused on negative observations exclusively, such as the fact that Student preferred to stand rather than sit when engaging in activities, that he required "hand over hand"

direction to make transitions, that he engaged in “parallel play” rather than playing with peers, that he did not initiate contact with peers and that he was not yet toilet trained. They had substantial fears about the possibility that he would vomit due to anxiety in a new placement. However, Hayward also failed to gather all of the information available to them. Hayward was aware Student was in a class at Kidango but they chose not to observe his abilities in that classroom. Had they done so, they would have learned that his classroom included typically developing peers and that he was progressing in that environment. They would have also observed that he had overcome his anxiety and there was no longer a problem of vomiting. Instead, they focused their decision making solely on the total number of children in the classroom being small, and never considered placing Student in an inclusion classroom with supplementary aids or services because they believed he needed to show more of the preschool readiness of a typically developing preschool student. This is contrary to the basic premise of providing special education.

12. Taken as whole, testimony from the Hayward members of the IEP team indicated that their approach to placement was to start in the most restrictive placement and allow students to work their way up to the least restrictive rather than having procedures in place to assure that, to the maximum extent appropriate, children with disabilities would be educated with children who are not disabled. This is an exactly opposite approach to that mandated by the court in *Rachel H.* and contrary to the recent reiteration by the U.S. Supreme Court of the goals of special education in *Andrew F.*

Factors to Evaluate in Determining Whether Inclusion is Appropriate

13. In determining whether inclusion is appropriate, the Ninth Circuit has elucidated four facts to consider. *Rachel H., supra*, 14 F. 3d at p. 1404. In evaluating Student’s placement, Student’s ability to make progress with academics in a manner

appropriate to his age and circumstances should have been considered. *Andrew F., supra*, 138 S. Ct. at p. 999. Evidence was submitted that Student made progress in communication at Kidango and with social interactions. He started his circle time involvement with a seat outside the circle and ended with a seat within the circle. He also danced with the other children and was interested in when that part of the day would commence. He was beginning to learn colors and shapes and was starting to ride a tricycle. He continued with his development of those abilities at Happy Days.

14. Next, any non-academic benefits Student would have achieved by being included with typical peers should have been discussed. The Kidango report noted that Student benefited from his peers in his development of a desire to talk and interact. While he was very attached to his developmental specialist, he was beginning to smile at the other children and wave. These abilities were evident to the assessors from Hayward when they met Student and were also evident during his time at Happy Days. Student's current preschool teacher described Student as making efforts to be silly and funny when it was time to dance in order to make his classmates laugh. She also noted that Student demonstrated a strong desire to learn to talk and had peers who had verbally expressed a desire to help him learn. This sense of friendship and community is an important early social experience for Student and one he will likely build on given consistent inclusion opportunities.

15. Militating against inclusion are considerations of whether Student would disrupt the classroom or require such a disproportionate amount of the teacher's time that it would be detrimental to his classmates. Both Ms. Sherwood and Ms. Blair indicated that they managed Student easily during the course of the day in classes of 16 and eight, respectively. Ms. Blair, who teaches without the assistance of any aides, credibly testified that Student did not disrupt class or take an unmanageable amount of her time such that other students suffered. She

acknowledged that he needed help with transitions but analogized Student's needs to the other two and three year-olds in the class. Moreover, both teachers specifically stated that Student was generally cooperative. Ms. Blair also noted that Student was redirectable with additional explanation and encouragement when he balked at a non-preferred activity. Both Ms. Blair and Ms. Sherwood stated that Student was not a behavior problem. This fact was echoed by assessors in Student's December 5, 2016 IEP.

16. The final factor to be considered is cost. No evidence was presented by Hayward of any cost prohibition to having Student in an inclusion program.

17. The reasons cited by the Hayward assessment team were not adequate reasons for determining that Student should be completely segregated from education with typically developing peers. The statement in his December 5, 2016 IEP that "due to his disability and learning style he will; benefit from specialized academic instruction, the use of visuals to facilitate transitions a smaller student to staff ratio and a modified curriculum" does not explain why he cannot be placed in an inclusion classroom. Where a segregated facility is considered superior, it must be considered whether the services which make that placement superior could be feasibly provided in a non-segregated setting. *Rachel H., supra*, 14 F. 3d at p. 1404. Hayward staff testified to use of visuals in inclusion classrooms and providing modified instruction and accommodations for students with special needs is required for all children with disabilities, regardless of the classroom to which they are assigned. Nowhere did Hayward explain why Student could not be mainstreamed. Having uneven exposure to typically developing peers during recess did not meet Hayward's obligation to provide Student with the maximum exposure to his typically developing peers possible. Placement of Student in a completely segregated class was a denial of FAPE. This denial of FAPE began on December 5,

2016.

Snapshot Rule

18. Hayward argues that Student's success in the general education setting of Happy Days preschool must not be considered because of the "snapshot rule". Hayward asserts that the question is whether the offer was appropriate at the time it was made.

19. The "snapshot rule" instructs that a determination regarding Student's IEP should be judged on the basis of the information reasonably available to the parties at the time of the IEP meeting. (*L.J. by and through Hudson v. Pittsburg Unified School District* (9th Cir. 2017) 850 F. 3d 996, 1004, citing, *Adams v. Oregon*, (9th Cir. 1999) 195 F. 3d 1141, 1149.) The rule is not absolute, however. Later acquired evidence is relevant if it sheds light on the reasonableness of a decision at the time the decision was made. (*E.M. v. Pajaro Valley Unified School District* (9th Cir. 2011) 652 F. 3d 999, 1004.)

20. In this case, Student's performance in the general education classroom at Happy Days does shed light on the reasonableness of the decision to segregate Student from any typically developing peers. He is in a class of up to eight children with one teacher. While the teacher has intermittent help, mostly with toileting assistance for students in the class and sometimes with Student's feeding tube, the teacher runs the class primarily on her own. Student cooperates in the classroom and is not a behavior problem. His physical challenges have provided some "teachable moments" for the other students in his class while Student has benefitted from being able to imitate their classroom and playground behaviors. He participates in activities and, while he may require redirection at times when he is not inclined to join adult directed activities, he is only three years old and he responds to the redirection. He does require teacher assistance to access his education but Hayward was obligated to provide the supplemental aids and services necessary to mainstream him.

21. Even without reference to Student's performance at Happy Days preschool, however, information that Student could make educational progress in an inclusion setting was available to Hayward when they were making their decisions regarding placement recommendations. They just chose not to pursue it. Student had made demonstrable progress in Kidango's inclusion preschool class. Ms. Vacca and Ms. Markovich testified that the progress Student made at Kidango was "minimal". However, neither of them explained how moving from being unable to engage in circle time to enthusiastic participation could be considered minimal and both demonstrated reluctance to admit that any of Student's goals could be met in an inclusion or co-teaching class. Their demeanor and tone of voice indicated that they were reluctant to admit that anything other than their original placement recommendation could have been successful. Eventually, however, both acknowledged during testimony that Student could make progress on his goals in an inclusion classroom. While they did not agree that a one-to-one aide would be a good step, their concerns centered around a lack of adequate support and a fear of the environment with 17 or 24 children being "overwhelming". Additional support being provided to allow Student a mainstreaming opportunity is what the IDEA requires. Had they taken the opportunity to observe Student in the inclusion classroom where he was successfully integrated with typically developing peers, their fears about him being overwhelmed might have changed. Therefore, the placement recommendation was not reasonable at the time it was made both because District assessors did not have complete information on Student's present levels of performance and because it did not adequately explain why Student's disabilities prevented him from being educated with his typically developing peers.

Heightened Deference to School District Employees

22. Hayward argues that "Just as reviewing courts must not substitute their own notions of sound educational policy for those of the school authorities which they

review, administrative agencies must also provide a degree of deference to the expertise of school district employees... Thus, an administrative law judge should use a preponderance of the evidence standard providing deference to the opinions and acts of school authorities and professionals." As authority for this proposition, Hayward cites *Rowley*, and Evidence Code §664.

23. No heightened deference is automatically due to District employee opinions or actions. Nor does the evidentiary presumption of Evidence code section 664 apply. The California evidence code does not apply in a due process hearing. (5 C.C.R. § 3082) District employees' opinions and actions are properly evaluated in the same manner as all other evidence presented during the course of a case: with the weight the finder of fact deems appropriate in light of the relevance, credibility and accuracy of the information provided.

24. Even if Evidence Code §664 applied, Hayward confuses deference with an evidentiary presumption. The "presumption of regularity" states, "it is presumed that official duty has been regularly performed." The statute pertains to a presumption that routine tasks of government officials have been completed or conducted according to statutory or regulatory specifications absent proof to the contrary. So, school boards are presumed to have complied with their official duty and exercised discretion in enacting salary schedules absent a contrary showing. (*City and County of San Francisco v. Cooper* (1975) 120 Cal. 3d 898.) And the Wildlife Conservation Board is presumed to have complied with the law in allocating money from a public fund to a particular project, absent a showing that the board acted improperly. (*Outfitter Properties, LLC, v. Wildlife Conservation Board* (2012) 207 Cal. App 4th 237, 244.) If a question pertained to whether a notice that was required had been mailed and a district employee testified that it had, a presumption would be appropriate. However, the functions necessary to develop and

implement an IEP are not "routine". Each IEP is as unique as each child's situation and needs.

25. A presumption does not direct a finder of fact to accord greater weight to an opinion or action of a public employee than to that of any other witness, especially when, as here, the opinions and actions of the Hayward employees are in dispute. A presumption provides for one party to be considered correct unless proven wrong. Evidence has shown that Hayward failed to consider all pertinent information in developing its recommendation for Student and that the placement of Student in a class with no typical peers violated state and federal law. Similarly, the court in *Rowley, supra*, was referring to deference to an administrative law judge's evaluation of an individual State's educational processes so that state's rights were not superceded by federal courts, not to the individual opinions of school officials. (*Rowley, supra*, 458 U.S. at p. 207-208.) Opinions and actions of Hayward staff were evaluated with the weight appropriate to the expertise and exercise of judgment evident at the time of hearing.

TUITION REIMBURSEMENT

26. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and that the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); *School Committee of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 369-370 [105 S.Ct. 1996, 85 L.Ed. 2d 385]) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284].) Administrative Law Judges have broad authority to fashion relief for a failure to provide FAPE including reimbursement of private school tuition. *Forest Grove School*

Dist. v. T.A. (2009) 557 U.S. 230, 243-244, fn. 11 [129 S.Ct. 2484; 174 L.Ed.2d 168][authority of hearing officer to grant relief is coextensive with that of district court].) Here the parties fully litigated the appropriateness of Parents' placement of Student in Happy Days preschool and the expenses Parents incurred in making the placement.

27. A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at 52 pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489,1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

28 Reimbursement is the usual remedy when a district denies FAPE by failing to place a preschooler in the LRE and parents make an appropriate unilateral placement. (*L.B. v. Nebo School Dist.*, *supra*, 379 F.3d at pp. 978-979; *LaGrange*, *supra*, 184 F.3d at pp. 978-979; *G.B. v. Tuxedo Union Free School Dist.*, *supra*, 751 F.Supp.2d at pp. 587-590; *Board of Educ. of Paxton-Buckley-Loda Unit School District No. 10 v. Jeff S.*, *supra*, 184 F.Supp.2d at pp. 803-804.)"To qualify for reimbursement under the IDEA, parents ... need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services

as are necessary to permit the child to benefit from instruction." (*C.B. v. Garden Grove Unified Sch. Dist.*, *supra*, 635 F.3d at pp. 1159-1160 [quoting *Frank G. v. Board of Educ.* (2d Cir. 2006) 459 F.3d 356, 365]; see also *S.L. v. Upland Unified School Dist.* (9th Cir. 2014) 747 F.3d 1155, 1159-1160; *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1047; *Anchorage School Dist. v. M.P.*, *supra*, 689 F.3d at p. 1059.)

29. Reimbursement must not be denied for parents' failure to provide the required notice if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (Ed. Code, §56175; 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369-370 [105 S. Ct. 1996, 85 L. Ed. 2d 385].)

30. In this case, a preponderance of the evidence demonstrated that Student's placement in Hayward's segregated early childhood class for students with the most severe disabilities was not the least restrictive environment for him. Even the 10 percent of time he was to be integrated with typical peers was unreliably provided.

31. Conversely, ample evidence demonstrated that Happy Days provided Student with instruction designed to meet his unique needs and from which he was obtaining educational benefit while also gaining the non-academic benefit of inclusion with typically developing peers. Student is engaging in adult directed activities at his own pace and responds to redirection when necessary. Student is making progress with communication and is engaging with his classmates. Student is riding a tricycle on the playground using his feet to push and is playing on the slide. Student has a greater likelihood of progressing toward kindergarten readiness by being exposed to typical peers as much as possible than he would have being required to "earn" his way into a mainstream class. Student receives adequate support in a preschool program that allows him to be educated with typically developing peers for 100 percent of his school day.

32. Reimbursement for a placement may be reduced or denied if a parent fails to give a district 10 days' notice of their intention to place their child in a private placement and seek reimbursement. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148 (d)(1)(ii); Ed. Code § 56176 subd. (b).) Mother testified that she believed the notice was provided. No evidence contradicting this was presented by Hayward. Nor did Hayward argue in its closing brief that a lack of a 10-day notice should preclude or reduce reimbursement of the tuition being paid for Happy Days preschool.

33. District has not asserted prejudice due to a lack of a 10-day notice. The issue is, therefore, deemed waived. However, even if it was not waived, no evidence was presented demonstrating that Hayward, at any time, intended to offer Student a place in an inclusion classroom. Testimony at hearing focused solely on Hayward's belief that Student's needs could only be met in a segregated class. It is true that, after Mother verbally notified them of her intent to place Student in another school, Hayward offered the opportunity for Student to move into a different but also segregated class that began earlier in the day. However, that did not remedy the violation of the requirement that Hayward offer Student an educational placement in the least restrictive setting allowing Student the opportunity to be educated with his typically developing peers to the maximum extent possible.

34. Student started attending Happy Days preschool on March 2, 2017. Parents established that tuition for Happy Days was \$925 per month with an additional \$100 for assistance with toilet training per month. As toileting progress was a specified goal for Student, this charge is reimbursable as a related service. It was also established that Happy Days charged a \$225 registration fee that is also reimbursable. Student is entitled to tuition reimbursement through the month of May 2017, as this decision is issued after the month of May was more than half over. Student is entitled to reimbursement for attendance three days a week from March 2, 2017 through May 31,

2017, plus the registration fee. Parents are also entitled to reimbursement from March 2, 2017 through May 31, 2017 for transportation to and from the preschool (two round trips per day) at the District mileage rate for all days Student attended preschool.

35. Student was entitled to FAPE from Hayward beginning on the date when he turned three years old: December 5, 2016, and was denied a FAPE until his Parents placed him at the private preschool on March 2, 2017. Therefore, Student is also due three months of compensatory education for the months of December 2016 (from December 5), January 2017, and February 2017. As compensatory education, Student is awarded placement at Happy Days preschool for the months of June, July and August 2017, three days per week. Hayward shall also reimburse parent for transportation in the amount of two round trips per day or provide Student transportation to and from Happy Days, whichever Parent chooses.

ORDER

1. Hayward's offer of a special day class for 90 percent of Student's day did not provide FAPE because it was not an offer of special education and related services in the least restrictive environment.

2. Parents' placement of Student in Happy Days preschool was appropriate in light of the denial of FAPE by Hayward. Hayward shall immediately reimburse Parents for three days of preschool tuition per week from March 2, 2017, through May 31, 2017, along with \$225 for the registration fee for Happy Days preschool Student is also entitled three months of compensatory education. Hayward shall pay for Student to attend Happy Days preschool three days per week for the months of June, July and August 2017.

3. Parent shall also either be provided transportation for Student from Student's home to Happy Days preschool and back to Student's home or be reimbursed for the cost of transporting Student from their home to Happy Days

preschool and back, three times per week at Parent's discretion. Reimbursement, if selected, shall be at Hayward's standard travel reimbursement rate beginning March 2, 2017, through May 31 2017, upon submission of a monthly travel log showing date and destination of travel and the number of miles involved or upon submission of Hayward's usually required form for reimbursement, if required by Hayward. For June, July and August, Hayward shall either continue to reimburse parent for transportation or provide transportation, at Parent's discretion.

PREVAILING PARTY

Pursuant to 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. Student prevailed on the only issue heard and decided.

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).)

DATE: May 10, 2017

/s/

PENELOPE S. PAHL

Administrative Law Judge

Office of Administrative Hearings