

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CARLSBAD UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2018080664

DECISION

Carlsbad Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on August 16, 2018, naming Student. OAH continued the matter for good cause on August 28, 2018, January 3, 2019, and January 23, 2019.

Administrative Law Judge Rommel P. Cruz heard this matter in Carlsbad, California, on February 12, 13, and 14, 2019.

Attorney Justin Shinnfield represented Carlsbad Unified. Co-counsel Danielle Gigli attended the hearing on February 12 and 13, 2019. Tim Evanson, Director of Pupil Services, attended the hearing on all days on behalf of Carlsbad Unified.

Attorneys Cara Lucier and Helen Ghio represented Student. Mother attended the hearing all day on February 12 and 14, 2019, and part of the day on February 13, 2019. Father attended the hearing for part of the day on February 12 and 13, 2019, and all day on February 14, 2019. Student did not attend the hearing.

OAH granted a continuance at the parties' request for the parties to file written closing arguments. On March 4, 2019, upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUE¹

Did the July 6, 2018 individualized education program, effective at the start of the 2018-2019 school year, offer Student a free appropriate public education in the least restrictive environment?

SUMMARY OF DECISION

This Decision holds that Carlsbad Unified met its burden of proving it complied with the Individuals with Disabilities Education Act's procedural requirements in developing the July 6, 2018 IEP. Furthermore, the preponderance of the evidence established that the IEP's offer of goals, services, accommodations, and placement were reasonably calculated to enable Student to receive an educational benefit appropriate in light of his circumstances. Student is intelligent and gifted in many ways, but suffered from an auditory processing disorder and a severe reading disability, which also negatively impacted him in the areas of writing and mathematics. Student also had deficits in attention and executive functioning, resulting in difficulties in initiating, organizing, following through, and completing assignments. The IEP itself was designed to meet Student's unique needs and offered Student a free appropriate public education in the least restrictive environment. Therefore, Carlsbad Unified may implement the July 6, 2018 IEP without parental consent should Student seek to receive special education services from Carlsbad Unified.

¹ At hearing, the parties stipulated pursuant to a settlement agreement, that the July 6, 2018 IEP's offer of FAPE was to take effect starting the first day of the 2018-2019 school year. The issue has been rephrased. 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.).

FACTUAL FINDINGS

BACKGROUND

1. Student is 11 years old and resided with Parents within the boundaries of Carlsbad Unified at all relevant times. Student is extremely bright, thoughtful and kind. He is a skilled LEGO² builder who loves soccer. He has an auditory processing disorder and a significant reading disability; and at the time of the July 6, 2018 IEP team meeting, was significantly below grade level in reading fluency, reading comprehension, and writing. His reading disability also led to difficulties in solving mathematical word problems. Student also struggles with an attention deficit that results in executive function difficulties. Mother and Father testified at hearing. It was evident in their testimony how much they loved their son and how deeply concerned they were about the detrimental effect his deficits were having on him academically and emotionally, and how his struggles would impact him throughout his life.

2. At the time of this hearing, Student attended fifth grade at Sanderling Waldorf School, a private school in Vista, California. Student began attending Sanderling Waldorf in preschool and had the same teacher each year since kindergarten, Tamara Power. He had never repeated a grade. Student received tutoring for academic support throughout the years. Student had not participated in assessments and had not been exposed to a specific curriculum or a reading intervention program while at Sanderling Waldorf.

² LEGO consists of colorful interlocking plastic brick pieces which are assembled and connected in many ways to construct objects, including vehicles, buildings, and working robots.

JULY 27, 2017 INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION REPORT

3. Dr. Jill Weckerly, Ph.D., is a part-time licensed clinical psychologist in the San Diego Unified School District's Mental Health Resource Center. Dr. Weckerly was also a clinical psychologist in private practice. As a member of the Mental Health Resource Center's interdisciplinary team, she is involved in the diagnosis, assessment, and treatment of children and adolescents. In her private practice, Dr. Weckerly conducts independent neuropsychological evaluations for various school districts, and at the request of parents, within the county of San Diego. She has a master's degree in linguistics and two doctorates, one in cognitive science and linguistics, the other in clinical psychology. At hearing, Dr. Weckerly qualified to testify as an expert based on her education, training, and experience. Though her credentials were impressive, she did not attend the July 6, 2018 IEP team meeting and therefore, the IEP team did not have the benefit of the opinions she shared at hearing, thereby diminishing the weight of her testimony.

4. Dr. Weckerly conducted a neuropsychological evaluation³ of Student at the request of Parents to assess Student's cognitive and emotional functioning. She prepared a comprehensive report dated July 27, 2017, documenting her findings, conclusions, and recommendations. Student scored extremely low on reading and writing measures, demonstrating an inability to write a story or read simple text passages. He scored better in math, but his performance was still well below expectations considering his strong visual spatial skills and intact verbal intellectual functioning and fluid reasoning skills. Dr. Weckerly reported that Student's neuropsychological testing profile was consistent with a significant reading disability,

³ The terms "assessment" and "evaluation" are synonyms and are used interchangeably in this Decision. (Ed. Code, § 56302.5.)

which also impacted him in the areas of written language, and to a lesser extent, math. Student's deficit impacted his ability to acquire basic reading and writing skills. She explained in her report that rapid naming of objects, colors, digits, or letters requires efficient retrieval of phonological information from long-term memory. A child with reading difficulties may struggle with this skill, leading to slow and inaccurate recall of phonological codes from memory. The ability to decode unfamiliar words requires the ability to efficiently retrieve phonological information and execute a sequence of operations, and delays in this area may result in reading fluency problems.

5. Dr. Weckerly further noted in her report that a child with executive functioning and attention issues such as Student may have difficulties with word recognition. Student may have trouble sustaining visual attention long enough to distinguish small differences between letters, thereby confusing the letters. Student may become too focused on decoding individual words that he loses track of the meaning of the text. Student may have trouble using other words or pictures in the text to gain context, causing him to not understand what he had read or cause him to take longer to get through the text.

6. Dr. Weckerly offered 37 recommendations in her assessment report, which included providing Student with an intensive, comprehensive program for children with reading disabilities that addressed both reading and written language skills. She did not recommend a specific reading program, such as the Barton Reading Program. Dr. Weckerly did recommend direct, explicit instruction in a multi-sensory modality, with instruction that involved drills, repetition, and practice provided individually or in a small group. She also recommended, among other things, the use of visual organizers, pre-teaching the general framework of new information, frequent short breaks, reducing distractions in the environment, a breakdown of tasks or information into small steps or chunks, preferential seating, additional time to respond to a question, multimodal

presentation of information, repetition of instruction or new information, and asking Student to paraphrase what he heard or understood. Dr. Weckerly made no recommendations related to mathematics in her report; nor did she recommend Student receive instruction primarily in a special day class or nonpublic school, or suggest in any way that Student required a more restrictive placement outside of a general education classroom for a significant portion of his school day.

7. At hearing Dr. Weckerly testified that Student had been receiving instruction in the Barton Reading Program for the past 18 months, and had made gains in the program. She stated that a special day class setting for at least a majority of the school day was the appropriate placement for Student and that a nonpublic school placement should have been considered by the July 6, 2018 IEP team. Dr. Weckerly acknowledged that she had no knowledge as to whether Student's IEP team knew of Student's participation in the Barton Reading Program at the time of the July 6, 2018 IEP's development, nor did she share with Carlsbad Unified at any time prior to her testimony her opinion that Student required a special day class for most of the day to receive an educational benefit or that a nonpublic school setting was a better placement for Student. Dr. Weckerly did not assess Student following her neuropsychological evaluation in 2017 until August of 2018, when she re-administered the same testing instruments she used in 2017. She then prepared a table comparing Student's 2017 and 2018 scores.⁴ Student's scores improved in each of the tested areas in reading, math and written language. However, the table was not provided to Carlsbad Unified for consideration in developing the July 6, 2018 IEP.

8. At hearing, Mother testified that Dr. Weckerly recommended the Barton Reading Program for Student, and Parents immediately enrolled him in August 2017.

⁴ The test scores table was admitted into evidence for remedies purposes only.

Student received individual instruction in the Barton Reading Program from a tutor for approximately three to four hours a week. As part of a confidential settlement agreement reached between Carlsbad Unified and Parents in the Spring of 2018, Mother testified she provided invoices from the tutoring services to Carlsbad Unified's Director of Pupil Services Tim Evanson, for purposes of reimbursement.

9. Mr. Evanson testified that he did not share with Carlsbad Unified's IEP team members that Student had received tutoring in the Barton Reading Program as he only learned of the tutoring as part of confidential mediation discussions and the receipts for the tutoring services provided to him from Parents were made pursuant to a confidential settlement agreement between Carlsbad Unified and Parents.⁵

10. In the Spring of 2018, Parents contacted Carlsbad Unified regarding special education and related services for Student. Carlsbad Unified provided Parents with an assessment plan to assess Student, which Parents consented to. Dr. Weckerly's July 27, 2017 Neuropsychological Evaluation Report was provided to Carlsbad Unified's assessors for their consideration as to their Spring of 2018 assessments.

JULY 3, 2018 HEALTH ASSESSMENT REPORT

11. Carlsbad Unified nurse Julia Hart-Lawson assessed Student's health and prepared an assessment report dated July 3, 2018. Student wore glasses for reading and was in good health overall, having only missed approximately five school days during the 2017-2018 school year. Student passed a vision and hearing assessment. His bilateral vision was 20/20, he could track and converge on demand and was not color

⁵ Mother testified to providing Barton Reading Program tutoring service receipts to Mr. Evanson as part of her direct examination by Student's counsel, opening the door for Carlsbad Unified to present rebuttal testimony by Mr. Evanson regarding confidential settlement communications as it related to the tutoring services.

blind. His hearing was within normal limits on both ears.

JULY 6, 2018 MULTIDISCIPLINARY ASSESSMENT REPORT

12. The Carlsbad Unified multidisciplinary assessment team tasked to assess Student consisted of school psychologist Elyssa Luria, occupational therapist Crystal Brynildsen, speech-language pathologist Kelly Carr, and education specialist Joyce Lee. The assessment team prepared a comprehensive multidisciplinary psychoeducational assessment report dated July 6, 2018.

13. Carlsbad Unified school psychologist Elyssa Luria holds a master's degree in psychology and a Pupil Personnel Services credential. She has conducted on average 75 assessments each year for the eight years she has practiced as a credentialed school psychologist.

14. Education specialist Joyce Lee had been assigned to Carlsbad Unified's Poinsettia Elementary School for the past six school years. At Poinsettia, she teaches special education in a special day class for fifth graders. One of her responsibilities as an education specialist is to conduct academic assessments, which she performs approximately two to six times each year. She had conducted over 100 academic assessments in her career.

15. Kelly Carr has been a licensed speech-language pathologist in the school setting since 1991, with the past 12 years employed by Carlsbad Unified. Ms. Carr has conducted 50 to 60 speech and language assessments each year since 1991.

16. Occupational therapist Crystal Brynildsen is contracted by Carlsbad Unified to provide occupational therapy services and assessments. She possesses a master's degree in occupational therapy and has conducted approximately 20 to 40 occupational therapy assessments each year since 2009.

17. Ms. Luria, Ms. Lee, Ms. Carr, and Ms. Brynildsen testified at hearing. Each provided persuasive testimony that thoughtfully considered Student's needs and

educational program.

18. Parents reported concerns regarding Student's difficulty in reading and writing, challenges in grasping information and math concepts, as well as remembering and understanding information. Parents also shared concerns regarding Student's articulation and listening comprehension. Mother indicated that Student exhibited a short attention span and often needed directions repeated to him. Neither Mother nor Father reported to Carlsbad Unified's assessors that Student was receiving tutoring in the Barton Reading Program.

19. Student's teacher, Ms. Power shared concerns regarding Student's delays in reading and writing, and the impact it was having on his confidence. She reported his math performance had worsened since word problems were introduced. She did not use a specific curriculum in Student's class nor did she use a particular reading program for Student. Student had not participated in any assessments while at Sanderling Waldorf and no grade reports for Student were provided to the assessors.

20. Ms. Luria observed Student for 30 minutes in the fourth grade general education classroom at Sanderling Waldorf. The classroom had 16 students and one teacher. Student demonstrated appropriate social behavior as he worked with a peer, such as good eye contact with his peer, taking turns during discussion, and smiling as they worked collaboratively to help one another write a Mother's Day poem. Student remained on task, focused and engaged on the assignment. No significant behavior concerns were observed.

Cognitive and Processing Abilities

21. Ms. Luria assessed Student's intelligence using the Weschler Intelligence Scale for Children, Fifth Edition. The Weschler Intelligence Scale produced a Full Scale IQ composite score that represented Student's general intellectual ability. Student scored 120 on the Full Scale IQ, better than 91 percent of children his age. Student's scores in

the areas of fluid reasoning and visual spatial demonstrated his strong ability to abstract conceptual information from visual details and effectively apply that knowledge. His visual spatial score of 132 fell in the extremely high range, indicating a well-developed ability to apply spatial reasoning and analyze visual details. He could quickly and accurately put together geometric designs using a model. Student's auditory working memory subtest score was 91, an average score but an area of relative weakness for Student. His score on the digit span subtest demonstrated difficulty holding on to information in his short term memory and to manipulate that information; a skill that placed a strong demand on working memory and attention. Student's performance on the tests was an indication that he did better using working memory to problem solve when a visual, rather than a verbal, stimulus was used. Student's verbal comprehension score of 133 fell in the extremely high range and he scored in the high average range in the area of processing speed with a score of 119. This indicated a well-developed verbal reasoning system with strong word knowledge acquisition, effective information retrieval, good ability to reason and solve verbal problems and effective communication of knowledge. Student could also rapidly identify visual information, make quick and accurate decisions, and rapidly implement those decisions.

22. Ms. Luria assessed Student's processing abilities using the Comprehensive Test for Phonological Processing, Second Edition and Beery Buktenica Test of Visual Motor Integration Skills, Sixth Edition. On the Comprehensive Test for Phonological Processing, Student scored in the below average range in the areas of phonological memory, phonological awareness, and rapid symbolic naming. She reported that a majority of people with dyslexia have a core deficit in the phonological processing component of language. Students with dyslexia have a significant difficulty acquiring the sound-letter and letter-sound correspondences that are the foundation for accurate and fluent spelling and decoding skills.

23. The Beery Buktenica Test of Visual Motor Integration Skills is designed to assess the extent to which a child can integrate their visual and motor abilities (eye-hand coordination). Student performed in the high average range.

Social, Emotional, and Behavioral Functioning

24. The Behavior Assessment Systems for Children, Third Edition, is used to measure social emotional adjustment with the use of ratings scales to be completed by a parent and teacher. In the area of attention problems, Mother rated Student as at risk, and Ms. Power rated him as average. Student's profile on the Behavior Assessment Systems for Children indicated significant problems with hyperactivity, anxiety, and attention problems.

25. The Conners, Third Edition, is used to obtain a parent's and teacher's observations of a student's behavior, designed to identify attention deficit hyperactivity disorder. Mother and Ms. Power rated Student's "learning problems" as very elevated, suggesting Student may have difficulty learning and/or remembering concepts and may need additional explanations during instruction. In the area of executive functioning, Mother rated Student as very elevated, and Ms. Power rated him as elevated. This suggested that Student may have difficulty starting or finishing projects and may have poor planning, prioritizing, or organizational skills.

26. The Behavior Rating Inventory of Executive Functioning, Second Edition, is intended to provide a better understanding of a child's self-control and problem-solving skills by measuring domains of executive functioning. The assessment's questionnaires were completed by Mother and Ms. Power. The results of the Behavior Rating Inventory suggested Student had substantial difficulty holding an appropriate amount of information in mind or in active memory, for further processing, encoding, and or mental manipulation. Furthermore, Student's scores indicated difficulties in sustaining

working memory, which negatively impacted his ability to sustain attention and focus for appropriate lengths of time.

Academics

ORAL READING FLUENCY AND READING COMPREHENSION

27. Ms. Lee assessed Student's academic abilities using the Weschler Individual Achievement Test, Third Edition; Test of Written Language, Fourth Edition and CORE Reading Assessment. On Weschler Individual Achievement's basic reading skills cluster, Student scored a standard score of 74, placing him in the below average range. This score was a combination of scaled scores in pseudoword decoding and word reading, which he scored 84 (average) and 62 (low) respectively. In "word reading" a student is given sight words, with the goal to read as many words until the student makes four consecutive errors. Student was observed to make errors when reading single syllable vowel-consonant-e words, vowel diagraphs, and silent letter diagraphs.

28. Student's score of 53 on the Weschler Individual Achievement's oral reading fluency subtest was in the 0.1 percentile, placing him in the very low average range. On the reading comprehension subtest, he scored a 79, placing him in the below average range.

29. The CORE Reading Assessment Profile of Student identified his reading strengths and weaknesses. A survey of his reading and decoding skills fell in the "intensive level" range in the areas of r-controlled vowels, variant vowels, low frequency vowels and consonant spellings, and multisyllabic words. The assessment defined "intensive level" as significantly below grade level expectation, requiring substantial intensive instruction. On the CORE's measure of oral reading fluency, Student read a first-grade level passage with 34 correct words per minute with 92 percent accuracy placing him in the 50th percentile for mid-first grade, and the 25th percentile for end of first grade. Ms. Lee determined that Student's independent reading level was at late

first-grade and Student required intensive intervention to help him build phonemic and phonological skills to support the development of his overall independent reading skills.

LISTENING COMPREHENSION

30. Student scored in the superior range on the Weschler Individual Achievement's receptive vocabulary subtest and in the average range in the oral discourse comprehension subtest. His listening comprehension skills were found to be within the above average range compared to same aged peers. He did well when information was presented clearly, but answered inconsistently when asked to listen to commercials that used different kinds of voices or dialogue, or when people spoke too quickly.

WRITTEN LANGUAGE

31. On the Weschler Individual Achievement Test, Student's written language skills were in the low range overall compared to same aged peers. In the essay composition subtest, that asked him to write an essay in ten minutes about his favorite game and to include three reasons why he liked it, he did not write in complete sentences, did not provide an appropriate thesis statement, offered no additional reasons why he liked the game, and did not provide elaborations or transitions in additional sentences or paragraphs. In the sentence combining subtest, Student performed in the average range when combining two or three sentences into one sentence with the same meaning. However, he had difficulty writing a sentence when given a target word. He also performed below average when asked to write single words when dictated within the context of a sentence.

32. The Test of Written Language, Fourth Edition, is a norm-referenced comprehensive diagnostic test of written expression. Student's overall written language skills were found to be in the below average range compared to same aged peers. He

fell within the poor range in the vocabulary subtest. His scaled score of five in the spelling subtest was also in the poor range. When asked to write sentences from dictation using proper punctuation and capitalization, he scored in the average range.

33. In the logical sentence subtest of the Test of Written Language, Student's score fell in the below average range; a test that required him to edit illogical sentences to make better sense. He scored in the average range in the sentence combining subtest, which asked him to integrate the meaning of several short sentences into one grammatically correct written sentence.

34. The Test of Written Language also required Student to write a story in response to a stimulus picture, with five minutes to brainstorm, and 15 minutes to write. His score fell in the below average range regarding the punctuation and grammar of his writing, and in the poor range when evaluating the quality of his composition, such as vocabulary, plot, and character development.

MATHEMATICS

35. In the area of mathematics, Student's scores on Weschler Individual Achievement's math fluency subtests fell within the below average range in the areas of addition, subtraction, and multiplication. He solved fewer simple addition, subtraction, and multiplication problems within one minute than expected. However, Student could transition with ease from computing addition, subtraction, and multiplication. He knew the different math functions. Ms. Lee noted in the report that given Student's difficulties with timed tests, he confidently solved problems as quickly as he could.

Speech and Language

36. Ms. Carr assessed Student's expressive, receptive, and vocabulary skills using the following testing tools: Clinical Evaluation of Language Fundamentals, Fifth Edition; Listening Comprehension Test, Third Edition; Test of Language Development,

Fourth Edition; and Goldman Fristoe Test of Articulation, Third Edition. Ms. Carr reported that Student's expressive and receptive skills and vocabulary were average compared to peers his age. His pragmatics, voice and fluency were appropriate for his age and sex.

Fine Motor and Sensory Functioning

37. Ms. Brynildsen administered the following instruments to assess Student's fine motor and sensory function: Educational Assessment of School Youth, Occupational Therapy Assessment; Bruininks-Oseretsky Test of Motor Proficiency, Second Edition; and Sensory Processing Measure, Main Classroom Form. No concerns were noted as to Student's fine motor skills or ability to process sensory input, demonstrating above average abilities in coloring small shapes, completing mazes, folding paper, and cutting with scissors. He also demonstrated above average abilities to copy a number of shapes, and his handwriting was found to be legible. Furthermore, he was rated "typical" by Ms. Power in all areas on the Sensory Processing Measure, a tool to measure a child's ability to process sensory input.

38. The multidisciplinary assessment team determined Student qualified for special education under the category of Specific Learning Disability based on a significant discrepancy between his overall intellectual functioning and his academic achievement in basic reading, reading comprehension and fluency, written language and math fluency, as result of a phonological processing disorder. The assessors also opined that Student qualified under the category of Other Health Impairment due to deficits in the area of executive functioning, specifically in the areas of attention, working memory, planning and organization.

JULY 6, 2018 IEP

39. On July 6, 2018, the IEP team convened to review the recent assessments and to develop an IEP, which was identified as both an annual and a triennial. Parents,

program specialist and administrator Gigi Ostrowsky, Ms. Luria, Ms. Lee, Ms. Carr, Ms. Brynildsen, Ms. Hart-Lawson, and general education teacher Gina Garcia, attended. Ms. Power and Dr. Weckerly did not attend. Parents raised no concerns about the absence for Ms. Power from the meeting. Carlsbad Unified provided Parents with their procedural safeguards and rights. The IEP team reviewed the July 3, 2018 Health Assessment Report and July 6, 2018 Multidisciplinary Assessment Report. Parents had no questions and did not express any concerns regarding the findings, conclusions, or recommendations contained in the reports.

Present Levels of Academic and Functional Performance

40. The IEP team next identified Student's present levels of performance following the review of the assessment reports. The IEP noted that Student was a multi-modal learner who learned best when visual, kinesthetic, auditory, and tactile strategies were used during instruction. Student's ability to focus, initiate, and correctly complete a task independently improved when he was supported before, during, and after the instruction. He benefited from repetition and practice to retain, generalize, and apply newly learned skills. To maximize his ability to access the curriculum in the general education setting, Student required the assistance of text-to-speech and speech-to-text technology. The IEP noted that Student did not have behaviors that impeded his ability or the ability of others to learn.

41. The IEP noted Parents concerns regarding Student's difficulties in reading, writing, and reading comprehension, specifically his ability to recognize and work with sounds in spoken language (phonological awareness). At the meeting, Parents did not share that Student was receiving tutoring in the Barton Reading Program. At no time during the meeting did Parents express disagreement with the IEP's description of Student's present levels of performance.

42. The IEP noted Student eligible for special education due to a specific

learning disability based on a severe discrepancy between his intellectual ability and achievement in the areas of reading comprehension, written expression, basic reading skills, and listening comprehension, as result of a phonological processing disorder. The IEP also indicated Student secondarily eligible under Other Health Impairment due to his attention deficits.

ACADEMICS

43. With no prior academic assessments and grade reports to rely on from the previous school year, and minimal input from Student's private school teacher, the IEP team relied heavily on Ms. Lee's academic assessments to identify Student's academic skills. The July 6, 2018 IEP listed each of the academic testing instruments administered by Ms. Lee, with a brief description of what the instrument was intended to assess and a descriptive classification of score ranges and levels. The IEP listed Student's standard scores in each of the subtests on the Weschler Individual Achievement Test, his grade level expectations of the CORE Reading Assessment Profile, and scaled scores from the Test of Written Language.

44. The IEP noted Student could independently read only at a late first grade level, reading first grade level passages at 34 correct words per minute with 92 percent accuracy. This placed his reading fluency at the 50th percentile for mid-first grade. As for spelling, Student sounded out spelling strategies, but inconsistently applied phonics rules to spell target words correctly.

45. When writing, Student utilized appropriate capitalization to start a sentence, properly punctuate, and could self-correct errors from time to time. However, when given more involved writing assignments that asked him to independently transfer thoughts and ideas to paper on a given topic, he made more spelling errors, left out punctuation marks, produced simpler and/or grammatically incorrect sentences. In addition, Student struggled with keeping his ideas clear and organized from beginning

to end when asked to write about a given topic.

46. Student's math skills as reported by Ms. Power were noted in the IEP. She reported that Student struggled with reading math word problems, but was approaching proficiency in number sense/base ten, basic facts for all functions, operations and algebraic thinking, fractions, measurement and data, and problem solving, but required remediation with concepts in geometry. However, Ms. Lee testified that Ms. Power did not provide records or work samples demonstrating Student's struggles in geometry.

COMMUNICATION

47. Student's expressive and receptive language skills were average compared to peers his age. Vocabulary was an area of relative strength. His articulation, pragmatics, voice, and fluency were appropriate for his age. Communication was not identified as an area of need by the IEP team.

GROSS AND FINE MOTOR SKILLS

48. Student participated in general education physical education class. He could write and copy written words from the white board. He required extra time to process new information before putting it on paper. His fine motor skills were above average compared to peers his age. This was not an area of need identified by the IEP team.

SOCIAL/EMOTIONAL/BEHAVIORAL FUNCTIONING

49. The IEP noted that Student enjoyed school, was cooperative, eager to please, and responded well to praise and encouragement as reported by Ms. Power. Student got along with the adults and peers at school. When disagreements arose between he and his peers, he could appropriately handle the problems independently.

However, Ms. Power shared that as Student got older he became increasingly aware of his delays in reading. The IEP team noted the recent assessments' findings of elevated risks in the areas of anxiety, learning problems, functional communication, and attention which should be closely monitored. Both Ms. Power and Parents reported that Student did not consistently follow through and complete assignments independently, as he required periodic check-ins to clarify directions and to recall steps to complete assignments.

HEALTH, VOCATIONAL, AND ADAPTIVE/DAILY LIVING SKILLS

50. The IEP did not identify any concerns regarding Student's health, vocational skills, or daily living skills. He was in good health and could care for his own needs. His visual screening of June 5, 2018, indicated his bilateral vision to be 20/20 and his vision was the same with and without his glasses. His hearing was within normal limits in both ears. According to Ms. Power, Student could navigate through the classroom and was helpful in gathering and distributing items.

Annual Goals

51. The IEP team identified the following areas of need: reading fluency, comprehension, and decoding; paragraph writing, spelling, and editing; math problem solving; and executive functioning. To address these challenges, the IEP offered eight annual goals: one in executive functioning, three in reading, one in spelling, two in writing, and one in math.

52. The executive functioning goal was designed to improve Student's ability to follow through and complete assignments. The goal called for Student to independently create a graphic organizer with relevant content information prior to beginning a classroom project. To meet the annual goal, he had to accomplish this task successfully in four out of five opportunities, as measured by teacher observations and

data collected. The general education teacher and education specialist were responsible for this goal.

53. The IEP designated the education specialist and general education teacher to be the responsible people for the three reading goals; measuring progress using Student's work samples and teacher charted records. The first reading goal aimed to improve Student's reading comprehension, as Student's independent reading level was at late first grade. The goal required him to answer who, what, where, when, why, and how questions to demonstrate his understanding of key details of a second grade passage. He would be provided pre-reading activities, such as developing and reviewing vocabulary and acquiring background knowledge. Student had to be 80 percent accurate in four out of five trials to meet the goal.

54. The second reading goal addressed Student's struggles in reading fluency. The goal called for Student to read a second grade passage at 70 correct words per minute with 90 percent accuracy in four out of five trials to meet the annual goal.

55. The third reading goal required Student to read grade appropriate, irregularly spelled words with 80 percent accuracy in four out of five trials. To address this goal, Student would be provided a structured, systematic, and multisensory reading curriculum with direct instruction in a small group, with opportunities to practice phonics weekly.

56. The spelling goal required Student to encode grade appropriate irregularly spelled words with 80 percent accuracy in four out of five trials. He would be provided instruction and opportunities to practice. The education specialist, general education teacher and learning center staff would be responsible for the goal. His progress would be measured using his work samples and teacher charted records.

57. The first of two writing goals required Student to independently edit and revise his writing using appropriate capitalization, punctuation, spelling, grammar, and

meaning. He had to be 80 percent accurate in three consecutive paragraph writing samples to meet the goal. Student would be provided a word bank, spelling dictionary, editing and revising checklist, graphic organizer, access to a word processor, and instruction on how to utilize writing tools, with an opportunity to practice.

58. The second writing goal called for Student to write an informative text that required him to introduce a topic, use facts and definitions to develop points, and provide a concluding statement. He would be provided a topic and pre-writing activities such as developing background knowledge, reviewing topic vocabulary, and the use of a graphic organizer. Student had to score a three on a third grade writing rubric in four out of five trials. Student's work samples would be used to measure progress. The education specialist and general education teacher were responsible for both writing goals.

59. The math goal targeted Student's struggles with solving mathematical word problems. He had to create equations to solve fourth grade level multi-step word problems involving addition, subtraction, multiplication, and/or division of whole numbers. He would be given instruction on highlighting key words and opportunities to practice using visuals, illustrative organizers and a multiplication chart. Student had to be 70 percent accurate in five consecutive trials to meet the goal. The education specialist and general education teacher were responsible for the goal, using Student's work samples and teacher records to measure progress.

60. At hearing, Ms. Lee testified that the proposed math goal required Student to apply numerical operations and math facts in solving word problems. She further explained timed tests were difficult for Student due to his phonological processing deficit and her primary concern was not his fluency, but whether he understood math facts, which he did. She explained that his fluency could be improved through continued practice, and supported through accommodations that allowed him additional time to

solve problems. Therefore, Ms. Lee opined a specific math fluency goal was not necessary.

61. At hearing, Dr. Weckerly opined that a math fluency goal in the July 6, 2018 IEP to maintain fluency in math facts should have been offered, but she did not elaborate as to how the absence of a specific goal in math fluency was detrimental to Student.

Supplemental Aids, Services and Supports

62. To aid Student in achieving his goals, the July 6, 2018 IEP offered Student the following accommodations to occur on the school site throughout the school year: highlighting of essential information/study notes; checking for understanding before, during, and after instruction and asking Student to paraphrase instruction prior to tackling an independent task; use of audio books to support classroom reading assignments; access to a keyboard and a word processor for writing; a graphic organizer, with access to notes, note templates and graphic organizers with only key words and concepts missing; to be given sentence starters to show how to begin a written response; repetition and drills for practice; prompts and/or models for instruction, which would not apply during assessments; breaking down assignments to manageable parts; extending time on assignments and tests; allowing Student to respond in different ways such as saying the answer, having a larger space to write the response, or circling, rather than writing, the answer; the use of multisensory strategies, such as auditory, visual, and kinesthetic; providing examples of work that is correct to serve as a model and to demonstrate expectations of a task; a structured classroom; frequent breaks to build stamina and sustain attention to tasks; a 100s number table for fourth grade and higher; a multiplication table for fourth grade and higher; a calculator; speech-to-text and text-to-speech software; preferential seating near visual supports,

but away from distracting stimuli; and adequate wait and think time of up to ten seconds.

63. Ms. Ostrowsky opined at hearing that an assistive technology assessment of Student was not needed at the time of the July 6, 2018 IEP team meeting, and no persuasive evidence was offered to establish that a formal assistive technology assessment was necessary to determine what, if any, additional technological supports he may have required.

64. The IEP offered the following modifications and supports: modified assignments/standards; extra time for writing based on the assignment and project, throughout the school year, to be provided as needed; a structured, systematic, multisensory reading intervention in a small group setting for 30 minutes, three to four times a week to take place at Poinsettia's learning center. The IEP and any amendment to it would be shared with every Carlsbad Unified staff member who would work directly with Student. Furthermore, the educational specialist and general education teacher would consult with one another for 15 minutes each quarter.

Special Education and Related Services

65. The July 6, 2018 IEP offered the following special education and related services from July 6, 2018, to July 6, 2019, to be provided by Carlsbad Unified: 420 minutes a week of group specialized academic instruction to provide reading and writing instruction, to occur in a separate classroom; and 225 minutes a week of specialized academic instruction to be provided in the regular classroom, consisting of 150 minutes weekly for math instruction and 75 minutes weekly to cover executive functioning. At the IEP team meeting, Ms. Lee explained that the pull out reading intervention would occur in a small group setting, typically with three to four students. Ms. Ostrowsky testified that the pull out instruction would occur at Poinsettia's learning

center where Student would receive small group instruction taught by an education specialist.

66. The IEP did not offer extended school year services. The IEP team did not discuss extended school year services for the summer of 2019 or consider revisiting the need for services for the following summer at a future date over the school year. At hearing, Ms. Ostrowsky explained that Carlsbad Unified did not have enough data on Student to determine at the July 6, 2018 IEP team meeting that Student needed services during the 2019 extended school year, since Carlsbad Unified had not worked with Student directly and had no knowledge if Student regressed during extended school breaks. Dr. Weckerly opined at hearing that Student's general memory skills were good, and that questions regarding his memory were attributable to difficulties in sequencing and organizing information, and not to an inability to recall information. She further opined at hearing that a break from consistent, intensive instruction over a period of two months would not serve Student well.

Placement

67. The July 6, 2018 IEP identified Poinsettia as the school Student would receive all services if enrolled in Carlsbad Unified. The IEP calculated that Student would spend 77 percent of his time within the regular classroom and the remaining time outside the regular classroom at Poinsettia's learning center, to receive small group reading and writing instruction. A fifth grade classroom at Poinsettia had 32 to 33 students.

68. Parents initialed the IEP indicating in the affirmative that Carlsbad Unified facilitated Parents' participation at the meeting. While reviewing the assessments and discussing the IEP, Carlsbad Unified frequently sought Parents' input and encouraged them to ask questions. At hearing, Mother shared that Parents' questions were answered at the meeting and the IEP team had adequate time to review and develop the

proposed IEP. Carlsbad Unified provided Parents with a copy of the proposed July 6, 2018 IEP at the conclusion of the meeting.

PARENTS' PARTIAL CONSENT TO THE JULY 6, 2018 IEP

69. On August 13, 2018, Parents provided partial agreement to the July 6, 2018 IEP. Parents noted their agreement related only to eligibility, statewide assessments and Student's need for academic supports. Parents' partial consent to the IEP did not note any specific objections regarding the goals offered, the amount of specialized academic instruction offered, the lack of a transition plan, the insufficiency of consultation time between the special education and general education teachers, the failure to consider a continuum of placement options or Student's offered placement; or the failure to include an individual who taught Student in the IEP team meeting.

70. Dr. Weckerly visited Poinsettia in January 2019, and testified at hearing that the school was not appropriate for Student. She described Poinsettia's reading program as insufficient, providing only two sessions a week of small group instruction using a reading program unlike the Barton Reading Program. Dr. Weckerly opined that Student was making slow progress with the Barton Reading Program and a switch to a different reading program would result in him losing ground.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁶

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20

⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁷ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an individualized education program is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

⁷ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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.)

4. 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.)

5. In *Endrew F. v. Douglas County School Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000] (*Endrew F.*), the Supreme Court held that a child’s “educational program must be appropriately ambitious in light of his circumstances.” “[E]very child should have a chance to meet challenging objectives.” (*Ibid.*) *Endrew F.* explained that “[t]his standard is markedly more demanding than the ‘merely more than de minimis’ test [¶] . . . The IDEA demands more. It requires an educational program reasonably calculated to

enable a child to make progress appropriate in light of the child's circumstances." (*Id.* at pp. 1000-1001.) However, the Supreme Court did not define a new FAPE standard in *Endrew F.*, as the Court was "[m]indful that Congress (despite several intervening amendments to the IDEA) has not materially changed the statutory definition of a FAPE since *Rowley* was decided[,] [W]e decline to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in that case." (*Id.* at p. 1001.) The Court noted that "[a]ny 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 p. 999 [italics in original].) The Ninth Circuit affirmed that its FAPE standard comports with *Endrew F.* (*E.F. v. Newport Mesa Unified School Dist.* (9th Cir. 2018) 726 Fed.Appx. 535.)

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) 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].) Here, Carlsbad Unified requested the hearing in this matter, and therefore Carlsbad Unified has the burden of proof to the sole issue.

ISSUE: DID THE JULY 6, 2018 IEP OFFER STUDENT A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

7. Carlsbad Unified contends it complied with all procedural and substantive requirements of the IDEA in developing the July 6, 2018 IEP. Carlsbad Unified argues the

July 6, 2018 IEP's offer of FAPE was designed to address Student's unique needs, reasonably calculated to allow Student to meaningfully benefit from his education, and offered placement in the least restrictive environment.

8. Student contends the July 6, 2018 IEP's offer of FAPE was deficient as it failed to provide Student with an appropriate level of individualized instruction to address his dyslexia, sufficient academic supports throughout his school day, appropriate annual goals in all areas of need, a transition plan from private school to a general education classroom, and extended school year services for the summer of 2019.

9. Moreover, Student claims the July 6, 2018 IEP fails to provide a sufficient amount of consultation between the general education and special education teachers. Student further alleges Carlsbad Unified did not consider a continuum of placement options and should have included an individual who had taught Student at the July 6, 2018 IEP team meeting. Lastly, Student asserts the July 6, 2018 IEP was inadequate due to the lack of an assessment as to Student's need for assistive technology supports.

10. When a school district seeks to demonstrate that it offered a FAPE, there are two parts to the legal analysis. First, the tribunal must determine whether the district 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 reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) Whether a school district offered a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.*, (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*)).

Procedural Compliance

11. The IEP team is required to include as part of the team one or both of the

student's parents or their representative; a regular education teacher if a student is, or may be, participating in the regular education environment; a special education teacher; and a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about available resources. (34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) Finally, whenever appropriate, the child with the disability should be present. (34 C.F.R. § 300.321(a).)

12. 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. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of a free appropriate public education to the child. (34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a).)

13. A school district is required to conduct not just an IEP team meeting, but also a meaningful IEP team meeting. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485; *Fuhrmann, supra*, 993 F.2d at p. 1036.) The IEP team shall consider the concerns of the parent for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) & (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the

IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 960 F.2d at p. 1036 [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].)

14. The July 6, 2018 IEP team meeting was attended by all required team members, including Parents. Though Student's teacher, Ms. Power had knowledge of Student and did not attend, the IEP team did consider the information she shared with Carlsbad Unified's assessors. Furthermore, Carlsbad Unified's IEP team members were not aware that Student was receiving tutoring instruction in the Barton Reading Program, as Mr. Evanson justifiably did not share that information for fear of violating the confidentiality of the mediation and settlement agreement. In addition, Parents did not disclose the tutoring to any of the assessors during the assessment process or during the IEP team meeting. Accordingly, the absence of Ms. Power and Student's tutor from the IEP team meeting did not constitute a procedural error that violated the IDEA.

15. Additionally, Carlsbad Unified demonstrated that it had obtained adequate information from Ms. Power during its assessment as its assessors spoke to Ms. Powers, obtained rating scale questionnaires from her, and observed her classroom. Carlsbad Unified shared this information with Parents in its assessment reports. The record does not establish that Parents' ability to participate in the IEP team meeting was significantly impeded by Ms. Power's absence as Carlsbad Unified had more than sufficient information regarding Student's abilities in Ms. Power's class, nor did her absence deny Student an educational benefit. (*Mahoney v. Carlsbad Unified School Dist.* (April 8, 2009, S.D. Cal., No. 08-CV-1860 H(NLS).) 2009 WL 1010061, *5, *affd.* (9th Cir. 2011) 430 Fed.Appx. 562.)

16. Furthermore, Parents were active and welcomed participants at the

meeting. Carlsbad Unified provided Parents with a copy of their procedural safeguards and rights. Parents shared their concerns regarding Student's ability to read, write, and to comprehend what he was reading. Mother also expressed concern regarding the gap between his academic progress and his grade level, as well as Student's difficulties with executive functioning. The IEP team considered Parents' input and concerns. Parents were afforded an opportunity to meaningfully participate in the development of Student's IEP. Hence, the IEP team meeting was conducted in accordance with the IDEA's procedural requirements.

Contents of the IEP

17. 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. of Mass.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].)

18. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation 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., supra*, 82 F.3d at p. 1500.)

19. An IEP is a written document for each child with a disability that includes a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must also include a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).)

20. Additionally, the IEP must contain statements of how the child's goals will be measured and the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(III), (IV); 34 C.F.R. § 300.320(a)(3), (4); Ed. Code, § 56345, subd. (a)(3), (4).) It must also contain an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and activities, as well as a statement of any individual appropriate accommodations necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments. (20 U.S.C. § 1414(d)(1)(A)(i)(V), (VI); 34 C.F.R. § 300.320(a)(5), (6); Ed. Code, § 56345, subd. (a)(5), (6).) Furthermore, the IEP must contain the projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).)

21. The July 6, 2018 IEP offer was comprehensive and contained all required information. The IEP contained a thoughtful and complete statement of Student's strengths and areas of concern to which all members of the IEP team, including Parents, contributed to and developed after consideration of a comprehensive range of assessments conducted by well qualified, licensed and credentialed professionals. A multi-modal learner, Student learned best when visual, kinesthetic, auditory, and tactile strategies were used during instruction. He did not consistently follow through and complete assignments independently, as he required periodic check-ins to clarify directions and recall steps to complete an assignment. His ability to focus, initiate, and complete a task independently and appropriately improved when he was supported before, during, and after the instruction. He benefited from repetition and practice to retain, generalize, and apply newly learned skills. However, his basic reading skills, reading comprehension and reading fluency was significantly below grade level. Student also struggled to put into writing his thoughts and ideas without spelling errors, missed punctuation marks and grammatical mistakes. He had difficulty producing a writing with clear and organized ideas. His reading deficits also negatively impacted his ability to successfully solve math word problems.

22. The IEP properly identified Student's areas of need to be reading fluency, comprehension, and decoding; paragraph writing, spelling, and editing; math problem solving; and executive functioning. Student's present levels of performance in each of those areas were clearly explained in the IEP.

MEASURABLE ANNUAL GOALS

23. The IEP also contained appropriate, measurable annual goals in the areas of reading fluency, comprehension, and decoding; paragraph writing, spelling, and editing; math problem solving; and executive functioning, and such goals were appropriately challenging based on Student's abilities. Academically, Student's annual

goals sought to strengthen his reading comprehension skills by asking Student to read second grade passages and demonstrate his understanding of key details. His reading fluency was also expected to increase to 70 correct words per minute with 90 percent accuracy reading the same grade level passages. The annual goals aimed to improve Student's ability to read and encode irregularly spelled words. The writing goals were designed to improve Student's ability to compose, edit and revise his writing. The executive functioning goal sought to improve his ability to follow through and complete assignments.

24. The IEP provided these academic and executive function goals would be measured through teacher observations, collected data, and Student's work samples. They were measurable in that Student was expected to improve his reading comprehension by successfully answering who, what, where, when, why, and how questions with at least 80 percent accuracy to demonstrate understanding. His reading fluency would be measured by tracking the words per minute Student was able to read. Achievement on the writing goals would be measured through passage writing with 80 percent accuracy and scoring a three on a third grade writing rubric on four out of five trials. In math, progress was measured by solving multi-step word problems with 70 percent accuracy on five consecutive trials. In the area of executive function, progress was measured by Student's ability to successfully create a graphic organizer in four out of five trials. The goals were an appropriate means of tracking progress in Student's executive functioning and academic areas of need.

25. Student's contention that the math goal was inadequate due to Student's inability to read fourth grade level word problems, and the goal immeasurable due to its many components was unpersuasive. Student was intelligent and knew his math facts. The IEP would support his access to fourth grade level word problems with accommodations such as the use of illustrative organizers, highlighting of key words,

and opportunities to practice using visuals. Furthermore, the evidence demonstrated that the goal was sufficiently clear such that educators could implement and measure the goal.

26. Similarly, Student's contention that he required a specific goal to improve his fluency in math to receive a FAPE was not supported by the weight of the evidence. He knew the different math functions and transitioned between problems that involved addition, subtraction, and multiplication with ease. His below average ability to recall the answers to basic math facts automatically and without hesitation could be improved through practice and repetition, an accommodation provided for in the July 6, 2018 IEP, without the need for a specific math fluency goal in his IEP. Accordingly, a preponderance of the evidence established that the lack of a specific math fluency goal was not a procedural violation as it was not needed, and the goals offered in the IEP, collectively, addressed Student's unique needs.

INSTRUCTION, RELATED SERVICES AND ACCOMMODATIONS

27. California law defines special education as instruction designed to meet the unique needs of the pupil coupled with related services as needed to enable the pupil to benefit from instruction. (Ed. Code, § 56031.) "Related services" include transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401.) In California, related services are called designated instruction and services, and must be provided "as may be required to assist an individual with exceptional needs to benefit from special education" (Ed. Code, § 56363, subd. (a).)

28. If appropriate, the IEP shall include a provision for the transition into the regular classroom program if the pupil is to be transferred from a special class or nonpublic, nonsectarian school into a regular class in a public school for any part of the schoolday. (Ed. Code, § 56345, subd. (b)(4).) A nonpublic, nonsectarian school is a

private, nonsectarian school that enrolls individuals with exceptional needs pursuant to an IEP and certified by the California Department of Education. (Ed. Code, § 56034.)

29. When developing a pupil's IEP, the IEP team shall consider whether the pupil requires assistive technology services and devices. (20 U.S.C. § 1414(d)(3)(B)(v).) An "assistive technology device" is defined as "any item, piece of equipment or product system [other than a surgically implanted device] . . . that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs." (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.) Assistive technology devices or services may be required as part of the child's special education services, related services, or supplementary aids and services. (34 C. F. R. § 300.105.)

30. Extended school year services must be provided if the child requires the services in order to receive a FAPE. (34 C.F.R. § 300.106(a)(2).) Extended year is the period of time between the close of one academic year and the beginning of the succeeding academic year. (Cal. Code Regs., tit. 5, § 3043, subd. (c).) Extended school year services are provided to a child with a disability beyond the normal school year of the public agency, in accordance with the child's IEP. (34 C.F.R. § 300.106 (b).) The services a child receives during the extended school year must be comparable to those he receives during the regular school year. (Cal. Code Regs., tit. 5, § 3043, subd. (f)(2).) A child requires extended school year services if the child's disabilities are likely to continue indefinitely or for a prolonged period, interrupt the child's educational program and cause regression which, when coupled with limited recoupment capacity, render it impossible or unlikely that the child will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs., tit. 5, § 3043.) In other words, extended school year "services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational

program during the summer months." (*N.B. v. Hellgate Elementary School District* (9th Cir. 2008) 541 F.3d 1202, 1211-1212, quoting *MM ex rel. v. Sch. Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 537-538.)

31. The July 6, 2018 IEP's proposed instruction, related services and supports were appropriate in light of Student's unique needs and reasonably calculated to enable Student to make progress appropriate in light of his circumstances. The IEP described the academic instruction, related services and supports; setting forth the projected start date, length, frequency, and duration of instruction, services, and supports. The IEP provided an appropriate level of pull out specialized academic instruction of 420 minutes each week, which included three to four 30-minute sessions of structured, systematic, multisensory reading intervention in a small group setting to target Student's reading deficits. In addition, the 225 minutes of weekly specialized academic instruction pushed into in the regular classroom was reasonably calculated to address Student's executive functioning and math delays.

32. The IEP's offer of group specialized instruction was appropriate in light of the information that was available at the time. Dr. Weckerly's July 27, 2017 Neuropsychological Assessment Report recommended either individual or group intensive instruction. Though Dr. Weckerly opined at hearing that Student required individual intensive instruction more so than group, especially in light of the progress Student made using the Barton Reading Program through a one-to-one tutor, the IEP team did not have the benefit of that opinion when drafting the July 6, 2018 IEP. Furthermore, Carlsbad Unified's IEP team members were not aware of the tutoring services Student was receiving, as Mr. Evanson could not share confidential settlement disclosures to the Carlsbad Unified team members and Parents chose not to disclose it despite their many opportunities to do so.

33. Additionally, the choice of methodology is left to the expertise of the

school and its employees. (*R.P. ex rel. C.P v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1122. "The IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide him with educational benefit."; *G.D. ex rel. Dien Do v. Torrance Unified School Dist.* (C.D. Cal. 2012) 857 F.Supp.2d 953, 965.) Carlsbad Unified established that its proposed reading program could meet Student's unique needs in this area, and Student did not establish that he required the Barton Reading Program to receive a FAPE.

34. Furthermore, the weight of the evidence established that the July 6, 2018 IEP did not require a transition plan to allow Student to successfully transfer to Poinsettia. He was not transferring from a special day class from Sanderling Waldorf, nor was Sanderling Waldorf a nonpublic, nonsectarian school as defined by California law. Student was placed in a regular classroom at Sanderling Waldorf with approximately 16 to 18 other students. He received no accommodations or specialized academic instruction in the five years he attended Sanderling Waldorf, and yet advanced from grade to grade. In addition, there was no persuasive evidence offered at hearing that Student could not succeed in the general education classroom with the proposed supports and accommodations, even in a larger class size, or that he required supports and services to successfully transition into the regular classroom at Poinsettia. Therefore, a transition plan was not warranted.

35. Moreover, the IEP offered an extensive array of accommodations, supports and related services that consisted of, among other things, access to equipment and technology such as keyboards, speech-to-text and text-to-speech software, and audio books; as well as repetition and drills for practice, extended time to complete assignments, frequent breaks to build stamina and sustain attention to tasks, multisensory strategies, a graphic organizer, and consultation between the education

specialist and general education teacher, all of which reasonably calculated and adequate to aid Student in meeting his goals.

36. Student's claim that a formal assistive technology assessment should have been conducted was unconvincing. No evidence was offered to demonstrate that the technological supports offered in the IEP were insufficient or inappropriate, or that a formal assistive technology assessment was required to explore other technological supports Student may have required to increase, maintain or improve his functional capabilities.

37. In addition, the quarterly 15 minutes of consultation between the education specialist and general education teacher was sufficient when considered in conjunction with the other services provided in the IEP. In addition to the 15 minutes of consultation each quarter called for in the IEP, the education specialist and general education teacher would collaborate throughout the year, as they were each responsible for all of the IEP goals, and the education specialist would provide support in the regular classroom for 220 minutes each week, working alongside the general education teacher. Therefore, the quarterly 15 minutes of consultation among the two educators was adequate under these circumstances.

38. Student's contention that he required extended school year services and that Carlsbad Unified erred in failing to discuss extended school year services for 2019 during the July 6, 2018 IEP team meeting was unpersuasive. Carlsbad Unified had no reason to believe Student needed extended school year services in 2019 to receive a FAPE. Carlsbad Unified had not previously worked with Student to determine his ability to retain information following extended breaks and no concerns of regression over extended breaks were reported by his private school teacher who had taught him over the course of five years. Furthermore, Carlsbad Unified's IEP team members were not aware of the tutoring services Student was receiving that began in the summer of 2018,

as Mr. Evanson could not share confidential settlement disclosures to the team members and Parents chose not to inform the IEP during the assessment process or at the IEP team meeting. Accordingly, the failure to offer extended school year services did not result in a denial of a FAPE as the IEP team did not have sufficient information at the time to reasonably conclude that Student required extended school year services to receive a FAPE.

Placement in the Least Restrictive Environment

39. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1.) The IDEA also requires, to the maximum extent appropriate, that a child with a disability must be educated with children who are not disabled. (*Ibid.*)

40. School districts, as part of a special education local plan area, must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. (34 C.F.R. § 300.115; Ed. Code, § 56360.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication in the home, hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.)

41. The Ninth Circuit has stated a four factor evaluation to determine whether

a placement is the least restrictive environment. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*)) The four factors are: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of interaction with children who were not disabled; (3) the effect the child will have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. (*Ibid.*)

42. Carlsbad Unified did not contend that the cost of mainstreaming Student in a regular classroom fulltime factored into their recommendation for pullout specialized academic instruction. However, an analysis of the other three *Rachel H.* factors established that Student's needs could have been met in the general education classroom for a majority of the school day. At Poinsettia, Student would have access to a regular class for a majority of his school day, with the amount of time spent outside the regular classroom for specialized academic instruction in a small group setting necessary and adequate to address his reading and writing deficits. The IEP's offer of placement provided Student with opportunities to interact and socialize with non-disabled peers. He was social and outgoing, with no behavioral issues that would impede his or his peers' ability to access their education. He did not require a special day class for the entire school day, nor a nonpublic school setting to receive a meaningful educational benefit.

43. Student's assertion that the July 6, 2018 IEP was defective due to the failure of the IEP team to consider a continuum of placement options was unpersuasive. Carlsbad Unified did consider a continuum of placement options, beginning with the least restrictive environment in a regular classroom, and moving along the continuum to offer 225 minutes a week of specialized academic instruction pushed into the regular classroom and 420 minutes a week of specialized academic instruction outside the regular classroom. The July 6, 2018 IEP team had no information that suggested the

team needed to continue any further along the continuum of placement options to consider more restrictive options. Dr. Weckerly's July 27, 2017 Neuropsychological Assessment Report did not recommend a special day class or nonpublic school, and the July 6, 2018 IEP team did not have the benefit of her opinion shared at hearing. Accordingly, the IEP team did not need to hold a discussion as to whether a more restrictive setting beyond a general education classroom with pull out services was appropriate. Furthermore, the weight of the evidence demonstrated that any failure to have such a discussion, even if it amounted to procedural defect, did not deprive Student of an educational benefit as the offer of placement was appropriate, nor did it deny Parents meaningful participation in the development of Student's IEP as Parents shared no concerns, and sought no further information, regarding the offer of placement during the development of the IEP.

44. Carlsbad Unified complied with the IDEA's procedural requirements in developing the July 6, 2018 IEP and the IEP itself was designed to meet Student's unique needs. It was reasonably calculated to enable Student to receive an educational benefit appropriate in light of his circumstances and based on information available at the time. Therefore, Carlsbad Unified proved by a preponderance of the evidence that the July 6, 2018 IEP offered Student a FAPE in the least restrictive environment.

ORDER

Carlsbad Unified may implement the July 6, 2018 IEP without parental consent if Student seeks to receive special education and related services from Carlsbad Unified. Carlsbad Unified shall convene an IEP team meeting within 60 days following Student's enrollment in Carlsbad Unified to review Student's progress on IEP goals.

PREVAILING PARTY

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

RIGHT TO APPEAL

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

DATED: April 03, 2019

/s/

ROMMEL P. CRUZ

Administrative Law Judge

Office of Administrative Hearings