

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

GOLETA UNION SCHOOL DISTRICT.

OAH Case No. 2018060323

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on June 1, 2018, naming Goleta Union School District. OAH granted the parties' joint request for continuance on June 27, 2018.

Administrative Law Judge Rebecca Freie heard this matter in Goleta, California on October 16, 17, 18, 23, 24, 30, and 31, 2018.

David German, Attorney at Law, represented Student. Parents attended the entire hearing. Student did not attend.

Melissa Hatch, Attorney at Law, represented Goleta. Dr. Margaret Saleh, Deputy Superintendent, attended the hearing as Goleta's representative.

At the parties' request, a continuance was granted to November 30, 2018, to allow them to file written closing briefs. Student and Goleta timely filed written closing briefs. The record was closed and the matter was submitted for decision on November 30, 2018.

ISSUE

Did Goleta deny Student a free appropriate public education in Student's May 31, 2018 individualized education program, by offering Student a more restrictive program and placement than his prior IEP under which he was making progress, thereby failing to offer Student a program and placement in the least restrictive environment appropriate to meet his needs?

SUMMARY OF DECISION

Student has Down syndrome. The crux of the dispute between the parties is how much time Student should be included in the general education classroom. Goleta believes Student should be removed from the general education classroom for 700 minutes a week for specialized academic education. In this Decision it is found that Student has made educational progress attending a general education classroom for all but 300 weekly minutes (approximately two 30 minute periods each day), when he is pulled from that classroom to receive specialized academic instruction in a special education classroom for students with moderate to severe disabilities. Student further established that an increase to 700 minutes a week does not constitute the least restrictive environment and denies him a FAPE. Goleta is ordered to convene an IEP team meeting to draft a new IEP consistent with this Decision. Goleta is further ordered to include an inclusion specialist from a nonpublic agency of Parents' choice, funded by Goleta, as part of the IEP team, and Goleta will fund the services of an inclusion specialist from a nonpublic agency chosen by Parents for one day a week for the remainder of the 2018-2019 school year.

FACTUAL FINDINGS

JURISDICTION

1. Student has resided with Parents within the boundaries of Goleta since he was five years of age and has attended Kellogg Elementary School in Goleta since kindergarten. He is now nine years of age. Student was born with Down syndrome, and qualifies for special education as a student with an intellectual disability.

2. Student is universally regarded as "sweet" and "endearing". He is very social, and has many friends at Kellogg. He is invited for play dates and to birthday parties by his general education classmates. Student has fine and gross motor deficits, and receives occupational therapy services to address his fine motor deficits, and adapted physical education to address his gross motor deficits. Student also receives speech and language therapy to address articulation, expressive language, and social pragmatics deficits. Student takes longer to learn skills and requires significant repetition before a skill is mastered. Student has a relative strength in visual memory, but has other memory deficits. In the IEP dated May 31, 2018, Student's goals were written to address mathematics, language arts, fine and gross motor skills, social-emotional functioning, behavior, and expressive and receptive language. Student is not disruptive in the general education classroom.

3. At the time of hearing Student spent most of the school day in a third grade general education classroom, accompanied by a one-to-one instructional aide. His last signed IEP was developed in December 2015 after a series of IEP team meetings. Pursuant to this IEP he receives specialized academic instruction for 300 minutes each week (usually two separate 30-minute periods each school day) in a special education classroom for students with moderate to severe disabilities. He also receives speech and language therapy for 60 weekly minutes, one 30-minute group session and the other a 30-minute individual session to address articulation, expressive language and pragmatic

deficits. In addition, he receives 120 minutes each month of adapted physical education to address gross motor deficits. It was unclear at hearing what occupational therapy services Student was receiving at the time of hearing because the December 2015 IEP calls for 30 weekly minutes of direct occupational therapy, but Parents verbally agreed at the annual IEP team meeting in spring of 2017 to occupational therapy consultation services for 20 hours annually. It was also unclear why Student is now receiving 60 weekly minutes of speech and language services since the December 2015 IEP calls for 45 weekly minutes. Parents consented to the goals in the proposed IEP from May 2018, and those are the goals currently being implemented.

2015-2016 SCHOOL YEAR

4. Student attended preschool in Santa Barbara, California. Most of his classmates were typically developing children. Parents moved into Goleta's boundaries before the beginning of the 2015-2016 school year, because they wanted Student to begin kindergarten at Kellogg, the elementary school Mother attended as a child.

5. In the spring of 2015 the Santa Barbara County Education Office assessed Student to provide the IEP team with the information necessary to develop an IEP that would meet his unique needs and provide him with educational benefit. An IEP team meeting was held on April 23, 2015, and it continued on May 6, 2018. Student was to begin kindergarten in the fall of 2015 as a Goleta student.

April 23, 2015, and May 6, 2015, IEP Team Meetings and Offer

6. The IEP team meetings were attended by the Santa Barbara assessors, and participants from Goleta, including Dr. Saleh. Parents attended the meetings, accompanied by Student's regional center worker and an educational advocate.

7. After the assessment reports were reviewed at the first meeting, the team members agreed that Student was qualified for special education as a child with an

intellectual disability. The team began to develop goals. Parents were eager for Student to attend Kellogg which was just down the street from their home. However, Goleta team members wanted Student to attend a "looped" kindergarten/first grade class at Mountain View Elementary School.

8. The looped kindergarten class combines both special education and general education students. Two teachers are in the classroom, one with a special education credential and the other with a general education credential. At an IEP team meeting near the end of the school year, parents are given the option of having their child repeat kindergarten in the looped class. This is because the children in the looped classroom generally need more time to meet kindergarten standards, and a second year in the looped classroom allows them to do so.

9. Parents did not want Student to attend Mountain View. They did not sign consent to the IEP.

Meetings of August 24, 2015, and October 6, 2015

10. As the beginning of the 2015-2016 school year approached, Dr. Saleh was concerned because Parents had not consented to the proposed IEP. She met with Parents on August 24, 2015, and the meeting was memorialized in a document titled Interim IEP. Parents consented to the proposed IEP, with the exception of the proposed placement at Mountain View in the looped kindergarten class. Student began the school year attending a general education kindergarten class at Kellogg. He had an instructional aide assigned to him. He received specialized academic instruction for 30 minutes each day, in a special education classroom for students with moderate to severe disabilities.

11. The IEP team met again on October 6, 2015, to discuss Student's progress at Kellogg. All required members were present, and Parents were accompanied by Student's regional center worker, and an educational advocate. Student was learning

expected classroom behaviors including following adult instruction, and was cooperative in play and work with peers in small groups. The IEP team reviewed goals which included four pre-academic/academic goals. Nine other goals were reviewed: two behavior goals, three speech and language goals, three occupational therapy goals, and one social-emotional goal.

12. During the IEP team meeting on October 6, 2015, Student's general education teacher and the special education teacher expressed concern that Student was not learning as quickly as the other children in the general education classroom. Student was near the bottom of the class in terms of letter recognition, at the bottom of the class in terms of writing, and near the bottom of the class in terms of mathematics. When the general education teacher instructed Student one-to-one, he still did not retain or generalize the information. The special education teacher did not feel 30 minutes of daily specialized academic instruction in the special education classroom was sufficient time since Student needed much repetition and re-teaching to grasp concepts. When the meeting concluded the team agreed that his placement would continue unchanged at Kellogg.

Academic Assessment

13. Student's special education teacher conducted an academic assessment of Student that was consented to by Parents at the October 2015 IEP team meeting. She administered the Wechsler Individual Achievement Test, Third Edition, to Student in October 2015. This test instrument can be used to compare a child's academic achievement levels in various areas with the levels of other students of the same age or grade. She also interviewed Student and his general education teacher. At that time, Student enjoyed working with peers, could sing the alphabet, recognize all upper and lower case letters, and could identify 15 sight words. Student had difficulty writing even with constant adult support. He could count to 10, but not consistently. Student learned

better in small groups or with one-to-one instruction, and got lost and unsure of what to do during large group instruction. He required adult support for all learning activities.

14. Witnesses and the academic achievement assessment reports admitted into evidence, discussed certain aspects of the Wechsler. The Wechsler consists of 16 subtests, seven of which are to be administered to kindergarten students. The evidence established that scores on various subtests are computed to result in composite scores for Oral Language, Written Expression, and Mathematics. Student's composite standard scores were 53 on Oral Language, 60 on Written Expression, and 54 on Mathematics, with a total achievement score of 57.¹ Student's subtest standard scores ranged from 45 in Math Problem Solving to 74 in Early Reading Skills.

IEP Team Meeting of December 1, 2015

15. The IEP team met on December 1, 2015. All required members were in attendance, and Parents were accompanied by an educational advocate. The results of the Wechsler were reviewed. The team agreed Student qualified for special education under the eligibility category of intellectual disability. There was a discussion about increasing Student's time for specialized academic instruction in the special education classroom from the current 30 minutes a day. Some Goleta staff recommended 90 minutes daily. Ultimately, the team agreed to 60 daily minutes of specialized academic instruction in the special education classroom.

16. Although Parents had not consented to the goals proposed at the IEP team meeting on October 6, 2015, baselines on those goals were updated. Student had made progress towards meeting most of the goals including the four pre-academic/academic goals. In addition to 60 daily minutes of specialized academic

¹ An average standard score on the Wechsler is 100, plus or minus 10 points.

instruction, the proposed IEP stated that Student was to be provided with an instructional aide "as needed," 45 weekly minutes of speech and language services (15 minutes direct, 30 minutes push-in in the general education classroom), 120 monthly minutes of adapted physical education, and 30 weekly minutes of occupational therapy in the general education classroom. Parents signed consent to the IEP a few days later. This is the last consented-to IEP for Student.

IEP Team Meeting of April 20, 2016

17. Student's annual IEP team meeting was initially convened on April 20, 2016. All required team members from Goleta attended the meeting, as did Parents. Student had met or exceeded all but one of the 13 goals Parents had agreed to in December 2015. The only goal he did not meet was an occupational therapy goal regarding his grip of writing instruments; he changed his grip every day. However, the general education teacher was concerned that he was struggling with grade-level content standards.²

18. The team developed goals for Student for the next year, using as baselines his progress on the 13 goals from the December 2015 IEP. The team developed 10 academic goals. A total of 21 goals were developed for this annual IEP in the areas of academics, speech and language, occupational therapy, behavior, and adapted physical education. The following accommodations and services were offered: preferential

² The website for the California Department of Education states "Content standards were designed to encourage the highest achievement of every student, by defining the knowledge, concepts, and skills that students should acquire at each grade level." The standards were designed for all students, but with the understanding that some of those with disabilities might not be able to meet the standards for each grade-level.

seating; visual and verbal prompting to complete tasks; social stories; special pencils, grips and a slant board for writing activities; articulation activities; and adult support as needed in the general education classroom to provide Student with cues, prime him for changes in routine, and for safety.

19. Parents readily agreed to two 30-minute sessions of speech and language therapy weekly, 30 weekly minutes of adapted physical education, and 30 minutes per week of occupational therapy. The special education teacher suggested Student receive 965 weekly minutes of specialized academic instruction (an average of more than three hours each day), or in the alternative consider placement in the looped kindergarten class at Mountain View. Parents wanted to observe the special education classrooms at Kellogg before agreeing to 965 weekly minutes of specialized academic instruction. However, there was no evidence that they did so.

20. Parents never returned a signed IEP to Goleta. On June 9, 2016, Student's "new baselines" were noted on the proposed goals pages of the May 20, 2016 IEP. Over the summer Student was tutored in math and reading, funded by Parents.

21. Goleta uses a standards-based report card. The report cards report the student's progress in meeting grade-level standards. Grade-level standards are expectations of what a student in a certain grade should achieve educationally in terms of skills, understanding concepts and the application of those skills by the end of that school year. Each grade level has its own set of standards, with multiple standards for most courses of study. The kindergarten report card for Student explains a four means the student "exceeds standards;" three means the student "meets and applies standards;" two means the student "approaches standards;" and one means the student "has difficulty with standards." It is not expected that a student will begin the school year at level three or four for most standards, since the standards are introduced through the curriculum during that school year and are expected to be met by the end

of the school year. Some standards will not be addressed in a specific trimester, and some may be met earlier than the end of the school year, if the curriculum is covered earlier in the year. At the end of the 2015-2016 school year, Student had earned a three in two reading standards. The remainder of his grades were mostly one's with a few two's. Student's special education teacher was listed as his teacher on the report card.

2016-2017 SCHOOL YEAR

IEP Team Meeting of September 26, 2016

22. This was Student's first grade year and he spent most of his day in a general education first grade classroom, removed only for services and 60 minutes of specialized academic instruction. Because Parents had not signed and returned to Goleta the May 20, 2016 IEP, a continuation IEP team meeting was convened on September 26, 2016. Student was still being served pursuant to the IEP signed in December 2015. The IEP team reviewed the proposed goals in the IEP of May 20, 2016, and saw the progress noted, which were called "new baselines," on June 9, 2016, and again on September 26, 2016. The IEP offer made was the same as in May, except the recommended minutes of specialized academic instruction was reduced from 965 weekly minutes to 860 weekly minutes. Parents signed an addendum page but did not initial the box indicating consent to the offer. There was no dispute during the hearing that the last consented to IEP was the one signed in December 2015, although proposed goals from the May 20, 2016 IEP, were being implemented for the 2016-2017 school year, since Student had met all but one of the December 2015 IEP goals.

IEP Team Meeting February 10, 2017

23. Parents requested an IEP team meeting after winter break in January 2017. During the meeting, the team discussed, among other issues, an early triennial evaluation be completed and reviewed at Student's annual IEP team meeting in April

2017. Parents consented to the assessment plan.

2017 Triennial Evaluation

24. Goleta assessed Student in the areas of intelligence, social-emotional status, academic achievement, motor skills, adaptive physical education, occupational therapy, and speech and language. Goleta also completed a report to assess his need for an instructional aide, which is called a special circumstances independence assessment.

25. As part of the psychoeducational assessment, several tools were used to measure Student's academic achievement, and where he was in terms of meeting California common core grade level standards.

26. The psychoeducational assessment report acknowledged that Student had met 11 of the 12 goals that were part of his kindergarten IEP for the 2015-2016 school year.³ It summarized Student's scores when he was assessed by Santa Barbara in 2015, and his scores on the Wechsler when it was administered to him in December 2015.

27. Amanda Fox, the school psychologist assessing Student, interviewed Student's general education teacher and special education teacher. Both expressed concern about whether he could meet grade level standards. His general education teacher noted he was learning, but at a slower pace than his general education peers.

28. Student's gross motor skills were assessed by an adapted physical education teacher, and his occupational therapist assessed his fine motor skills. Student's gross motor skills and fine motor skills were below those of typically developing peers. Student required prompts to stay on task, and sometimes had difficulty understanding directions. He was unable to write legibly, and even tracing was

³ Other documents show Student had 13 goals for his kindergarten year and met 12 of them.

an arduous task for him.

29. Student's speech and language therapist conducted a speech and language assessment. He exhibited poor articulation, shorter spontaneous sentences than expected from someone the same age, and he was difficult to understand, with teachers describing his speech as "unintelligible." The speech and language therapist used several different test instruments. Student scored below the seventh percentile on every test and subtest administered.

30. Ms. Fox conducted cognitive testing using the Leiter International Performance Scale, a nonverbal test instrument. Student had difficulty understanding the instructions, and could attend to testing for only five to seven minutes at a time, and then he would lose focus or need a break. Student's nonverbal intelligence quotient on this test was 51. Other test results confirmed this score, and also showed that Student had relatively strong abilities in some areas, and weaker abilities in other areas.

31. Ms. Fox completed the Southern California Ordinal Scales of Development. This instrument measures the level of cognitive development of the subject, and measures cognitive skills at three different stages of childhood. The first stage consists of cognitive skills seen in a child between two to four years of age. Student demonstrated cognitive skills in this stage, and one or two in the next stage that are developed between the ages of four through seven years. None of the skills in the third stage, seen in children seven to 11 years of age, were observed.

32. Based on the results of her testing, Ms. Fox determined that Student could not delay gratification and needed reinforcement or verbal praise immediately when he completed a task. He would be successful with rote learning, with much repetition and practice, but did not have the cognition to learn tasks that required abstract reasoning, including common core math and higher level reading comprehension.

33. Student's special education teacher, Kasey Powers⁴ assessed Student's academic achievement using the Brigance Comprehensive Inventory of Basic Skills, Second Edition, and the Wechsler which had previously been administered to him in December 2015. The first part of the Comprehensive Inventory measures readiness for various learning tasks, but since Student was seven years old when tested, he was not given standard scores which were based on testing of a lower-aged group of children. Ms. Powers established in her report that she administered the Comprehensive Inventory because it is useful to determine what skills and needs Student had in various areas for which appropriate goals could be developed for the IEP, and Ms. Fox confirmed this when she testified.

34. Ms. Powers also administered the Brigance First through Sixth Grade Assessments portion of the Comprehensive Inventory which measures academic achievement. Student had standard scores ranging from 63 in the Basic Reading section to 71 in the written expression section.

35. The assessment report compared Student's 2017 scores on the Wechsler, with his December 2015 scores. Standard scores were reported and compared, as were percentile ranks and qualitative descriptions. However, on cross-examination, Ms. Fox established that percentile ranks and qualitative description comparisons are much less reliable than standard score comparisons. The composite scores were compared, as were the scores on various subtests, although several subtests were not administered in 2015 because they were not part of the testing protocols for children who were Student's age in 2015.

⁴ At this time Ms. Powers used her original last name, Kalsman. Witnesses referred to her by both names during the hearing. For uniformity she will be referred to as Ms. Powers in this Decision.

36. With the Wechsler, the starting point, or basal level for the subtests changes for each age or grade level. Therefore, the initial question for a child who is five, will come before the initial question for a child who is seven. And questions end when a certain number of consecutive answers are wrong, which would be at a higher level for a child of seven, than one who is five. If a child cannot respond to the starting question for his age or grade level, the assessor can do a "reversal" and count back a certain number of questions as called for in the testing protocols to start with a question at a lower age or grade level. However, there is a limit to how many questions the assessor may go back, and a child who does not meet the basal can then not be scored. The number of correct answers is the raw score, which is then converted into a standard score which is determined by the grade or age of the child, and the range in which the questions were asked. Similarly, raw scores can also be converted into percentile rank or grade-level achievement.

37. When questioned by Goleta's attorney on direct examination concerning Student's Wechsler results, Ms. Fox was quick to point out percentile rank differences from 2015 and 2017, and it was not clear that Student was being tested with a higher starting point in 2017 than he was in 2015. Furthermore, higher level questions were part of the 2017 testing. Therefore, if standard scores in 2017 were significantly lower than those Student achieved in 2015, it could be found that he had not made academic progress between the two administrations of the test. However, if standard scores were very close to each other, it would be found that Student had made progress during that time period. As determined below, the evidence established that Student's standard scores were not significantly different between 2015 and 2017, with some scores slightly higher, and others slightly lower. And this was also true when Goleta conducted academic achievement testing using the same instruments in 2018.

38. On the Oral Language composite of the Wechsler, Student's 2015 standard

score was 53, and it was 52 in 2017. His standard score in the Written Expression composite was 60 in 2015, and 64 in 2017. His Mathematics composite score in 2015 was 54, but was 46 in 2017. However, his total achievement composite score of 57 in 2015, rose to 59 in 2017.

39. Only seven subtests of the Wechsler were administered to Student in 2015, with various subtest scores used to determine his composite scores. In 2017, Student was administered 12 subtests. As previously discussed, composite scores are based on the scores of one or more subtests. Therefore, although Student's Mathematics composite score of 54 in 2015 dipped to 46 in 2017, his Math Problem Solving subtest score of 45 in 2015 rose to 56 in 2017, and his scores were 57 and 67 on two math subtests that were not administered or part of the Mathematics composite score in 2015. Student's scores on four of the seven subtests administered both years were higher in 2017 than 2015. Lower scores on three subtests were three, five and 10 points lower in 2017 than what they were in 2015.

40. Ms. Fox had Parents and the special education teacher complete the questionnaires that comprise the Behavior Assessment System for Children, Third Edition. These questionnaires ask the raters to respond to statements about the subject in terms that range from "always" to describe the subject, to "almost always," to "sometimes," to "almost never," to "never." The responses are scored by a computer and the scores determine if certain characteristics are in the "average," "at risk," or "clinically significant" range. However, although some raters showed Student in the "clinically significant" or "at risk" range in some areas, Ms. Fox acknowledged that some of the ratings might be due to Student's diagnosis of Down syndrome, and the tests had not been normed on children with this diagnosis. Therefore, she stated in the assessment report that the scores should be looked at in terms of Student's strengths and weaknesses, not as red flags.

41. Ms. Fox also had Parents complete the Developmental Profile, Third Edition, which evaluates functioning of children through age 12 in five areas. Student was in the below average range in the physical, cognitive and general development domains. He was in the delayed range in the adaptive behavior domain, and he was in the average range in the social-emotional domain. His general development score, computed by looking at all five areas, was in the delayed range.

IEP Team Meetings April 25, 2017, and June 5, 2017

42. The IEP team met on April 25, 2017, to review the triennial assessment results. All required members present. Parents were accompanied by an advocate.

43. The assessors summarized their reports. Parents were concerned that Student was being administered standardized testing instruments that compared his skills and abilities to all children at his age or grade level (first grade at the time) when he was tested by Ms. Fox and Ms. Powers, although his intellectual disability interfered with his ability to make one year's worth of academic progress compared to his typical peers. The team then reviewed the special circumstances independence assessment which concluded that Student required an instructional aide, who could be shared with one other student, when he was in the general education classroom.

44. Parents had not signed the May 20, 2016 IEP, and therefore had not approved those proposed goals. Nevertheless, the team reviewed Student's progress on those goals, referring to the progress as "an update on baseline." In regards to his academic goals, Student had met two of his five math goals, but had not met three, although he had made progress on those three. He had not met a writing goal or a goal to print his name, although he was reported to have made progress on both writing goals. He had met two of four reading goals.⁵

⁵ Student had a total of 12 other goals in the areas of speech and language,

45. Based on the “baselines” established by Student’s progress in meeting the proposed goals from the May 20, 2016 IEP, as well as the assessment results, the Goleta team members drafted new proposed goals for the 2017-2018 school year. Parents took copies of these goals with them to review.

46. The IEP team met again on June 5, 2017. Parents were accompanied by their educational advocate. Student’s Goleta service providers, Ms. Fox, Ms. Powers, and Student’s general education teacher were present.⁶ The team reviewed and modified the previously proposed goals. The accommodations were unchanged from the previous IEP offers.

47. Goleta’s offer of placement and services was 700 weekly minutes of specialized academic instruction, two, 30-minute weekly speech and language therapy sessions (one group and one individual), and 30 minutes of adapted physical education. Parents left the IEP team meeting without signing the IEP, and on July 14, 2017, they filed a request for due process with OAH. Student’s case was dismissed in December 2017 after the parties executed a settlement agreement.

48. Student ended the 2016-2017 school year, his first grade year, with a standards-based report card that reflected all one’s, indicating Student had difficulty

occupational therapy, behavior, social-emotional deficits, and adapted physical education. He had met four of these goals, and made progress on the others. They are not discussed further in this Decision because the sole issue in this case is whether he should be removed from the general education setting to a special education classroom for specialized academic instruction, and if so, for what length of time.

⁶Although the IEP document does not list the general education teacher on the first page of the notes as one of the attendees, she is mentioned in the notes and signed the attendance sheet for this date.

with standards in all areas. The name of the teacher on the report card is that of Student's general education teacher. At the beginning of summer break, Parents hired a tutor for Student, a retired special education teacher, to tutor him in reading and writing.

2017-2018 SCHOOL YEAR

49. Student began the second grade in a general education second grade class. The last signed IEP from December 2015 had him receiving 300 weekly minutes of specialized academic instruction, which was provided to him in the special education classroom for children with moderate to severe disabilities. He continued to receive the speech and language therapy, and adapted physical education called for in that IEP, although at some point in time, as will be discussed below, his speech and language services were increased.

50. Mark Alciati, Student's speech and language therapist, worked with him in a variety of settings. Mr. Alciati addressed Student's needs in the areas of articulation and intelligibility, expressive language, and social pragmatics. The IEP in force called for 30 minutes of group therapy, which occurred usually with two other students, and 30 minutes of individual therapy. In addition, Mr. Alciati would spend time on the playground facilitating social interactions for those students on his case load who needed it. During the 2017-2018 school year Student received some of his speech and language therapy during the time he was supposed to be in the special education classroom receiving specialized academic instruction. Mr. Alciati also pushed into the special education classroom to work on language skills with that class as a whole for 30 minutes each week, and if Student was in the special education classroom at that time, and he usually was, he would participate in that activity. Mr. Alciati called him his "star" in the special education classroom since he would often be called up first to demonstrate what was being worked on, such as social greetings. Because the general

education classroom was less structured than the special education classroom, Mr. Alciati observed Student to be more reluctant to participate there than when he was in the special education classroom. Most of Student's speech and language therapy was conducted in the speech and language room, because they are sometimes noisy and could be disruptive in a classroom. Mr. Alciati also worked with Student's aide so the aide could work with Student on speech and language goals in the general education setting. Because Student was pulled out of the special education classroom for two 30 minute sessions of speech and language, and participated in another 30-minute session of speech and language therapy in the special education classroom, he likely received fewer than 300 weekly minutes of specialized academic instruction.

51. The terms of the settlement agreement negotiated at the end of 2017 called for Goleta to fund a nonpublic agency to provide Student with the services of an inclusion specialist. This specialist, Richard Clemens, is the founder and president of Inclusive Education and Community Partnership, Incorporated, a nonpublic agency certified by the California Department of Education. Mr. Clemens has a master's degree in special education and a California teaching credential in special education with a severely handicapped authorization. He began his teaching career in 1990, and became an inclusion-behavior specialist consultant in 1994. As the president of Inclusive Education and Community Partnership, he supervises a staff of approximately 20. Inclusive Education and Community Partnership works with school districts and regional centers to assist them in developing inclusion programs for students and adults with moderate to severe, and multiple disabilities. He has worked with over 100 school districts in California, and the agency supports over 500 students annually in school inclusion programs. Mr. Clemens has also conducted more than 100 trainings about inclusive education, autism, and positive behavior support.

52. Mr. Clemens first observed and began working with Student in February

2018, and saw many positive things about his educational program, as well as other areas where work was needed to optimize Student's school experience. On the positive side, the instructional team clearly wanted what was best for Student. One area that needed improvement was the role and the proximity of the instructional aide to Student, which Mr. Clemens described as "hovering." Instead, aide support should have been fostering independence. Another area of need was curriculum modification that would allow Student to work on his goals in the general education classroom, but at his instructional level. Mr. Clemens thought that Student's general education teacher could engage him more during oral presentations, and this improved during the time Mr. Clemens worked with Student. He was also concerned that Student was not given an appropriate amount of independence outside of the classroom, and was also concerned about Student being required to leave the classroom more than once during the day to receive individualized instruction in the special education classroom.

53. Mr. Clemens found Student's instructional team to be very responsive in terms of listening to his concerns, and implementing the strategies he and they developed. There was great improvement. The aide moved back from Student in the classroom, and this allowed other children in the classroom to work with him more often. With better curriculum adaptation for Student he was better able to work independently. Curriculum adaptations improved when certain things were addressed by the instructional team with Mr. Clemens' facilitation, although there was not much generalization of the specific adaptations into other areas.

54. Mr. Clemens described a step by step process he recommended for curriculum adaptation. The first step is to determine what the intended educational outcome is for the general education students in the classroom when they participate in the activity. Then there needs to be thought given as to whether Student will be able to achieve a similar outcome by participating in this activity, maybe with accommodations,

or whether Student can attain a modified outcome. If neither is possible, then one must look at the goals and determine which one or ones could be worked on by Student participating in the activity, and how this could be done. In this way, all of the students in the classroom meet an educational goal by participating in the activity.

55. Mr. Clemons introduced a strategy for Student that minimized him having to trace by giving him a word bank. (Student's fine motor deficits make writing difficult for him.) Previously Student would be asked a question on a work sheet, his aide would write the answer, and Student would trace what the aide wrote. With a word bank, a work sheet would have a list of words in one part of the paper, and Student would then learn the words and be able to do the assignment independently. Mr. Clemens did not work with Student's team after the end of May 2018. However, as the result of Mr. Clemens work with Student and his team, Student was able to better stay on task independently, travel the campus independently, and transition from one activity to another independently. At lunch the aide no longer sat with him.

Academic Assessment Report Dated May 31, 2018

56. In preparation for Student's annual IEP team meeting scheduled for May 31, 2018, Goleta again conducted an academic assessment to measure Student's academic progress, or regression. Student's special education teacher, Ms. Powers, and an inclusion specialist for Goleta, Robyn Young, administered the Wechsler and the Brigance Comprehensive Inventory including the First through Sixth Grade Assessments Inventory portion of the Brigance. As was the case when Student was tested in previous school years, he often complained about how hard some of the questions were. Ms. Powers and Ms. Young prepared charts that compared Student's scores on the Wechsler subtests and composites from 2015, 2017, and the current testing in 2018. They did the same with the scores on the Brigance from 2017 and 2018.

57. On the Wechsler, some of Student's composite scores dipped from one

year to another, and some rose from one year to another. His standard score on the Oral Language composite was 53 in 2015 and 52 in 2017, but rose to 63 in 2018. His score in the Total Reading composite rose from 63 in 2017, to 73 in 2018. Student's composite score in Basic Reading declined one point from 78 in 2017 to 77 in 2018. Student had not been scored previously for the Reading Comprehension/Fluency composite, but his score in 2018 was 71. Student's composite score in written expression rose from 60 in 2015, to 64 in 2017, but declined in 2018 to 52. Student's score on the Mathematics composite was 54 in 2015, 46 in 2017, and rose to 50 in 2018. His Math Fluency composite score of 62 in 2017 fell to 53 in 2018. Student's Total Achievement score, which encompasses all of the composite scores was 57 in 2015, 59 in 2017, and 58 in 2018. Overall, these scores, taking into account the fact that a child may do better in testing on one day than on another, do not demonstrate academic regression.

58. Student's scores on the various subtests of the Wechsler showed similar variability with some rising from one year to the next, and others falling. However, each subtest starts at a higher basal level each year it is administered, so Student was tested at a higher level each year; he was not tested using the same questions. Since Student's cognitive testing standard scores from 2017 ranged from 49 to 64, and his nonverbal intelligence quotient, measured by the Leiter was 51, his standard scores on the Wechsler were in the expected range for someone at his age with his cognitive ability.

59. Student's performance on the Brigance Comprehensive Inventory, including the First through Sixth Grade Assessments Inventory, showed growth. With only two exceptions on the Comprehensive Inventory his raw scores were the same or higher in 2018 than they were in 2017; in most cases they were higher. Where he had been unable to be tested in some areas in 2017 because he could not meet the basal, he now met the basal and could be tested. On the First through Sixth Grade Assessments,

which measure academic achievement, his standard scores were the same or higher in 2018 than they were in 2017, with only one exception. His Basic Reading composite standard score rose from 63 to 65. His Reading Comprehension standard score stayed the same at 67. On the Total Math composite his standard score rose from 68 in 2017 to 72 in 2018. His Written Expression composite score fell from 71 to 68 between 2017 and 2018, and his Listening Comprehension composite score stayed the same at 67. Again, as with the Wechsler, Student's academic achievement standard scores on the Brigance testing did not demonstrate regression.

IEP Team Meeting May 31, 2018

60. Parents attended the IEP team meeting accompanied by Mr. German. Amanda Martinez-Iqbal, Goleta's special education coordinator, also attended as Goleta's administrator, and was accompanied by Ms. Hatch. Student's service providers, an independent occupational assessor who had conducted an assessment pursuant to the settlement agreement, and Mr. Clemens also attended. A Goleta assistive technology assessor attended and a vision specialist from Santa Barbara attended to discuss their respective assessments. Ms. Fox, and Student's general education and special education teachers also attended.

61. The team first reviewed Student's progress on his goals. In terms of his academic goals, Student met four of the six goals related to English language arts (reading and writing), and made progress on the two he did not meet. He met one of four math goals, but made progress on the other three. The primary reason given for not meeting goals was the level of prompting Student required. He met or made progress on goals in adapted physical education, speech and language, occupational therapy and behavior. Goleta team members expressed concern about the level of prompting he required to meet the goals, however.

62. The team then reviewed the assessments, first the functional vision

assessment conducted by Santa Barbara, then the independent occupational therapy assessment. The team then discussed the assistive technology assessment, and finally the academic achievement assessment. Parents did not express any disagreement with the assessment results.

63. A draft IEP was distributed, and the team reviewed the comments regarding Student's pre-academic and academic skills, which were primarily based on the academic achievement assessment. His speech and language therapist, adapted physical education teacher, and his occupational therapist discussed Student's progress during the school year, as did his teachers and Ms. Fox. Parents did not disagree with these comments. The team reviewed 16 proposed goals for the 2018-2019 school year. There were four proposed English language arts goals, and two math goals. The remaining goals addressed speech and language, adapted physical education, behavior and social skills.

64. The team discussed the accommodations and services in the IEP, and Mr. Clemens suggested that Student work with two aides, one in the morning and another in the afternoon, or one aide for one set of days of the week and then the other for the remaining days. This would be done so that Student's prompt dependency would be reduced and his independence and generalization would increase. Student's adapted physical education instruction was increased from 30 weekly minutes to 60 weekly minutes because Student had not met (but had made progress on) any of his three adapted physical education goals from the previous year. Student would receive 60 weekly minutes of group speech and language therapy.

65. The biggest change in the IEP from the terms of the settlement agreement from December 2017, was that Goleta now recommended that Student receive 700 weekly minutes of specialized academic instruction in the special education classroom for children with moderate to severe disabilities, an increase of 400 minutes per week.

Ms. Powers, his special education teacher, explained that the reason for this was because he had met just five of 10 academic goals, and only two of five behavior goals from the previous year. Further, the academic testing, according to Ms. Powers, showed Student had significant needs in math, reading, and writing, and the academic testing showed "minimal or no growth [since] 2017, and, in fact showed regression." The reasons given by Ms. Powers for Goleta recommending 700 weekly minutes of specialized academic instruction were not valid, as will be discussed in the Legal Conclusions below.

66. Student's standards based report card at the end of the 2017-2018 school year gave the name of his special education teacher as his teacher. His grades were "N's" which meant he "needs improvement" in all areas of "Attitudes and Approaches to Learning," and Art, Music and Physical Education. His academic grades were all one's, "Has difficulty with standards."

PLACEMENT CONSIDERATIONS

Evidence Supporting Removal of a Student from the General Education Setting for Specialized Academic Instruction

67. Several Goleta staff members testified about why they supported the increase in minutes Student would be removed from the classroom for specialized instruction.

68. Dr. Saleh came to Goleta in 2012, after more than 25 years at other school districts. She received her bachelor's degree in education in 1983, her master's degree in education administration in 1991, and her juris doctor in 2008. She is a member of the California State Bar. Dr. Saleh was a teacher from 1986-1995, dean of students at a high school from 1995-1997, assistant principal at a middle school from 1997 to 2006, and director of special education for the Conejo Valley Unified School District from 2006 to 2012, when she came to Goleta. She has also taught many undergraduate and graduate

level college courses related to education and special education.

69. When Dr. Saleh came to Goleta she determined that students with moderate to severe disabilities were being “warehoused” in general education classrooms where they were not learning. She has worked very hard to design and build many programs in Goleta for children with disabilities. She believes that children with disabilities should be included in activities with typical peers. However, she strongly believes that students with moderate to severe disabilities will make greater educational progress if they are pulled out of the general education environment to receive individualized direct instruction in core academic areas of reading, written expression, and math. Often the curriculum used for these students will be different than the one used in the general education classroom, and the instructional level will be lower than that in the general education classroom for these core subjects. The amount of time a child is removed from the general education environment for specialized academic instruction may increase as the child ages, and the instructional level in the general education classroom often exceeds the instructional level required by a child with a disability.

70. Dr. Saleh did not favor what she referred to as the “one size fits all” approach of Student’s experts, who unanimously testified that a child with moderate to severe disabilities, such as Student, benefits most from being educated in a general education classroom with appropriate supports, and minimal, if any, removal for specialized instruction. Other Goleta witnesses supported Dr. Saleh’s view.

71. Ms. Fox, Kellogg’s school psychologist, also testified in support of Goleta’s proposal to increase the amount of minutes Student would be pulled out of the general education classroom to receive specialized instruction in the special education room. She received her pupil personnel services credential as a school psychologist in 2012 after receiving her master’s degree in school psychology in 2011. Ms. Fox has worked for

Goleta as a school psychologist since 2012.

72. Ms. Fox testified that Student “did not gain enough skills to keep up” with his classmates in the general education classroom. She observed him in his general education classroom the week before she testified and believed that he simply did not have the ability to understand what was going on in the classroom.

73. Ms. Fox defined “meaningful progress” for Student as that which would provide him with the best outcome as an adult - to develop adaptive and behavioral skills that would allow this to happen. She then segued into a discussion about how Student needed to develop “the conceptual understanding that underlies . . . math skills as well as the language skills that underlie reading and writing.” Ms. Fox would like Student to have a “mastery” of these skills. She believed that if he was removed for direct instruction with an alternative curriculum by a special education teacher in a special education classroom for 700 minutes per week, he could gain the skills to be able to benefit more when he spent time in the general education classroom. She believed it would be easier for Student to focus on the instruction in a smaller classroom than the general education classroom. Student learns best with much repetition, a slower pace, and explicit instruction by a special education teacher, according to Ms. Fox.

74. Ms. Fox espoused the belief that typically developing students have higher academic achievement test scores from year to year if they are making educational progress. She similarly believes that because Student’s scores did not increase year over year he was not making progress. The evidence established the contrary. As noted above, because testing demands increase as children age, if a Student’s scores remain relatively consistent that is improvement and not stagnation or regression. Ms. Fox’s inaccurate assertion significantly undermined her credibility. In addition, she expressed concern about the fact that Student was not working at “grade level,” although with a

non-verbal intelligence quotient of 51 (an intelligence quotient of 100, plus or minus 15 points is in the average range) one would not expect him to meet grade level standards without modification. Ms. Fox also expressed the opinion that Student only made “minimal” progress on his goals from what she reviewed when the IEP team met on May 31, 2018. This is not reflected in the progress reports themselves.

75. Ms. Fox’s testimony on direct examination was significantly undermined on cross-examination. Student’s attorney successfully challenged several aspects of the testimony she gave on direct examination, as determined above. Additionally, she became flustered and uncomfortable and less assured of her previous responses.

76. Ms. Martinez-Iqbal, Goleta’s former coordinator of special education (now an elementary school principal for Goleta) also testified in support of Goleta’s decision to increase Student’s weekly minutes outside the general education classroom for the 2018-2019 school year to 700 minutes per week. Ms. Martinez-Iqbal received her bachelor’s degree in psychology and religious studies in 2005, and her master’s degree in education in 2008. She has completed the course work for a doctoral degree in education. She has a clear administrative services credential, a special education credential for students with mild to moderate disabilities, with autism certification, and a multiple subject teaching credential. She was a special education teacher from 2007 to 2011 in various school districts in Santa Barbara County, and came to Goleta in 2011 as an elementary school teacher. She then worked in Goleta as an education specialist, and became Goleta’s coordinator of special education in 2015. This year she became the principal of a Goleta elementary school. She has also taught education classes at the college level.

77. Ms. Martinez-Iqbal described Student’s alternative reading curriculum. This curriculum is highly structured and requires approximately 30 to 45 minutes per lesson, sometimes more. Further, there is an expectation that one lesson will be completed in

one session. However, Student's current level of specialized academic instruction is sufficient to implement the curriculum as described by Ms. Martinez-Iqbal. Accordingly, an increase of more than 100 percent is not warranted on this basis. Ms. Martinez-Iqbal acknowledged that Student was an active participant in activities such as science, social studies, music, and art in the general education classroom.

78. Ms. Martinez-Iqbal explained how education has changed since California adopted common core standards. Students are expected to interact with each other when they are learning core curriculum, which she defined as language arts and math. The expectation is also that students in a classroom should be able to meaningfully access the common core curriculum taught in the general education classroom. However, according to Ms. Martinez-Iqbal, because Student's intellectual disability impacts his ability to access grade-level curriculum in his general education class, he should be removed from the general education classroom for 700 weekly minutes. Again, she did not sufficiently explain why 700 minutes per day is appropriate or necessary to meet his educational needs.

79. As justification for increasing the number of minutes in the special education room from 300 weekly minutes to 700 weekly minutes, Ms. Martinez-Iqbal contended that many of Student's goals from year to year were nearly the same, so he really wasn't making progress from year to year. However, a review of the goals reflects her opinion's inaccuracy. For example, a reading comprehension goal developed at the 2017 annual meeting states, "By 6/5/2018, after reading and/or listening to a story at his instructional level and given 2 (visual or verbal) choices for each element, [Student] will identify a character, the setting, and one event from the story with 'minimal prompting' in 4 out of 5 opportunities as measured by data collection."⁷ At the following year's

⁷ "Minimal prompting" was described as no more than three prompts in the IEP.

annual IEP team meeting the reading comprehension goal states, "By 5/31/19, when given a selected reading passage a[t] his instructional reading level that contains one visual picture to accompany the story, [Student] will correctly answer 5 written comprehension questions that each have 2 written answer choices with 2 verbal and one gesture prompt with 80% accuracy in 4 out [of] 5 opportunities as measured by data collection." The goal in the 2018 IEP requires much more from Student than the goal in the 2017 IEP. In 2017, Student was not required to read the story himself, rather, it could be read to him; in 2018 he was required to read the story himself. In 2017, someone could verbally ask Student to identify three elements from the story for the goal to be met; in 2018 Student was required to respond to five written questions that he had to read himself. The 2018 goal was clearly written for a child with much better reading skills than Student had in 2017. Although there Ms. Martinez-Iqbal was concerned because both goals were based on common core first grade reading standards, but that does not mean the goals were the same, and clearly they were not.

80. Robyn Young also testified in support of Goleta's plan to increase Student's specialized academic instruction in the special education classroom. She graduated from college in 1995, and received a moderate to severe special education credential in 1999, a master's degree in special education in 2001, and an administrative credential in 2004. She has been employed as an educator since 1999, and has taught students from kindergarten through high school in a variety of programs and settings. She has also taught graduate school courses in education. Ms. Young began working at Goleta in 2011, and is employed by Goleta as an inclusion facilitator and autism specialist, based at Kellogg. As part of her duties Ms. Young trains aides, both on a formal basis as well as an informal basis, meets with general education teachers each week formally for discussion about various topics related to special education, and acts as a case manager for some students. Ms. Young modifies curriculum as necessary, and

makes sure accommodations are provided, and determines whether any changes are necessary for a specific student. She provides some students with specialized academic instruction in a small room where she can work with them individually and without distractions. She interacts with parents, teachers and aides, as well as administrators.

81. At Kellogg there is a special education team that includes both general education and special education teachers, instructional aides, administration, the school psychologist, the speech and language therapist, occupational therapist, and adapted physical education teacher. Various team members meet informally for a working lunch nearly every day, and Ms. Young is available for consultation on an as-needed basis.

82. Ms. Young was asked to define inclusion and described a student with disabilities who is part of a general education classroom, and is considered to be a full member of that classroom. She stated that inclusion is different for each student, and depends on the needs of the student and what he or she is able to access in the general education classroom. It also depends on what is in the student's IEP.

83. Ms. Young described Kellogg's inclusion model. There is collaboration between the general education teacher and the special education teacher to ensure appropriate and meaningful learning is taking place for the student, and is making progress. To accomplish this both formal and informal meetings occur, with daily check-ins. The "included" student goes to the general education classroom first for attendance taking, etc. The included student will have his own chair at the table, or a desk in the general education classroom. The general education classroom is considered to be the student's classroom. Most included students at Kellogg also have additional adult support. The team will check in with each other to make sure there have been no changes in the student's schedule for the day. Most of the students have visual schedules. At various times of the day the students will receive their specialized academic instruction in a small structured setting that is not the general education

classroom. Then they will return to their general education classroom.

84. Ms. Young believes Student needs systematic structured instruction using a specialized curriculum in reading, writing, and math each day for 45 minutes for each of these three areas, outside of the general education classroom, to make more progress than he has been making. Ms. Young explained that when she was working on her master's degree, full inclusion of children like Student in general education was recommended, but now, she believes, the "pendulum has swung," and that is no longer considered to be best practice.

85. Many Goleta witnesses, including Ms. Fox and Ms. Young, testified about Student's scores each of the three times he was administered the Wechsler, in 2015, 2017, and 2018. As was the case with Ms. Fox, Ms. Young's testimony on direct examination regarding the Wechsler, which she administered to Student in 2018, implied that because standard scores did not increase in some cases, it meant Student had not made educational progress. Again, as was the case with Ms. Fox, this testimony changed under cross-examination.

86. Goleta witnesses also testified that Student was not meeting grade-level standards. This testimony reflected a belief that if Student received 700 weekly minutes of specialized academic instruction outside of the general education classroom, his scores would increase from year to year when he was administered academic achievement tests such as the Wechsler, and he would begin to meet the grade level standards of the general education class for that grade. However, this view is inconsistent with Student's intellectual ability. His academic achievement test standard scores should not have to rise each year as a litmus test for the amount of time Student can access a general education setting.

Evidence Regarding General Education Setting

87. Expert witnesses for Student testified as to the benefits of placement in a

general education setting for students with moderate to severe disabilities, particularly those with Down syndrome. Mr. Clemens testified that research showed that students with moderate to severe disabilities, especially those with Down syndrome, who were included in general education settings had much better outcomes in adulthood. Mr. Clemens stated that "Students who are included are more likely to live, recreate, and work in their communities in inclusive settings than students who were in special day classrooms." They develop better language skills and behavior skills as a result of being included, and develop better academic skills and learn more than those who are not included. They learn how to work independently and get along better with others in the workplace. Mr. Clemens also testified that students with mild to moderate disabilities, such as a student with a specific learning disability, will do better receiving services in a segregated setting such as a resource specialist program classroom than those with more severe disabilities. He asserts this is because students with moderate to severe disabilities learn more from experience, and actual participation in an activity rather than receiving instruction in a one-to-one educational setting.

88. Mr. Clemens's worked with Student's team to help support him in his general education setting during the 2017-2018 school year. He observed that Student made progress with the changes he recommended but believes the team requires additional support with curriculum adaptation.

89. Mr. Clemens believes Student could benefit from a program where he receives all academic instruction in a general education class. He envisions the program should include one day per week of inclusion and behavior services and an inclusion specialist, for two full months. Then the IEP team could decide if this level of service should be reduced. During this one day per week, the specialist would train aides, help the team adapt curriculum, and look at any other issues that might arise and develop a solution. There would be a weekly team meeting for the first two months for

instructional planning which would involve the teacher, the instructional aides, the inclusion specialist and any other service providers whose attendance would be necessary and helpful, as well as a parent. At the end of two months it would be decided if visits of the inclusion specialist could be reduced to two times a month, and the weekly meetings be similarly reduced. Mr. Clemens also recommended district-wide training for administrative personnel about inclusion.

90. Mr. Clemens also recommends Student be assigned two aides to work with him at different times to decrease his prompt dependency and increase his independence and generalization. Lastly, Mr. Clemens recommended that Student be pulled out of the classroom for 30 minutes each day, not necessarily to the special education classroom for children with moderate to severe disabilities, but possibly the resource or learning center where Student would be “primed” for what would be happening in the general education classroom. This would not be intensive academic instruction, but it would be giving him exposure and strategies to deal with what would be happening in the general education classroom for the period of time between this pullout session and the next. Mr. Clemens’s recommendations for Student were based on his experience with Goleta and Student that consumed dozens of hours, last school year, and multiple observations and interactions with Student. Mr. Clemens knows Student and is knowledgeable about inclusion programs. His testimony, however, is predicated on the assertion that Student should receive *all* academic instruction in the general education environment. Such a program is not at issue in this case. Accordingly, his global opinion regarding what he believes is Student’s “optimal” program is given little weight. The portions of his testimony applicable to supporting Student when in the general education classroom, however, are given great weight based on his expertise and personal knowledge of Student.

91. Another expert witness who testified on behalf of Student was Nancy

Franklin. She earned her bachelor's degree in elementary education in the state of New York, and subsequently earned a master's degree in education in 1976. She has been in the field of education since 1973, working as an elementary school teacher in the state of New York, and then for the Los Angeles Unified School District. She began teaching in a special day class in Los Angeles and earned her California special education credential in 1986, and earned her tier I administrative credential in 1998, and her tier II administrative credential in 2002. Ms. Franklin has been a board certified behavior analyst since 2008. She was employed by Los Angeles until 2013, holding a variety of high-level administrative positions, mostly centered on inclusion and least restrictive environment, and behavior. She has worked as a consultant since 2014 in many areas of special education, and began working for Inclusive Educational and Community Partnership Inc. in 2016.

92. Ms. Franklin also testified regarding a full-time inclusion program for Student in a general education classroom. Ms. Franklin observed Student in his general education classroom both this school year and last.

93. Ms. Franklin saw that Student had typical peers as friends with whom he ate lunch and recently observed a conversation he had with them that was several minutes long and included lots of laughter. When Student participated with the general education class in physical education, Ms. Franklin observed the class slowing down a very competitive game of kickball when it was Student's turn to kick the ball and it did so without any adult intervention; it occurred because of the other children's independent decision to do this. It was clear to Ms. Franklin that Student is a true member of his general education class, but she also asserted that Student required the additional support by an inclusion specialist. She estimated that initially the inclusion specialist would need approximately one day a week at the school to provide necessary services. Ms. Franklin's opinion regarding the educational benefit, specifically socially,

Student receives from inclusion with this general education peers is given great weight.

94. Mary Falvey, Ph.D. also testified on behalf of Student. Dr. Falvey received a bachelor's degree in social sciences in 1972, her master's degree in special education in 1975, and her Ph.D. in 1980 from the University of Wisconsin. After college graduation, Dr. Falvey was a teacher and principal of a special education center in Marin County. Dr. Falvey taught at California State University, Los Angeles from 1980 in the Charter College of Education until her recent retirement. Most of her teaching was in the field of special education. When Dr. Falvey obtained her doctoral degree she did research for her dissertation in the Madison public school system and compared the progress of students with moderate to severe disabilities in a traditional segregated special day classroom on a general education campus, with the progress of similar children who were placed in a co-taught kindergarten classroom with typically developing children. She found the children with moderate to severe disabilities in the inclusive co-taught classroom did better both socially and academically than the children in the special day classroom, who were only integrated with typically developing peers for lunch and recess.

95. Dr. Falvey emphasized the necessity that a moderately to severely disabled student be given proper support when included in a general education classroom. These supports will enable the child to have meaningful participation even if the activity is one that might require a higher level of academic achievement than the child might have. For example, if the class is reading a specific book, the child with a disability can be provided with an audio version of the book. Dr. Falvey also found that children with Down syndrome were more successful as adults when they were included in a general education classroom. They were more likely to be employed as adults, not in sheltered workshops, but in meaningful jobs.

96. Dr. Falvey met with Student and Parents a few days before she testified.

Initially Student was apprehensive, because he thought he was going to be tested, but once he realized that would not happen, he noticeably relaxed. He responded to questions from Dr. Falvey and others without hesitation, and although he had some articulation issues, she easily understood him.

97. Student's experts share a universal opinion that children with moderate to severe disabilities should be fully included, and appropriately supported, in a general education classroom for academic instruction. However, as noted previously, the issue in this case is not one of full-inclusion versus a special day class placement for academic instruction. At issue in this case is whether the increase in services from 300 minutes per week of specialized academic instruction to 700 minutes per week is appropriate for Student. Accordingly, the legal conclusions focus on the narrow issue presented.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT⁸

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 et seq. (2006);⁹ 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,

⁸ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁹ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

employment, and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs.

4. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ___, 137 S.Ct. 988 [197 L.Ed.2d 335]

(*Andrew F.*). The Court explained that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) In cases in which a student is not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances. (*Andrew F.*, *supra*, 137 S.Ct. at p. 1001.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this matter, Student had the burden of persuasion on the issues decided.

ISSUE: SHOULD STUDENT BE REMOVED FROM THE GENERAL EDUCATION CLASSROOM FOR SPECIALIZED ACADEMIC INSTRUCTION FOR 700 WEEKLY MINUTES?

6. This case concerns two drastically differing paradigms of what inclusive education is. Student's experts share a universal opinion that children with moderate to severe disabilities should be fully included, and appropriately supported, in a general education classroom for academic instruction. Student disagrees with Goleta witnesses who testified that his academic achievement test scores show he has not made academic progress. Student argues that he has met many of his goals, and made progress on all of them throughout his tenure in Goleta, although last school year 90

minutes of the time designated for pull-out specialized academic instruction was time Student was receiving speech and language services. Student also points out that although Parents did not sign an IEP after December 2015, Goleta did not file its own request for due process and therefore it must have believed Student was receiving a FAPE under the old IEP which placed him in the special education classroom for specialized instruction for 300 minutes a week. (*I.R. v Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164,1165.)

7. Goleta employees assert that for some children, as they age, the academic demands begin to outpace their ability and these students should be taught language arts and math through specialized academic instruction in a special day class utilizing a modified curriculum. As noted previously, the issue in this case is not one of full-inclusion versus a special day class placement for academic instruction. The stark philosophical difference among Goleta employees and Student's experts regarding the two models of education need not be reconciled in this Decision. At issue in this case is whether the increase in services for Student from 300 minutes per week of specialized academic instruction to 700 minutes is appropriate, and the legal conclusion focus will be on this narrow issue presented.

8. Goleta contends that Student has not received educational benefit from placement in the general education classroom for all but 300 minutes each week, even though he has received proper support and services in that setting. Instead Goleta claims Student now needs to be removed from the general education classroom for 700 minutes each week, so that he can receive specialized academic instruction in the special education classroom. Goleta claims Student only made minimal progress on his goals, and he is frequently frustrated in the general education classroom because he does not understand what is happening. Goleta cites witness testimony that academic testing scores showed Student had made minimal or no educational progress, and in some

areas regressed. Goleta claims Student does not need the services of a nonpublic agency inclusion specialist. Finally, Goleta claims that its educational methodology is removal of students from general education so they can receive specialized academic instruction, and Student did not establish that its methodology is deficient.

9. As determined below, Student established by a preponderance of the evidence that he received educational benefit with his existing level of specialized academic instruction, that he made progress on his goals, and that his standardized test scores did not demonstrate stagnation or regression.

Legally Compliant IEPs

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

Least Restrictive Environment

11. A school district must ensure that a child with a disability is educated in the least restrictive environment. (34 C.F.R. § 300.116.) To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that (1) children with disabilities are educated with non-disabled peers; and (2) special classes or separate schooling occur only if the nature or severity of the disability 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); Ed. Code, § 56031; 34 C.F.R. 300.114

(a.)

EDUCATIONAL BENEFIT IN CURRENT PROGRAM

12. Goleta witnesses repeatedly relied on Student's academic test scores to support its position that he received no educational benefit at his current level of specialized academic instruction. Student has undergone three separate academic achievement assessments since he entered Goleta in 2015. He was administered the Wechsler in October 2015, the spring of 2017, and the spring of 2018. He was administered the Brigance in the spring of 2017 and the spring of 2018. Testing is not easy for Student, and it is understandable that he approached Dr. Falvey with trepidation when he met her recently, since he thought she was there to conduct more testing.

13. Ms. Fox and Ms. Young both asserted that Student's scores on the Wechsler, each time it was administered, showed no academic growth, although this belief weakened when they were cross-examined. Although both had administered the Wechsler many times, they did not seem to have a clear understanding that Student's standard score would not rise unless he made extraordinary academic growth between each administration of the test, highly unlikely given his reported intellectual ability. As previously discussed, a Wechsler subtest consists of a series of questions the subject must answer. The first question on the list of questions for a subtest administered to all students is the starting point for a subject who is a kindergarten student, or in the case of a test that is not administered until a later grade, the first question for that grade. The starting point in subsequent years would be farther down on the list, with a different starting point for each grade-level. Questioning stops when the subject has missed answers to several consecutive questions. The raw score, i.e. the number of questions answered correctly, is then converted to a standard score. Student's standard scores on the Wechsler were in the 50's and 60's for the most part, each time he was tested.

Some year's scores dipped on a subtest or composite, and other years they rose. But there was no significant variability. There was no steady decrease. This is not a test where a subject gets a higher standard score each year because he has grown academically. If Student had not been making academic progress, he would have had lower standard scores than he had the previous year, and this decrease would have been continuous.

14. In regards to the Brigance testing, on both the Comprehensive Inventory and the First through Sixth Grade Test, virtually all of Student's scores were higher in 2018 than they were in 2017. Again, if Student was not making progress, his scores would not have risen on the First through Sixth Grade Test; they would have fallen. Another problem with Goleta's presentation of this argument during hearing was that Ms. Fox, during direct examination about Ms. Powers's academic testing and the 2018 testing, emphasized the fact that Student's percentile scores had fallen between 2017 and 2018 testing. However, during cross-examination she admitted that standard scores were far more reliable than percentile scores and grade-level scores when discussing academic achievement testing.

15. Goleta also asserted Student was not making academic progress because his IEP goals were the same from year to year, and he did not meet some goals, even though he was reported to make progress on his goals each year. The correct standard for measuring educational benefit under the IDEA is not merely "whether the placement is 'reasonably calculated to provide the child with educational benefits,' but rather, whether the child makes progress toward the goals set forth in her IEP." (*County of San Diego v. Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) There is no requirement that a student meet every goal in the IEP to show academic progress. Further, although Goleta claimed Student's goals remained unchanged from year to year, the evidence did not establish this. Ms. Martinez-Iqubal attacked the goals

because, for repeated years, the goals addressed kindergarten or first grade standards and they were to be implemented when Student was in second or third grade. The evidence established that the goals were not the same for repeated years as they added additional requirements and greater complexity. Even though Student did not meet every goal, the notes from his IEP team meetings confirmed that he met or made progress on his goals year after year.

16. The fact that Student was not meeting grade level standards does not establish he was not making educational progress. Student learns much more slowly than typically developing children. His ability to retain information (which would assist him when he is tested), is not that of a typically developing peer. Again, there was no evidence that because he is in a general education classroom he is expected to meet grade-level standards. Multiple witnesses, both for Student and Goleta, agreed about that when they testified. Yet every school year Student was issued a grade-level standards based report card.

17. Finally, the evidence established that Student may not have received 300 weekly minutes of specialized academic instruction as called for in his IEP. Mr. Aliciati, Student's speech and language therapist, testified that during the 2017-2018 school year, he was removing Student from the special education classroom for his two weekly 30-minute speech and language therapy sessions. And for another 30-minute period when Student was supposed to be receiving his specialized academic instruction in the special education classroom, Mr. Alciati conducted a weekly large group session in the special education classroom. Rather than being instructed, Student was an active participant in the large group speech and language therapy session. Thus, Student may have received fewer than 300 weekly minutes of specialized academic instruction. This further undermines Goleta's position that Student now requires more specialized academic instruction to receive educational benefit.

18. Student also received non-academic benefit in his current program. The evidence established that Student is very much a part of his general education classroom with friends, and the support of the entire class. This was demonstrated by Ms. Franklin's testimony about the kickball game she observed recently, when his classmates slowed down the very competitive game so he could fully participate, and the testimony of other witnesses such as Ms. Martinez-Iqbal who testified that Student was very much a part of the general education classroom during hands-on activities such as science. Mother's testimony confirmed this when she said he had regular play-dates with classmates from the general education class, and was invited to birthday parties. Although Goleta's witnesses, and some Goleta reports indicated that Student was isolating himself in the general education classroom in the past, Goleta witnesses also affirmed that Student had friends and social relationships with classmates in the general education classroom.

19. Student made academic progress on his goals during the prior school years. Student's standardized test scores showed growth rather than stagnation or regression. Student received non-academic benefit, specifically socially, during the prior school years. Accordingly, the evidence established that Student has received educational benefit at the current service level. The evidence did not establish that Student requires more specialized academic instruction, particularly 700 weekly minutes, to receive a free appropriate public education.

Methodology

20. Goleta's final argument is that it is entitled to select the methodology used to educate Student and that it determined the methodology includes 700 minutes per week of specialized academic instruction in a special education classroom.

21. The methodology used to implement an IEP is left up to the school district's discretion so long as it meets a student's needs and is reasonably calculated to

provide meaningful educational benefit to the child. (*Rowley, supra*, 458 U.S. at p. 208; (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) Parents, no matter how well-motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student. (*Rowley, supra*, 458 U.S. 176, 208.)

22. The *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*Ibid.*) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loath to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley, supra*, 458 U.S. at pp. 207-208).)

23. Goleta conflates educational services and placement with methodology, but they are two different things. The IDEA and its supporting regulations, as well as California's implementing statutes and regulations, mandate a school district provide a program that meets the student's unique needs, is reasonably calculated to provide education benefit, and places the student in the least restrictive environment to meet that child's needs. (34 C.F.R. § 300.115; Ed. Code § 56361.) Methodology is the manner in which a school district chooses to teach a child with an IEP, and in this case it is with the use of the alternative curriculums to teach Student math and reading. The evidence did not establish that Student requires 700 weekly minutes of specialized academic instruction to meet his needs and provide him with educational benefit. Except to the extent that 700 minutes of specialized academic instruction in a special day class exceeds Student's needs, no finding is made in this Decision regarding the appropriate amount or configuration of services as that issue was not before this tribunal in this

case. As discussed below, that determination will be left to Student's IEP team when it reconvenes to craft Student's new IEP.

REMEDIES

1. Student prevailed on the single issue decided in this case, and established that he should not be removed from the general education classroom for specialized academic instruction for 700 minutes each week. Therefore, the IEP of May 31, 2018, is not legally compliant and denies Student a FAPE.

2. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369-370 (*Burlington*); *Parents of Student W. v. Puyallup School Dist.*, No. 3 (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)). In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, at p. 374 [the purpose of the IDEA is to provide students with disabilities "a free appropriate public education which emphasizes special education and related services to meet their unique needs."].) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d. at p. 1497.)

3. This decision holds that Student made educational progress under his current program. That does not mean, however, that he is entitled to no remedy. The Goleta members of Student's IEP team fundamentally misunderstood the progress he made. Goleta has its own inclusion specialists, but the evidence established that their belief that Student must receive specialized academic instruction for 700 weekly minutes to receive educational benefit is erroneous. Therefore, it is necessary for an outside inclusion specialist to remedy the denial of FAPE. Goleta is ordered to fund the services of an inclusion specialist from a nonpublic agency chosen by Parents for one day each

week for the remainder of the regular school year, to ensure Student is properly included in the general education classroom. This shall commence within 30 days of the date of this decision.

4. Student's IEP has been found legally noncompliant. A new IEP team meeting must now be convened to develop a legally compliant IEP. As a new IEP is developed for Student, the evidence established that an inclusion specialist will be a necessary IEP team member to remedy the denial of FAPE and assist in creating an appropriate IEP. The IEP team will need to discuss Student's present levels, areas of need, and review the IEP goals to determine whether they should be changed, and if so, then develop new goals. The IEP team will need to determine the appropriate amount of specialized academic instruction, and determine the appropriate placement for those services, but the duration of these services shall be fewer than 700 weekly minutes. Student's IEP team should also consider whether Student should be removed from the general education classroom for a small portion of the day for the 30-minute daily "priming" Mr. Clemens testified Student needed. Student may be removed from the general education classroom for speech and language services as necessary.¹⁰ The IEP team meeting shall occur no more than 30 days after the date of this Decision. Goleta shall fund the attendance of the inclusion specialist Parents select at this meeting and any other IEP team meetings convened this school year.

¹⁰ In his closing brief Student did not object to removal from the general education classroom for speech and language therapy. Student's small group and individual speech and language therapy sessions are usually conducted in the speech and language room, and the evidence established that this was the most appropriate place for this.

ORDER

1. Student's IEP dated May 31, 2018, does not constitute an offer of FAPE regarding the offer of 700 weekly minutes of specialized academic instruction in a moderate to severe special day class.

2. Goleta shall convene an IEP team meeting to develop a new IEP for Student within 30 days of this order. A nonpublic agency inclusion specialist chosen by Parents shall attend the meeting. Goleta shall fund this attendance.

3. Goleta shall fund the services of an inclusion specialist from a nonpublic agency chosen by Parents for one day each week for the remainder of the 2018-2019 regular school year.

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, Student prevailed on the sole issue decided.

RIGHT TO APPEAL THIS DECISION

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: January 4, 2019

/s/

REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings