

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

WILLIAM S. HART UNION HIGH SCHOOL
DISTRICT,

v.

OAH Case No. 2019010586

DECISION

William S. Hart Union High School District filed a due process hearing request (complaint) with the Office of Administrative Hearings on January 15, 2019, naming Student.

Administrative Law Judge Robert Martin heard this matter in Santa Clarita, California on February 12 and 13, 2019. Ian Wade and Joanne Kim, attorneys at law, represented Hart. Hart Director of Special Education Sharon Amrhein attended both days of the hearing on behalf of Hart. Mother (Parent) represented Student. Student attended the hearing on the morning of February 12, 2019.

A continuance was granted for the parties to file written closing arguments, and the record remained open until March 6, 2019. Hart submitted a timely closing argument, the record was closed, and the matter was submitted for decision on March 6, 2019.

ISSUE

Did Hart's April 17, 2018 individualized education program for Student, as amended August 10, 2018, offer Student a free appropriate public education in the least restrictive environment appropriate for Student?¹

SUMMARY OF DECISION

Hart's burden of proof was to demonstrate it complied with the procedural and substantive requirements of the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.) and California law in developing Student's IEP. In this case, IEP team meetings to develop the IEP were held without a general education teacher or school psychologist present, when their participation was required, and not excused. In addition, Hart failed to prove the IEP team considered Student's most recent assessments in developing the IEP. Hart also failed to provide a clear, written offer of placement, services, modifications and accommodations in Student's final August 10, 2018 IEP. As a result of these procedural inadequacies, Hart failed to prove the IEP at issue was reasonably calculated to provide Student educational benefit. Hart therefore failed to meet its burden to prove Student's IEP met all procedural and substantive requirements of the IDEA and California law.

¹ The ALJ has reworded and clarified the issue stated in Hart's prehearing conference statement as allowed by the holdings in *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) The ALJ has not changed the substance of the issue.

FACTUAL FINDINGS

JURISDICTION

1. Student was 13 years old and in eighth grade, at the time of hearing. Student lived with Parent within Hart's jurisdictional boundaries at all times relevant to these proceedings.

2. Student was found eligible for special education in 2008 under the eligibility category of autism. Prior to July 2017, Saugus Union School District was responsible for providing Student a FAPE. In the spring of 2017, pursuant to his Saugus IEP, Student attended the Academy for the Advancement of Students with Autism, a non-public school. Student attended a special day class, with a full-time one-on-one aide who assisted him in completing tasks assigned by his special education teacher, Celine Olivas.

2017 ASSESSMENTS

3. In spring 2017, the Academy assessed Student for his triennial IEP. The assessors prepared a school-based occupational therapy assessment, a language and speech report, and a psychoeducational report.

4. None of the 2017 assessors from the Academy testified at the hearing. There was no evidence the assessors presented their reports at any subsequent IEP team meeting.

Occupational Therapy Assessment

5. Laura Herrell assessed Student's fine motor, visual motor, visual perceptual, and sensory processing skills, and authored an occupational therapy assessment report dated March 22, 2017. According to the report, Ms. Held was an occupational therapist, with masters and doctoral degrees in occupational therapy.

6. The report was based on a review of Student's records, a teacher questionnaire regarding Student's sensory needs in the classroom, classroom and clinical

observations of Student, and the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition. According to the report, Student had sufficient fine motor skills and manual dexterity to complete certain tasks such as preferred games and academic activities, but struggled with fine motor precision skills when writing. Student exhibited delays in both visual motor and visual perceptual skills needed to complete written tasks accurately and legibly, and deficits in his sensory processing skills, and his ability to self-regulate sensory input to maintain attention.

7. The report recommended Student continue to receive occupational therapy services, in an amount of a type and duration to be determined by Student's IEP team. It recommended accommodations of: visual schedules, with directions written down and broken down; a study carrel with high sides to block vision and minimize distractions; a chew noodle, ball chair, compression vest, move and sit cushion, and theraband for self-regulation of sensory input; access to movement breaks, a weighted pencil, and boxed or highlighted lined paper. The report recommended three measurable occupational therapy goals for improving Student's visual motor/visual perceptual skills, sensory processing and self-regulation skills; and motor planning skills.

Language And Speech Assessment

8. Joseph Camarillo assessed Student's continued eligibility for language and speech services and authored a report dated March 20, 2017. The report identified Mr. Camarillo as a speech and language pathologist, with a master of science degree and a certificate of clinical competence for speech-language pathologists from the American Speech and Hearing Association.

9. The report was based on a review of Student's prior speech and language evaluations, Parent and teacher interviews, class observation, and standardized tests and instruments. The report concluded Student exhibited extremely low receptive and expressive language vocabularies, scoring as well or better than only 0.1 percent of

children his age. He did not independently initiate or respond to communications, but would do so consistently with prompting from his one-on-one aide. Student's utterances ranged from one to three words. Student exhibited some mild articulation errors and phonological word simplification, but his speech was generally understandable. Student did not engage with his classmates. Most of Student's communication was pre-intentional, such as communicating a desire for an object by reaching for rather than asking for it. However, Student showed progress using his Picture Exchange System to communicate needs and wants. He exhibited no behaviors that interfered with his classroom participation.

10. The report recommended Student continue to receive a mix of individual and group language and speech services to address his deficits in receptive and expressive language, and to develop his skills for using the Picture Exchange System. The report did not recommend any specific frequency and duration of services.

Psychoeducational Assessment

11. Andreas Christou assessed Student to determine: (1) Student's learning ability; (2) his cognitive functioning; (3) whether Student exhibited any psychological processing deficits impeding his academic progress; (4) Student's social and emotional functioning; and (5) whether Student continued to be eligible for special education. Mr. Christou authored a report dated May 19, 2017. The report identified Mr. Christou as a school psychologist, with master's degrees in arts, science, education, and public administration, and a pupil personal services credential.

12. The report was based on a review of Student's special education history, including Student's recent IEP's, triennial assessments from 2011 and 2014, a 2015 independent psychoeducational evaluation, and, from 2016, a Department of Education Diagnostic Center assessment report, a functional behavior assessment, and an evaluation of environmental learning support. The report was also based on Parent's

answers to a questionnaire about Student's developmental history, a teacher interview, a classroom observation of Student, and Parent and/or teacher responses to three rating scales: (1) the Gilliam Autism Rating Scale, Third Edition, completed by Parent and teacher, to evaluate the likelihood that Student had autism spectrum disorder, and, if so, its severity; (2) the Adaptive Behavior Inventory, completed by Parent and teacher, and scored by comparison to a normative sample of persons with intellectually disabilities, to evaluate Student's functional daily living skills in the areas of self-care, communication, social skills, adaptive skills, and occupational skills; and (3) the Sensory Processing Measure, completed by teacher, to get information about Student's social participation, vision, hearing, touch, body awareness, balance and motion, and planning and ideas, to help determine whether; sensory processing issues were affecting Student's ability to learn, or impairing higher-level functions such as planning and organizing movement, or social participation. Finally, the report was also based on two tests administered to Student directly: (1) the Comprehensive Test of Nonverbal Intelligence, a norm-referenced test that uses nonverbal formats to measure the intelligence of subjects whose scores on traditional tests might be reduced by impaired language or motor abilities; and (2) the Beery-Buktenica Developmental Test of Visual-Motor Integration - Full Format, plus its supplemental Visual Perception and Motor Coordination tests, to test Student's ability to copy geometric shapes to screen Student for difficulties in integrating or coordinating his visual perceptions with his motor abilities (finger and hand movement).

13. Notably, the psychoeducational report stated it was also based on one standardized test, and two rating scales, whose results were not discussed or included in the report: the Brigance Comprehensive Inventory of Basic Skills, administered by teacher, to assess Student's academic skills in the areas of readiness, speech, listening, reading, spelling, writing, research and study skills, and mathematics; the Behavior Assessment System for Children, Parent Rating Scales, Third Edition, completed by Parent

to measure Student's adaptive and problem behaviors in community and home settings; and the Conners Rating Scales, Third Edition, completed by Parent, to obtain Parent's observations on Student's behaviors that could potentially indicate attention deficit hyperactivity disorder, conduct disorder, oppositional defiant disorder, anxiety, depression, learning problems, hyperactivity or problems with executive functioning. The report stated the results of the Behavior Assessment System for Children and the Conners identified several critical items and areas of concern.

14. The report concluded: (1) Student met the criteria for special education eligibility under the category of autism spectrum disorder, with Student exhibiting severe autism requiring substantial support; (2) Student had severe deficits in cognitive functioning in reasoning, memory and language, with cognition similar to typical children ages two to four, caused by his autism, and indicative of an intellectual disability; (3) Student's visual perception skills, motor coordination skills, and visual-motor integration skills were all in the very low range; (4) Student had significant communication deficits in receptive and expressive language, and social communication; (5) Student was easily frustrated, and engaged in maladaptive behaviors to express frustration and attract attention when frustrated; and (6) Student had very poor ability to function independently compared to others with intellectual disabilities, with below-average to poor skills in self-care (such as doing laundry or mending clothes), communication (following through on oral directions) social interaction (maintaining eye contact and attention), academics (reading and following written directions), and occupation readiness (performing work requiring at least sixth grade reading ability).

15. The report recommended Student's IEP team: (1) discuss Student's eligibility for special education under the category of autism spectrum disorder; (2) develop plans to address Student's deficits in receptive and expressive language; and assist Student in his academic work, behavior and communication.

April 17, 2018 Iep Team Meeting

16. Pupils generally matriculate from Saugus to Hart in seventh grade. Hart became Student's district of residence in July 2017, beginning with his 2017 extended school year. Hart offered Student extended school year services in July-August 2017. Student did not attend extended school year.

17. Student began his 2017-2018, seventh grade school year, enrolled in a special day class for students with moderate to severe disabilities at Hart's Rancho Pico Junior High School. On or about February 5, 2018, by mutual agreement between Hart and Parent, Hart placed Student in a special day class for students with moderate to severe disabilities at Villa Esperanza, a non-public school.

18. On April 17, 2018, Villa Esperanza convened Student's annual IEP team meeting, the first of four IEP team meetings to develop Student's IEP completed August 10, 2018. Parents, and Hart program specialist Wesley Hester, attended. From Villa Esperanza, speech and language pathologist Ariel Hegedus, Student's special education teacher Alexandra Digiacinto, occupational therapist Rebecca Manzella, student occupational therapist Emerlin Smith, administrator Terri Reed, and behavior specialist Rachel Moreno, attended. No school psychologist or general education teacher attended the meeting, or provided written input to Parents or the IEP team for use in developing Student's IEP. Parents did not excuse either from attending. Mother was the only IEP team meeting attendee who subsequently testified at hearing.

19. Hart presented no evidence team members from Hart or Villa Esperanza considered the 2017 triennial assessments from Saugus by the Academy at or for this meeting. The IEP team meeting notes do not refer to the 2017 assessments. No school psychologist was present at the meeting. The notes refer to reports presented by the attending speech and language pathologist, behavior specialist, and occupational therapist, which were brief summaries of their recent observations of Student.

20. The April 17, 2018 IEP incorporated 15 annual goals from Student's 2017 IEP, all of which had a May 8, 2018 completion date: two math goals; one language arts; one vocabulary; two expressive language; one goal for following auditory instructions; one visual motor/visual perceptual; one sensory processing; one motor planning/body awareness; two independent living; and two behavior goals. The IEP team reviewed Student's progress towards those goals. Student met five of his 2017 goals: his math goal of using touch points to solve 10 addition and subtraction problems; his math/life skills goal of using a calculator to add the prices of four items selected from a menu; his language arts goal of answering who, what, where, and when questions after reading a developmentally-appropriate texts; his independent living goal of performing the five-step task of washing dishes; and, with maximal direct cues, his expressive language goal of answering questions using two-word combinations of at least 10 core words.

21. Student's April 17, 2018 IEP retained all 15 of Student's 2017 IEP goals as continuing goals. The IEP team did not change the existing May 8, 2018 completion date for the retained 2017 goals.

22. Based on their recent observations of Student, Student's speech and language pathologist, occupational therapist, behavior specialist, and teacher reported Student's present levels of performance to the IEP team. Student enjoyed playing with toys, music, reading, coloring and painting, and recess activities. Student was able to follow one step directions without assistance and two-step directions with verbal prompting. Given initial directions, Student could complete his morning routine of showing his Student identification card to sign into school, putting his lunch in the refrigerator, and putting his backpack away. Student could read short sentences of four to six words, knew some, but not all, numbers up to 50, and could perform single-digit addition and subtraction using TouchMath. When prompted, Student could communicate with others using speech, pictures, and an iPad electronic device with installed ProLoQuo symbol-based

communication software, provided by Hart in March 2018 for augmentative and alternative communication.

23. Student exhibited relatively strong gross motor skills, and could navigate the school environment and participate in recess without difficulty. He had difficulty with sensory regulation that interfered with his attention, but demonstrated improved self-regulation with sensory diet of deep pressure, movement breaks, tactile input through fidgets, and oralmotor input through a chew noodle. Student was sensitive to sounds, but benefitted from wearing noise-cancelling headphones.

24. The IEP team determined Student continued to have unique needs in academics, expressive and receptive language, visual processing, fine motor skills and visual-motor coordination, sensory regulation, functional and social communication, functional and independent living skills, and behavior. The IEP team proposed 12 new goals: two functional reading, two functional mathematics; one vocabulary; one functional living; one independent living; two fine motor, for handwriting, and for shoe tying; one appropriate refusal; one social; and one behavior.

25. The IEP's special factors page indicated Student required assistive technology devices such as a pressure vest, chew noodle, and access to tactile items, to provide sensory input throughout the day to help Student's sensory regulation. The IEP did not state whether Student required an iPad, or any other augmentative and alternative communication device.

26. The IEP team reviewed a proposed behavior intervention plan developed by behavior specialist Ms. Moreno to address Student's aggressive behaviors of hitting, kicking, scratching, head-butting, and attempting to bite staff when asked to end or pause a preferred activity, or gave Student rules regarding the activity, such as "be careful on your bike." The IEP team also agreed Student continued to need the support of a full-time one-on-one aide for his safety and the safety of others.

27. The IEP team discussed a continuum of placement options for Student,

including placement in: a general education environment; special day classes for students with mild to moderate, or moderate to severe disabilities; and non-public school. The team agreed the appropriate placement for Student was continued placement in a Villa Esperanza special day class for students with moderate to severe disabilities, during the regular and extended school year, for instruction in a modified curriculum, with a behavior intervention plan. Supports and services included: a full-time one-on-one instructional aide; 60 minutes of individual and 30 minutes of group speech and language weekly; 120 minutes of individual and 120 minutes of group occupational therapy monthly; 240 minutes of behavior intervention services monthly; and door-to-door transportation to and from Villa Esperanza. Hart offered numerous program accommodations, including modified assignments, standards, grades and reporting, reduced and shortened assignments, frequent breaks, use of sensory strategies, checks for understanding, and shortened and simplified instructions.

28. The IEP indicated that Student's graduation plan was to participate in a curriculum leading to a certificate of completion, with a projected completion date of June 6, 2025.

29. Hart personnel – school psychologist Jennifer Betty, occupational therapist Gabe Micciche, and speech and language pathologist Julie Casady – read the 2017 assessments relevant to their fields of expertise after the final August 10, 2018 IEP team meeting, and testified that Student's unique needs identified by the April 17, 2018 IEP team, and the goals, placement and services developed by the team, were consistent with the results of the 2017 assessments.

30. Parents did not object to Student's goals, placement, or accommodations in the April 17, 2018 IEP, but did not consent to the IEP because they wanted Student to repeat seventh grade, and receive an additional 15 minutes per week of speech and language services. Parents were also concerned about the IEP's projection that Student would complete his educational program in 2025.

May 1, 2018 IEP Team Meeting And Amendment IEP

31. Student's IEP team met on May 1, 2018, to address Parents' concerns. Mother, and Hart program specialist Wesley Hester, attended. From Villa Esperanza, speech and language pathologist Ariel Hegedus, special education teachers Alexandra Digiacinto and Lola Lee, occupational therapist Rebekka Manzella, administrator Terri Reed, and behavior specialist Rachel Moreno, attended. Parent agreed in writing to excuse the attendance of a general education teacher, and none attended. As with the April 17, 2018 meeting, Mother was the only attendee who testified.

32. Hart agreed to Parents' request to have Student repeat seventh grade. The IEP team discussed the way in which Student's IEP goals were implemented not just by the speech and language pathologist, but also by Student's teacher and all staff in student's classroom. After the discussion, Parent consented to Student's speech services as they were. The IEP team also discussed Parents' concerns regarding Student's projected completion date, and Parent consented to Student's IEP with no changes to the projected completion date.

33. Other than confirming Student would repeat seventh grade, the May 1, 2018 amendment IEP made no substantive changes to the provisions of Student's April 17, 2018 IEP. Parent consented in writing to all provisions of the May 1, 2018 amendment IEP on May 1, 2018.

July 2, 2018 IEP Team Meeting And Amendment IEP

34. Parents withdrew Student from Villa Esperanza in June 2018. Parents were undecided whether Student would return to Villa Esperanza in the fall, and asked Student's IEP team to meet to discuss Student's placement for the 2018 extended school year, only. Student's IEP team met on July 2, 2018. Parents attended, and from Hart, program specialist Wesley Hester, special education director Sharon Amrhein, and school psychologist Michelle Pena, attended. Because Hart did not offer special education

students any placements in a general education environment for the extended school year, Mother consented in writing to excuse the attendance of a general education teacher.

35. The IEP team discussed Student's communication skills and behavior. As noted in the progress notes for Student's goals as of his April 17, 2018 IEP team meeting, Student had made significant progress in his ability to follow directions and his behavior goals. The IEP team concluded placement in a Hart special education daily living skills program for moderate to severely disabled Students, located at Valencia High School, and involving some community interaction, would be appropriate for his 2018 extended school year. Hart prepared an amendment IEP offering Student that placement, for instruction in a modified curriculum, with a behavior intervention plan and supports and services including: a full-time one-on-one special circumstances instructional aide; 30 minutes of group speech and language weekly; 30 minutes of individual or group occupational therapy weekly; and door-to-door transportation to and from school. Hart did not offer behavior intervention services for the extended school year.

36. The amendment IEP stated the offered placement was for the 2018 extended school year only. It made no changes to Student's program for the regular school year. It also stated the IEP team could reconvene to discuss placement for the 2018-2019 school year if Parents or Hart thought a change of placement from the non-public school might be appropriate. Parents consented in writing to all provisions of Student's July 2, 2018 amendment IEP.

August 10, 2018 IEP Team Meeting And Amendment IEP

37. Special education teacher Asha Kakonde taught Student at Valencia High during the extended school year. Student continued to make progress on his IEP goals. In July 2018, Parent informed Hart Student would not be attending Villa Esperanza for

the 2018-2019 school year, and Parent and Hart agreed to hold an IEP team meeting to discuss Student's placement.

38. Student's IEP team met on August 10, 2018 to discuss his placement for 2018-2019. Mother attended, and from Hart, Ms. Kakonde, special education director Sharon Amrhein, school psychologist Jennifer Betty, supervisor James Mackey, speech and language pathologist Rose Munn, and Rio Norte Junior High School assistant principal Francine dos Remedios attended. Hart sought to excuse the attendance of a general education teacher and occupational therapist. Checked boxes on the IEP team member excusal form signed by Parent indicated these team members were being excused because their areas of the curriculum or related services were not being discussed or modified. Alternative boxes indicating their areas of the curriculum or related services would be discussed or modified, and they had submitted written input, were not checked. Neither of the excused members submitted written input for consideration by the IEP team. The IEP meeting notes stated the general education teacher was being excused because Student had previously received only specialized academic instruction in a special day class. The meeting notes also stated the team would discuss all additional options for general education inclusion which could be reviewed by assistant principal Ms. Dos Remedios.

39. The IEP team discussed Student's progress in communication skills and behavior. As discussed during his April 17, 2018 IEP team meeting, Student could follow one step directions without assistance and two-step directions with verbal prompting. Given initial directions, Student could complete his morning routine of showing his Student identification card to sign into school, putting his lunch in the refrigerator, and putting his backpack away.

40. Ms. Kakonde reported Student had no issues in her special day class during the extended school year. He followed directions, exhibited no significant behaviors, and did well on field trips to local grocery stores and shops for community-based instruction.

41. Ms. Munn noted Student's familiarity with using PECS symbol boards for communication. She suggested Student continue to use that system for communication in addition to his iPad.

42. Ms. Amrhein provided the team unspecified information concerning Student's program at the Academy for the Advancement of Children with Autism, and Student's 2017 assessments. The IEP notes state Ms. Betty would review those assessments in the future. This statement that Ms. Betty would review the 2017 assessments after the final August 10, 2018 IEP team meeting is the earliest reference in the record to any member of Student's 2018 IEP team reviewing his most recent assessments.

43. The team reviewed placement options for Student, including placement in: (i) a general education classroom; (ii) a new co-teaching program for daily living skills, developed by Ms. Kakonde in collaboration with the general education department at Rio Norte, that provided mainstreaming opportunities at recess, lunch, and in a special day class that included general education students assisting special education students; (iii) a moderate to severe special day class for the entire school day; and (iv) a non-public school. Ultimately, all the team members, including Parent, determined Student, who had previously been in a special education environment 100 percent of the school day, was ready for the less restrictive environment of the daily living skills program on a comprehensive campus. Students in the daily living skills program mainstreamed with general education students for a third of the school day, at recess, lunch, and in a general education PE class. They received special education for two-thirds of the school day, in a moderate-severe special day class on the campus, an integrated classroom that incorporated the participation of general education students.

44. In the August 10, 2018 IEP, Hart's FAPE offer to Student, from August 16, 2018 until April 16, 2019 (the date of Student's next annual IEP), consisted of placement in the daily living skills moderate to severe special day class taught by Ms. Kakonde on the comprehensive Rio Norte campus for two-thirds of his school day, and mainstreaming

with general education students one-third of the school day during recess, lunch, and PE. The offer left Student's goals, modifications, accommodations, and transportation unchanged from Student's April 17, 2018 IEP, as amended May 1, 2018. Existing support services of a one-on-one aide, speech and language, and occupational therapy also remained unchanged except that the services now were to be provided by Hart instead of a non-public school.

45. Student's previous IEP's offered 240 minutes per month behavior intervention services from a non-public school through April 17, 2019. The August 10, 2018 IEP changed the offer of behavior intervention services by changing the end date to August 10, 2018, effectively terminating the services as of the date of the IEP. The existing behavior intervention plan was not changed. The IEP itself does not explain the apparent termination of the behavior intervention services, and no other evidence was offered.

46. Hart's August 10, 2018 IEP FAPE offer also contained confusing duplicative offers of full-time specialized academic instruction, speech and language services, and occupational therapy, from a non-public school, from April 17, 2018, until April 16, 2019.

47. Parent consented in writing to all provisions of the August 10, 2018 amendment IEP on August 10, 2018.

Withdrawal Of Consent To One-On-One Aide

48. In the fall of 2018, Parent became increasingly dissatisfied with Student's one-on-one aide. Parent felt the aide acted rudely towards her by refusing to speak to her or answer questions about Student, and failed to stay close enough to Student to ensure he was safe during pick-up and drop-off times.

49. On January 10, 2019, Parent revoked consent to the service of a one-on-one aide for Student. Believing Student required a one-to-one aide in order to access his education and receive a FAPE, and that it was unsafe for Student and others for him to attend school without a one-on-one aide, Hart filed this action.

50. At hearing, Parent testified she had no objection to any provision of Student's IEP. She agreed Student required a one-on-one aide as part of his individualized education program. Parent's sole objection to Student's IEP was to the particular one-on-one aide provided by Hart to implement that service.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA

1. This hearing was held under the Individuals with Disabilities Education Act), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)² et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment 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 individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34

² All citations to the Code of Federal Regulations refer to the 2006 edition, unless otherwise noted.

C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

4. The Supreme Court clarified the *Rowley* standard in *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ___, 137 S.Ct. 988, 1000-1001 (*Endrew F.*). It explained *Rowley* held 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.) As applied to a student 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. (*Endrew F., supra*, 137

S.Ct. at p. 1001.) The Court noted that “[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” (*Id.* at p. 999 [italics in original].)

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); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62.) In this case, Hart, as the complaining party, bears the burden of proof.

PROCEDURAL AND SUBSTANTIVE REQUIREMENTS

6. When, as in this case, the parents of a child receiving special education refuse to consent to the implementation of an IEP component that the district believes is necessary to provide FAPE to their child, the IDEA and Education Code do not provide the district a way to obtain a limited decision that the particular component at issue is necessary, and may be implemented without the parents’ consent. Instead, Education Code section 56346 requires the district to prove that its IEP, in its entirety, with all its components, offered the child a FAPE. Section 56346 requires the District to: (i) provide prior written notice pursuant to Education Code section 56500.4 before ceasing to provide the component no longer consented-to (Ed. Code, § 56346, subd. (d)(1)); (ii) continue to implement any components of the program to which the parent has

consented (Ed. Code, § 56346, subd. (e)); and (iii) expeditiously initiate a due process hearing “in accordance with Section 1415(f) of Title 20 of the United States Code.” (Ed. Code, § 56346, subd. (f); (*E.N. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1169).

7. Section 1415(f)(3)(E)(i)-(iii) sets forth requirements for the hearing officer’s decision, and thereby a district’s burden of proof. Section 1415(f)(3)(E)(i) provides, “a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.” A determination that one or more components of an IEP were necessary to provide a FAPE would not satisfy this requirement – the district must prove the IEP, in its entirety, offered a FAPE. Section 1415(f)(3)(E)(ii) provides, “In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies: (I) impeded the child's right to a free appropriate public education; (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or (III) caused a deprivation of educational benefits.” This provision does not apply in district-filed cases seeking a determination that the district’s IEP offered the student a FAPE, as such cases do not “allege a procedural violation.” Section 1415(f)(3)(E)(iii) makes clear that a hearing officer may order a district to comply with IDEA procedures, even if the procedural inadequacies at issue would not qualify as FAPE denials under Section 1415(f)(3)(E)(ii). It states, “Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.”

8. There are two parts to a school district’s proof it complied with the IDEA in developing a Student’s IEP. First, the district must prove it complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the district must prove the IEP developed through those procedures was designed to meet the child’s

unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

10. An IEP is evaluated in light of information available to the district when it developed the IEP; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Id.*, citing *Fuhrmann v. East Hanover Board of Education, supra*, 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

11. Procedural compliance is closely scrutinized. "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation" at every step "as it did upon the measurement of the resulting IEP." *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1485 (quoting *Rowley, supra*, 458 U.S. at pp. 205–06.)

12. A district's determination of whether a child has a disability, and the educational needs of the child, must be made by an IEP team consisting of a team of qualified professionals and the parent of the child. (20 U.S.C. § 1414(b)(4)(A).) The IDEA and Education Code require that certain individuals attend every IEP team meeting, including: (i) the parent of the child; (ii) not less than one regular education teacher of the child, if the child is or may be participating in the regular education environment; (iii) not less than one special education teacher, or where appropriate, not less than one special education provider of the child; (iv) a representative of the school district who is knowledgeable about the availability of the resources the district, is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum; (v) an individual who can interpret the instructional implications of evaluation results; (vi) at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (vii) whenever appropriate, the child with a disability. (20 U.S.C. § 1414 (d)(l)(B); Ed. Code, § 56341, subd. (b)(1)-(7).)

13. A required member of the IEP team may only be excused from attending an IEP team meeting if: (i) the parent agrees in writing with the district that the team member's attendance is not necessary, because the member's area of the curriculum or related services is not being modified or discussed in the meeting; or (ii) if the meeting involves a modification to, or discussion of, the member's area of the curriculum or related services, the team member may be excused if the parent consents in writing to the excusal, and the team member, prior to the meeting, provides parent and the IEP team written input into the development of the IEP. (20 U.S.C. § 1414 (d)1(C); Ed. Code, § 56341, subd. (f)-(h).) The student-filed case *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, is instructive. In *M.L.*, an autistic student's IEP team met without a general education teacher, to consider placement options for the student that included an integrated classroom attended by both special needs and general education students. The district argued it had not violated the procedural requirements of the IDEA because three attending members of the IEP team had significant teaching experience. (*Id.* at p. 642.) In a plurality opinion, all members of the three-judge panel rejected the contention that team members with significant teaching experience could stand in for the required regular general education teacher, and found a procedural violation. (*Id.* at pp. 642, 651, 658.)

14. In developing a child's IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

15. An IEP must be in writing, and include: (i) a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; (ii) a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability

to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.); (iii) a statement of how the child's goals will be measured (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3)); (iv) a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4)); (v) a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).)

16. The IEP's written offer of placement, services, modifications and accommodations must be clear and understandable. *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526, cert. den., 513 U.S. 965 (*Union*). This requirement "should be enforced rigorously" as it creates a clear record to help eliminate factual disputes, and assist parents in presenting complaints. (*Union, supra*, 15 F.3d at p. 1526. See also, *S.H. v. Mount Diablo Unified School Dist.*, (N.D. Cal. 2017) 263 F. Supp. 3d 746, 762; *Glendale Unified School Dist. v. Almasi*, (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1108 (IEP must present "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal.").)

17. The assessments used to develop the IEP must evaluate all areas of disability known or suspected at the time of the IEP, and must have been conducted appropriately. (20 U.S.C. § 1414(a)(2) & (b); Ed. Code, § 56381, subd. (b); *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1121–1122 ("*Timothy O.*"). Informal observations or subjective opinions are insufficient bases for developing an IEP. (*Timothy O, supra*, at pp. 1118-1119.) The IDEA requires a formal assessment, conducted in a way that (1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent;

(2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and (3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessment must be: (1) selected and administered so as not to be discriminatory on a racial or cultural basis; (2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (3) used for purposes for which the assessment is valid and reliable; (4) administered by trained and knowledgeable personnel; and (5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).) No single measure, such as a single intelligence quotient, may be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

18. Without appropriate assessments, an IEP team lacks critical evaluative information necessary to provide a FAPE. The lack of information makes it impossible for the team to consider and recommend appropriate services, deprives the student of critical educational opportunities, and substantially impairs the parents' ability to fully participate in the collaborative IEP process. (*Timothy O., supra*, at p. 1119.)

19. Hart contends its April 17, 2018 IEP, as amended August 10, 2018, offered Student a FAPE in the least restrictive environment appropriate for Student. Parent does not object to Student's IEP except to the extent Parent withdrew her consent to the related service of a one-on-one aide based on her objections to the particular one-on-one aide assigned to implement the related service.

20. Hart did not meet its burden of establishing that its April 17, 2018 IEP, as amended, met procedural requirements. First, Hart failed to follow IDEA and Education Code procedures in developing the IEP offer, by failing to include a general education teacher at any of the four IEP team meetings on April 17, 2018, May 1, 2018, July 2, 2018, and August 10, 2018. Two of Student's IEP team meetings required such participation:

Student's April 17, 2018, and August 10, 2018 IEP team meetings at which the IEP team discussed possible placement of Student in a general education environment. The August 10, 2018 IEP team meeting, in particular, was specifically convened to discuss Student's placement, including placement in a general education classroom or in a program on comprehensive campus with significant mainstreaming in the general education environment. At that meeting, Student's educational program was changed from 100 percent of his school day in a special education environment to 33 percent of his school day mainstreaming with general education Students, and 67 percent of his day in an integrated special day classroom that incorporated the participation of general education students. No general education teacher attended the August 10, 2018 meeting, or provided Parent and the IEP team written input into the development of Student's IEP. The Education Code does not allow for the excusal of this procedural violation on grounds that participating members of the IEP team such as Ms. Dos Remedios, or Ms. Kakonde, were sufficiently knowledgeable regarding opportunities for Student to participate in a general education environment to stand in for the required general education teacher.

21. Second, Hart failed to include a school psychologist at Student's April 17, 2018 IEP team meeting, the meeting at which Student's IEP team considered his psychoeducational needs and goals, as well as his placement, program modifications, accommodations, and services. Parent did not consent to the excusal of this required IEP team member. The legal requirements for assessments emphasize the critical nature of the information they contain, and demonstrate the need for an IEP team to review all assessments, but especially a complicated, multi-part assessment such as Student's psychoeducational assessment, with the help of a team member with the particular expertise required to evaluate and interpret the assessment and explain the instructional implications of the assessment results to the IEP team and Parents. Here, the 2017

psychoeducational report stated that the results of the Behavior Assessment System for Children and the Conners rating scales identified several critical items and areas of concern, but it did not discuss those areas of concern or include those rating scales. It also did not discuss or include the Brigance assessment. While the appropriateness of the assessments conducted by the Academy is not directly at issue in this hearing, the fact that the 2017 psychoeducational report in evidence was missing test results and rating scales that identified several critical items and areas of concern further highlights the need for a school psychologist to assist the team's discussions.³

22. Third, Hart ultimately did not prove Student's IEP team considered any of his 2017 assessments at all in developing his IEP. Student's IEP team determined Student's unique needs, goals, and services at his April 17, 2018 IEP team meeting, and these did not change in subsequent addendum IEP's, except for the August 10, 2018 IEP's change of service provider from non-public school to Hart, and duplication of services in that IEP. No evidence was presented that Student's April 17, 2018 IEP team considered his 2017 occupational therapy, speech and language, or psychoeducational assessments. Instead, the evidence from the August 10, 2018 IEP team meeting notes is that Ms. Amrhein brought copies of Student's 2017 assessments to that final IEP team meeting, for school psychologist Ms. Betty to review, for the first time, after the meeting. Ms. Betty, occupational therapist Mr. Micciche, and speech and language pathologist Ms. Casady testified that their post-IEP reviews of the 2017 assessments confirmed that Student's unique needs identified by the April 17, 2018 IEP team, and the goals, placement and

³ Although a school psychologist attended the August 10, 2018 IEP team meeting, there was no evidence the psychologist reviewed Student's most recent psychoeducational assessment, from 2017, with the team, or that the team discussed or considered the assessment.

services developed by the team, were consistent with the results of the 2017 assessments. However, Hart does not argue that this after-the-fact review cured the procedural inadequacy of Student's IEP team's failure to consider the assessments while developing Student's IEP.

23. Finally, Hart failed to provide a clear, written offer of placement, services, modifications and accommodations in the final August 10, 2018 IEP. That IEP contained confusing duplicative offers of full-time specialized academic instruction, speech and language services, and occupational therapy, from both Hart and a non-public school, from April 17, 2018, until April 16, 2019. More critically, it retained Student's behavior intervention plan but appeared to terminate his behavior services by changing the end date to August 10, 2018, effectively terminating the services as of the date of the IEP. The IEP did not present "a clear, coherent offer which [a parent] reasonably could evaluate."

24. It may be true, as Hart contends, that Student's educational program, as implemented, was not merely appropriate, but exceptional. However, the legal appropriateness of an IEP offer is determined as of the time it was developed, based on how it was developed, rather than by the quality of the program when implemented. An IEP offer that leads to an exceptional program in practice can only be found to have offered a student a FAPE if the district complied with IDEA and Education Code procedures in developing the offer, and if the offer was reasonably calculated to provide the student a FAPE based on the information available to the district when it developed the offer.

25. As a result of the substantial procedural inadequacies described above, Hart failed to prove that Student's April 17, 2018 IEP as amended on October 10, 2018, was reasonably calculated to enable Student to receive educational benefit when his IEP was developed. Consequently, Hart failed to prove it offered Student a FAPE in the April 17, 2018 IEP, as amended on October 10, 2018.

ORDER

Hart's request for relief is denied.

PREVAILING PARTY

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

RIGHT TO APPEAL

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

DATED: March 22, 2019

/s/

ROBERT G. MARTIN

Administrative Law Judge

Office of Administrative Hearings