BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2019050382

PARENT ON BEHALF OF STUDENT,

v.

MT. DIABLO UNIFIED SCHOOL DISTRICT.

DECISION

OCTOBER 3, 2019

On May 7, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parent on behalf of Student, naming Mt. Diablo Unified School District as respondent. Administrative Law Judge Charles Marson heard this matter in Concord, California, on August 20 and 21, 2019.

Student's Mother represented Student. Student did not attend the hearing. Attorney Deborah U. Ettinger represented Mt. Diablo. Administrator of Dispute Resolution William Bryan Cassin attended all hearing days on respondent's behalf.

At the parties' request the matter was continued until September 10, 2019, for written closing briefs. The briefs were timely filed, the record closed, and the matter submitted on September 10, 2019.

ISSUES

Did Mt. Diablo deny Student a free appropriate public education from May 7,

2017, through the 2018-2019 school year by:

1. failing to provide her safe and adequate transportation to and from school; specifically, by failing to transport her directly to and from home by the shortest route and without the presence of other students who might manifest aggressive or sexual behavior;

2. failing to provide her a one-to-one aide; and

3. failing to provide her a private school placement?

DECISION SUMMARY

This Decision holds that Student did not meet her burden of proving that Mt. Diablo's offer to transport her to and from school on a special education bus was unreasonable, unsafe or unlawful. It also holds that Student did not prove that she needed a one-to-one aide in her general education setting. Finally, it holds that Student did not prove she needed a private placement.

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006); Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the "IDEA," are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

FACTUAL FINDINGS AND LEGAL CONCLUSIONS

Student was 16 years old and a junior in high school at the time of hearing. At all relevant times she resided within Mt. Diablo's geographic boundaries and attended Mt. Diablo's Northgate High School, a comprehensive high school campus having about 1700 students. Student was eligible for special education and related services in the category of Other Health Impaired due primarily to anxiety and depression. Student also had an anatomic abnormality, called Virchow-Robin-Space syndrome, which affected the perivascular canals in her brain, and had been diagnosed with asthma, excoriation disorder and seizure disorder. Student had been in general education classes while at Northgate except for one hour a day in Academic Success, a resource class. Since 2017 she had also been receiving mental health therapy from a Contra Costa County therapist once a week.

Student's individualized education program, called an IEP, provided for transporting her from home to school and back. In both the school years examined here, Mt. Diablo offered to transport Student from door to door in a special education bus. Mother declined the offer and drove Student to and from school herself. Mother requested that Mt. Diablo transport Student to school alone, or only with other students with no serious behavioral histories. She also sought a one-to-one aide for Student in classes and on the campus. Last year Mother also requested that Mt. Diablo place Student at Futures Academy in Walnut Creek or a similar private school. Mt. Diablo declined those requests as unnecessary.

ISSUE 1: DID MT. DIABLO DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION FROM MAY 7, 2017, THROUGH THE 2018-2019 SCHOOL YEAR BY FAILING TO PROVIDE HER SAFE AND ADEQUATE TRANSPORTATION TO AND FROM SCHOOL; SPECIFICALLY, BY FAILING TO TRANSPORT HER DIRECTLY TO AND FROM HOME BY THE SHORTEST ROUTE AND WITHOUT THE PRESENCE OF OTHER STUDENTS WHO MIGHT MANIFEST AGGRESSIVE OR SEXUAL BEHAVIOR?

Student contends that Mt. Diablo's offer to transport her to and from school in a special education bus denied her a free appropriate public education, referred to as a FAPE, because the other students on the bus might injure her either by violence or sexualized behavior, because one particularly threatening student might be on the bus, because the bus ride would take too much time, and because Student might have a seizure on the bus that could not properly be addressed.

Mt. Diablo contends that the proposed bus transportation would be reasonably safe, that the allegedly threatening student might or might not be on the bus, that the driver is trained in any event to deal with any disturbances that might arise, that the bus ride is not too long, and that any seizure Student might have could be adequately addressed.

A FAPE means special education and related services that are available to an eligible child, that meet state educational standards and are provided at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14) and (26), 1414(d)(1)(A); 34 C.F.R. §§ 300.17, 300.34, 300.39 (2006); Ed. Code, §§ 56031, 56032, 56345, subd. (a) and 56363 subd. (a); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make

progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central Sch. District v. Rowley* (1982) 458 U.S. 176, 206-207 [102 S.Ct. 3034]; *Endrew F. v. Douglas County Sch. Dist.* (2017) 580 U.S. ____ [137 S.Ct. 988, 999]; *E.F. v. Newport Mesa Unified Sch. Dist.* (9th Cir. 2018) 726 Fed.Appx. 535, 537 [nonpub. opn].) In California, related services are also called designated instruction and services. (Ed. Code, § 56363, subd. (a).)

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, assessment, 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 (2006); 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. §1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528]; see also 20 U.S.C. §1415(i)(2)(C)(iii).)

Transportation provided as a related service must be reasonably safe. A school district that transports a student has a duty to exercise reasonable care under the circumstances. (Ed. Code, § 44808; *Eric M. v. Cajon Valley Union Sch. Dist.* (2009) 174 Cal.App.4th 285, 293; *Farley v. El Tejon Unified Sch. Dist*. (1990) 225 Cal.App.3d 371, 376.) However, the IDEA requires transportation of a disabled child only to address her educational needs, not to accommodate a parent's convenience or preference. (*Fick v. Sioux Falls Sch. Dist.* 49-5 (8th Cir. 2003) 337 F.3d 968, 970; *S.K. v. North Allegheny Sch. Dist*. (W.D.Pa. 2015) 146 F.Supp.3d 700, 712-714.)

The Proposed Bus Transportation

Student's home was on the rural outskirts of Clayton, slightly over 9 miles from Northgate. Mother drove Student to and from school during the last two school years.

She testified that even a direct trip by car took 45 to 50 minutes "on a good day," and more on a bad day because of traffic. The special education bus offered by Mt. Diablo would transport Student and approximately 9 other students entitled to transportation by their IEP's. The one-way trip would take an hour, or slightly more than an hour, depending on traffic. The only adult on the bus would be the driver.

Mother's Concerns for Student's Safety

Dr. M. Wycoff-Montenegro, Student's psychiatrist, wrote two letters related to transportation that Mother gave to Student's IEP team. Mt. Diablo members of the IEP team considered Dr. Wycoff-Montenegro's advice. Dr. Wycoff-Montenegro recommended in part that "the school bus should be a safe environment where there is no violence or inappropriate sexual behavior," and "there should be no violence or inappropriate sexual activity on the bus." These statements were not controversial, but Mother exaggerated them to Mt. Diablo and at hearing, claiming that they meant that any special education student who might engage in such behaviors must be removed from the bus before her daughter rides on it. Mother's test for telling which children must be removed was whether they had behavior intervention plans in their IEP's. If they did, according to Mother, they could not be on the same bus as Student.

Mother therefore insisted that Mt. Diablo transport Student either alone, by a car service such as Hop, Skip and Drive with 2 or 3 other students, or on a bus, but in no case with any special education students whose IEP's contained behavior intervention plans. Citing confidentiality laws, Mt. Diablo declined Mother's requests to know the identities of the other students on the bus or whether they had behavior intervention plans.

Mother also declined Mt. Diablo's bus offer due to the possible presence on the bus of a particular student. She testified that in October 2016, while she was an employee of Mt. Diablo, she was sexually assaulted in a classroom by a student

described at hearing as Student X. Mt. Diablo ordered her not to report the event to the police, but she did so anyway. Mt. Diablo then fired her for violating laws relating to Student confidentiality. At the time of hearing, Mother was suing Mt. Diablo for wrongful termination and other issues in the Contra Costa Superior Court. That matter is not yet set for trial. Mt. Diablo vigorously contests Mother's version of these events.

Mother testified that Nadia Visaya, a Mt. Diablo program specialist who had attended Student's IEP team meetings and was familiar with him, told her Student X would be on the bus with Student. Ms. Visaya testified she did not tell Mother that, but said instead that she could not say whether Student X would be on the bus or not. She explained to Mother that confidentiality laws prevented her from identifying the other students who would be on the bus and from telling her whether their IEP's contained behavior intervention plans.

Mother also asked Ms. Visaya about the route the bus would take and where it would stop, and Mr. Visaya was able to give her a rough map of the route, but declined to give her the addresses of the other students to be picked up for the same reasons of confidentiality.

Mother has never allowed Student to ride Mt. Diablo's special education bus. Her concerns about violence and sexualized behavior are based solely on her perceived experiences in other school districts and on hearsay from an unidentified bus driver with whom she spoke in 2017. No evidence was admitted at hearing that would show that students with behavior intervention plans had been violent on Mt. Diablo's special education busses, or had engaged in significant sexually suggestive or offensive behavior.

There was also no evidence that the bus driver would have been unable to deal with such behavior if it had occurred. Each bus was equipped with a video camera. Mt. Diablo's special education bus drivers were trained in first aid, in the 13 disabilities

addressed by the IDEA, and in a crisis prevention program called CPI, sponsored by the Crisis Prevention Institute, which included behavioral management techniques. The drivers received additional training every year and were re-certified annually. Among other methods, if a student continued to act out, drivers were trained to pull over in a safe place, remove the student from the bus and arrange for separate transportation for that student. In addition, Mother and the IEP team had agreed that Student would be allowed to sit alone in the front of the bus next to the driver.

Student occasionally had seizures for one to two minutes that resembled fainting. The most recent one was in December 2018. Mt. Diablo and Student's doctor executed a seizure action plan that provided for first aid in the event of a seizure, and if necessary for sending Student to an emergency room. There was no evidence Student has had a seizure going to or coming home from school.

These facts did not support Student's argument that Mt. Diablo's offered transportation would have been unsafe. A speculative fear that Student would suffer from riding the special education bus is not proof that an offer of transportation denies a student a FAPE. (*DeLeon v. Susquehanna Community Sch. Dist*. (3d Cir. 1984) 747 F.2d 149, 150; *Choruby v. Northwest Regional Educ. Service Dist.* (D.Ore, January 14, 2002, Civ. 01–54–JE) 2002 WL 32784016, p. 10 [nonpub. opn.].)

Nor is Mother's fear that Student X might ride the same bus sufficient to render the offer unreasonable or unsafe. Since Mother showed in her dealings with Mt. Diablo and at hearing that she was given to exaggeration, and since Ms. Visaya was careful to comply with confidentiality laws with respect to the other students to be picked up, Ms. Visaya's memory of their conversation was more credible. Ms. Visaya told Mother she could not say whether Student X would be on the bus or not. In addition, Student X's alleged unpleasant history was with Mother, not Student.

Student asserts that her IEP team was required to follow Dr.

Wycoff-Montenegro's advice about the bus, and was required to reach out to contact Dr. Wycoff-Montenegro or to pay for her to attend IEP team meetings if it had any questions about her advice. However, the law requires only that the IEP team "consider" such outside recommendations, not that they must be adopted or must be investigated by the school district. (34 C.F.R. § 300.324(a)(1) (2017), 300.502(c)(1) (2006); Ed. Code, § 56341.1, subds. (a), (d)(3); 56381, subd. (b).) The IEP team did consider the doctor's opinions.

Student also faults the IEP team for not informing Mother in meetings that the option of transportation by the car service Hop, Skip and Drive was available. Student cites no law that would require such a disclosure. A school district, as part of a special education local plan area, must have available a "continuum of alternative placements" to meet an eligible student's needs for special education and related services. (34 C.F.R. § 300.115(a) (2017); see also Ed. Code, § 56360.) The use of a particular hired car company is not an alternative placement, and even if it were, Mt. Diablo's obligation is to have that continuum available, not to discuss every option on the continuum at every IEP team meeting. (*M.H. v. Pelham Union Free Sch. Dist.* (S.D.N.Y. 2016) 168 F.Supp.3d 667, 678; *T.G. v. New York City Dept. of Educ*. (S.D.N.Y. 2013) 973 F.Supp.2d 320, 341.) Mt. Diablo was under no obligation to identify or discuss use of a particular car company at an IEP team meeting, and although Mother may not have been aware of Hop, Skip and Drive at the time of the meetings, she was likely aware in general of the availability of hired cars and taxis.

Length of the Bus Trip

Dr. Wycoff-Montenegro's letters also recommended that Student's bus trip be no longer than an hour, and Mother rejected use of the bus in part because the trip might be somewhat over an hour each way.

The prospect of a bus trip of that length did not render Mt. Diablo's offer

unreasonable. A small increase in travel time does not demonstrate a denial of FAPE. (*DeLeon v. Susquehanna Community Sch. Dist., supra,* 747 F.2d at pp. 152, 154 (increase of trip length from 40-50 minutes to 60-70 minutes by replacing parental driving with school bus not shown to be detrimental to student's education).)

Mother and Student lived in a rural area far enough from the school that the length of the bus trip would primarily be the consequence of geography and traffic, which would affect any transportation plan. ALJ's and agencies have upheld bus trips of well over an hour when circumstances have required it. (See, e.g., *Murrieta Valley Unified Sch. Dist. v. Parents* (OAH, Sept. 23, 2016, No. 2016080027) (90 minutes); *Vista Unified Sch. Dist. v. Parents* (OAH, Nov. 25, 2014, No. 2014051236) (same); *Parents v. Oceanside Unified Sch. Dist.* (OAH, March 5, 2012, No. 2011120626) (90 minutes to school, 2 hours home); *Alpine (UT) Sch. Dist.* (OCR 1991) 18 IDELR 861 (90 minutes).)

Dr. Wycoff-Montenegro's reasons for recommending that the bus trip take no more than an hour each way are unknown. Dr. Wycoff-Montenegro did not appear at any IEP team meeting, nor did she testify as a witness. There was no evidence she attempted to contact anyone at Mt. Diablo to learn anything about Student's situation. Nor was there any evidence that Dr. Wycoff-Montenegro had any expertise in educational matters or any knowledge of the conditions of Mt. Diablo's proposed bus transportation of Student. It has been observed that "[a]n expert's opinion is only as good as the facts on which it is built." (*Shiffer v CBS Corp.* (2015) 240 Cal.App.4th 246, 352, citations omitted.) Because Mt. Diablo members of the IEP team had no information about the bases for Dr. Wycoff-Montenegro's opinion, or about her factual assumptions, experience or insight, they were reasonable in declining to follow her suggestions about bus transportation.

Mother's Concerns about a Seizure

No other witness supported Mother's concerns that Student might have a seizure

on the bus that the driver might not notice in time. This fear too was speculative. Any form of transportation for Student poses that potential risk, including Mother's driving of Student or a trip in a hired car. On a large campus like Northgate there will always be times when staff cannot immediately respond to signs of seizure, yet the evidence did not show that Student's seizure action plan had been inadequate to deal with these dangers. Mother did not criticize the seizure action plan at hearing, and there was no evidence it was not working as designed.

Mother's Reimbursement Claim

Mother argues she is entitled to reimbursement for mileage for driving Student to and from school during the 2017-2018 school year on a separate theory. For reasons not in the record, in September 2018 the California Department of Education ordered Mt. Diablo to reimburse Mother for mileage for the 2017-2018 school year. Mt. Diablo did reimburse Mother for that mileage in the amount of $1,353.54, using the rate set by the Internal Revenue Service. The Department of Education accepted that payment as full compliance. Mother asserts that amount was insufficient to defray her actual expenses.

This issue will be decided here only as it pertains to the IDEA. Mother had no entitlement to any mileage reimbursement for the school year 2017-2018 under the IDEA, because Mt. Diablo's offer of the school bus was reasonable and lawful. Whether Mother is entitled to additional reimbursement because of an order of the California Department of Education is beyond the scope of this Decision. The issue here is whether she was entitled to mileage reimbursement under the IDEA and related laws, and she was not. Mother's choice not to accept Mt. Diablo's lawful offer to bus Student placed the burden and cost of an alternative method of transportation on her, not Mt. Diablo.

Student did not prove that the bus transportation proposed by Mt. Diablo was unreasonably unsafe or likely to lead to Student's physical or psychic injury. Student also

did not prove that the bus ride would be so long it would interfere with her education, or that it would endanger her in the event of a seizure. The bus offer did not deny Student a FAPE.

ISSUE 2: DID MT. DIABLO DENY STUDENT A FAPE FROM MAY 7, 2017, THROUGH THE 2018-2019 SCHOOL YEAR BY FAILING TO PROVIDE HER A ONE-TO-ONE AIDE?

Student contends that she should have been provided a one-to-one aide in class and on the campus to assist her in her academic work, and to protect her from bullies. Mt. Diablo argues that such an aide was unnecessary and might have led to embarrassment and undue dependence on the aide.

A district must provide an aide as a related service for a special education student if the aide "may be required to assist [the child] to benefit from special education." (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) "[O]nly those services necessary to aid a handicapped child to benefit from special education must be provided . . ." (*Irving Independent Sch. Dist. v. Tatro* (1984) 468 U.S. 883, 894.)

Student had deficits in executive functioning which affected her academic work. She had difficulty listening to a lecture and taking notes on it at the same time, and difficulty with planning and organization. The record includes a February 2019 independent neuropsychological assessment by Dr. Nicolle Ionescu, a clinical neuropsychologist associated with the University of California's Benioff Children's Hospital in Oakland. Dr. Ionescu tested Student's executive functioning and reported that Student showed "mild cognitive decline in the areas of complex executive functioning and memory." Generally, however, Dr. Ionescu's testing led her to conclude that Student's overall processing speed performance was "typical for her age" and her working memory was "similar to other children her age . . ." Dr. Ionescu recommended several accommodations for executive functioning, but an aide was not among them.

The record also includes a March 2019 psychoeducational assessment conducted

by Mary Tsuboi, a Mt. Diablo school psychologist, in conjunction with Student's triennial review. Ms. Tsuboi's assessment generally agreed with Dr. Ionescu's. Ms. Tsuboi administered the Comprehensive Test of Nonverbal Intelligence-2, which showed that Student's overall cognitive skills were in the average range and produced a full scale score of 93, which was in the 55th percentile among her peers. That was consistent with Dr. Ionescu's report that, on her testing, Student achieved a full scale IQ of 98. Both assessments concluded from standardized testing and record review that Student's skills and abilities were mostly in the average range. Ms. Tsuboi also recommended several accommodations for executive functioning, but did not recommend an aide.

Student was sometimes bullied in her freshman year by other girls on the campus and in the bathrooms. No evidence at hearing established the nature, frequency or severity of the bullying, or the effectiveness of any response to it by Mt. Diablo. In the spring of that school year, Mother testified, she enrolled Student "for her safety" in the John Muir Adolescent Outpatient Program. The program's documents state she was enrolled there due to negative experiences at school "exacerbating [Student's] psychiatric symptoms." Student was discharged from that program in early summer and pronounced ready to attend Northgate again.

In August and September 2018, Student's IEP team met to plan Student's transition back to Northgate. It agreed to continue Student's once-a-week therapy through the County. It also discussed providing a one-to-one aide for a period of 30 days to assist Student in her transition, but an aide was not immediately available. Mother decided to return Student to school anyway, and in the 30-day transition period, Student was quite successful without an aide. At an IEP team meeting in October 2019 at the end of the 30-day period, Student's teachers reported that she was earning all A's and B's and "doing well" in class.

The alleged bullying did not recur in Student's sophomore year. The notes from

the triennial meeting in March 2019 stated that there had been no bullying in the current year and that Mother "confirmed that this is correct." At the same meeting, Student's County therapist confirmed that Student was not complaining to her of bullying. Student still avoided being in a bathroom with other girls, so Mt. Diablo allowed her to use single-stall facilities such as those reserved for staff.

Mt. Diablo has addressed Student's executive functioning deficits in a variety of ways, none of which is directly challenged here. The last IEP to which Mother consented provided Student numerous accommodations including copies of class notes, checks for understanding, chunking of information, preferential seating, a weekly planner check, a weekly binder check with assistance in organizing it, breaks as needed, the option to type notes, testing in an alternative setting, double the usual time for testing, use of class notes on quizzes and tests, shortened quizzes, shortened assignments, repeating and rephrasing test instructions, additional time for assignments, and reduction of homework. It also provided goals in the areas of asking for help and studying for tests.

At the triennial review in March 2019, Mother asked Mt. Diablo to provide Student a one-to-one aide, primarily as a scribe and note-taker. The Mt. Diablo members of the IEP team opposed the request, fearing that at Student's age she would be embarrassed in front of her peers by having an adult follow her around on the campus and hover over her, and that she might become overly dependent on the aide. They proposed instead a technological solution for Student's note-taking problems called an Echo Pen, which both records lectures and transcribes them. The triennial IEP team referred that proposal to assistive technology staff for consideration. There was no evidence at hearing that the Echo Pen would not be effective in helping Student listen to a lecture and produce notes at the same time.

Student has been achieving academically at or above the level her cognitive capacities would forecast. Ms. Tsuboi reported that "During 9th and 10th grades, except

for two below average grades in 9th grade, [Student] has received average to above average semester grades in all subject areas." Student's transcript confirms that statement. Throughout her time at Northgate, aside from the two low scores in her first semester, Student has earned all A's, B's, and C's. Her program specialist stated that she does grade level work, and her teachers stated that she works well in groups and has friends.

The evidence did not show that a one-to-one aide was necessary for Student to benefit from her special education. The Mt. Diablo educators who testified uniformly believed that Student did not need an aide. No educator testified that she did; the only professional support for providing an aide came in a letter from Dr. Wycoff-Montenegro, who stated only that an aide would be "very helpful." That may be true, but it does not establish that Mt. Diablo denied Student a FAPE by declining to provide one. Because Dr. Wycoff-Montenegro neither explained her opinion nor appeared at IEP team meetings or at hearing, the bases for her opinion could not be known. Dr. Wycoff-Montenegro had never observed Student in class or contacted anyone at the school to learn about Student's needs. The IEP team could not conclude from Dr. Wycoff-Montenegro's letter alone that she had a well-informed or balanced view of Student's needs at school.

The Mt. Diablo members of the IEP team considered Dr. Wycoff-Montenegro's suggestion of an aide, but were reasonable in deciding not to agree with it. Their views that the aide might embarrass Student and lead to undue dependence were reasonable educational judgments, and there was no evidence at hearing that called those views into question.

Without an aide, Student has been benefiting from her special education by accessing the curriculum and advancing from grade to grade. Bullying is not significantly interfering with her education. Student aspires to graduate with a diploma and attend a

community college, and later to move to a four-year university to study veterinary practice. She is on track to achieve at least the first two of those goals; she will graduate with a diploma and her grades support admission to a community college.

Contrary to Student's contention, the IDEA did not require Mt. Diablo to provide her an aide so that she could improve her grades and go directly from high school to a four-year university. In *Board of Education v. Rowley, supra,* 458 U.S. 176, the Supreme Court expressly rejected the argument that the IDEA requires a school district to "maximize the potential" of each special needs child. (*Id.* at p. 200.) The IDEA "guarantees . . . an education that is appropriate, not one that provides everything that might be thought desirable by loving parents." (*Tucker v. Bayshore Union Free Sch. Dist.* (2d Cir. 1989) 873 F.2d 564, 567 (citation and internal quotation marks omitted).)

Student did not prove she needed a one-to-one aide to benefit from special education or to obtain a FAPE.

ISSUE 3: DID MT. DIABLO DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION FROM MAY 7, 2017, THROUGH THE 2018-2019 SCHOOL YEAR BY FAILING TO PROVIDE HER A PRIVATE SCHOOL PLACEMENT?

Student argues that Mt. Diablo must place her at a private school for disabled children, such as the Futures Academy in Walnut Creek, for two reasons. The first is that Student needs a private school to succeed academically and be protected from bullies. The second is that such a placement would relieve Mother and Student of the consequences of Mother's broken relationship with Student's IEP team and Mt. Diablo.

The first argument is unpersuasive because Student's academic achievement is satisfactory and the bullying has stopped. There was no evidence at hearing beyond Mother's testimony that Student needs to be privately placed for academic reasons or to avoid bullying. Aside from a conclusory phrase in a letter from Dr. Wycoff-Montenegro stating that if Student's current placement fails, she "may" need a

private school, no professional opined that such a placement was appropriate for Student.

Student's other argument is that Mother and Mt. Diablo have such a contentious relationship that she has no faith that together they can devise an adequate program for Student. Mother has numerous disputes with Mt. Diablo. She has filed at least one civil lawsuit against Mt. Diablo and a number of its special education staff members concerning her firing, and perhaps another making allegations under Title IX of the Education Amendments Act. She has repeatedly filed complaints with the California Department of Education, and has also complained about specific teachers to the Commission on Teacher Credentialing. Mother is convinced that Student's program is inadequate because Student has become a "target" of retaliation for Mother's actions, and that the Mt. Diablo's unwillingness to change its transportation offer or to provide an aide or a private school is based in personal hostility to her. No evidence at hearing corroborated that testimony.

Since Mother perceives all of Mt. Diablo's treatment of Student as part of a coordinated plan of retaliation, she was not able at hearing or in her closing brief to separate the three issues addressed here from many others. In her closing brief, Mother raises a wide variety of complaints about Mt. Diablo's conduct, most of which are unrelated to the issues decided here. Many of them depend upon factual assertions Mother makes for the first time in the brief. Those arguments and assertions are not addressed here.

Mother essentially wants Student to attend a private school so she and Mother are relieved of the alleged retaliation and of Mother's strained relationship with the rest of the IEP team. But placement in a private school does not depend on a parent's relationship with Mt. Diablo or an IEP team; it depends on whether the Student herself needs such a placement. She does not.

More importantly, both federal and state law require Mt. Diablo to provide Student special education in the least restrictive environment appropriate to meet her needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a)(2)(i) (2006); Ed. Code, § 56040.1.) This means that Mt. Diablo must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii) (2006); Ed. Code, § 56040.1.)

The Ninth Circuit Court of Appeals, in *Sacramento City Unified School District v. Rachel H.* (1994) 14 F.3d 1398, set forth the standards by which the least restrictive environment must be determined. The court adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. (*Id.* at p. 1403.)

Student is being educated satisfactorily at Northgate. She is benefiting from her placement in general education. She has good grades commensurate with her cognitive capacity, is advancing from grade to grade, and has friends in school. She is not disruptive, and the cost of her placement in general education was not an issue at hearing. Since Student is being educated satisfactorily in a general education setting, that is her least restrictive environment. The IDEA prohibits her placement in a more restrictive environment for disabled children, so Mt. Diablo was required to decline Mother's request for placement at a private school.

Student did not prove that she needs a private school placement to receive a FAPE.

ORDER

All of Student's requests for relief are denied.

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, Mt. Diablo prevailed on all issues decided.

RIGHT TO APPEAL

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

/s/
CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings