

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

DIXIE ELEMENTARY SCHOOL DISTRICT.

OAH Case No. 2014110335

DECISION

Parent filed a due process hearing request on behalf of Student with the Office of Administrative Hearings, State of California, on November 4, 2014, naming the Dixie Elementary School District.

Administrative Law Judge Charles Marson heard the matter in San Rafael, California, on December 16 and 17, 2014.

Student's Mother represented Student who did not attend.

Jan E. Tomsy, Attorney at Law, represented Dixie. Rebecca Minnich, Special Education Coordinator, attended the hearing on behalf of Dixie.

A continuance was granted for the parties to file written closing arguments, and the record remained open until January 20, 2015. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUE

Did Dixie deny Student a free appropriate public education during the 2014-2015 school year by failing to offer and provide:

1. An appropriate placement that would include three shortened school days of no more than six periods and two days of home instruction per week;

2. An accommodation requiring teachers to provide Student hard copies of assignments rather than requiring him to obtain documents online; and
3. An accommodation requiring adults who interact with Student at school to utilize a positive or neutral tone when speaking to him?¹

SUMMARY OF DECISION

This Decision holds that Dixie did not deny Student a FAPE during the 2014-2015 school year by refusing to shorten his days and place him at home two days a week; by declining to provide him hard copies of assignments; or by declining to provide an accommodation requiring school staff to use a positive or neutral tone in speaking to him.

JURISDICTION

1. Student is a thirteen-year-old boy who lives with Mother within the geographical boundaries of Dixie and is in the eighth grade at Dixie's Miller Creek Middle School. Since September 2014 he has been eligible for, and has been receiving,

¹ On December 3, 2013, the parties entered into a settlement agreement in which Mother waived all special education claims against the Dixie through January 10, 2014. From that date through the end of the 2013-2014 school year, Student's special education was the responsibility of another local educational agency, not Dixie. This Decision therefore addresses Dixie's responsibilities to Student during the 2014-2015 school year only. (See *Student v. Dixie Elementary School Dist.*, OAH Case No. 2014071198, Order Granting Motion to Dismiss, Aug. 19, 2014.) At hearing, the ALJ took official notice of the pleadings and papers on file in that matter.

special education and related services in the category of emotional disturbance. He has also been receiving occupational therapy for mild fine and gross motor deficits.

2. Starting in Student's sixth grade year, Mother has sought to persuade Dixie to allow Student to attend school only on Mondays, Wednesdays, and Fridays, with a day containing six rather than seven periods, and to be provided home instruction on Tuesdays and Thursdays, the days Mother works at home. At the beginning of Student's seventh grade year, Dixie offered Student a "504 plan"² that Mother accepted in part, although she did not agree to the requirement that he attend school five days a week. Instead, for the latter half of the school year, Mother enrolled Student in the California Virtual Academy (CAVA), an independent charter school that offers on-line instruction. CAVA provided Student an individualized education program in April 2014.

3. In August 2014, Mother re-enrolled Student in Miller Creek for the eighth grade, and Dixie provided Student a 30-day interim program modeled on the CAVA IEP. Mother again urged Dixie to provide Student two days a week of home instruction and a shorter school day, but Dixie declined. The interim program required his attendance at school five full days a week.

4. At an IEP team meeting on September 16, 2014, the parties agreed that Student was eligible for special education in the category of emotional disturbance. Dixie again declined Mother's request for a program placing Student on campus for three days a week with shortened days and at home for two days a week. Instead, Dixie

² A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et. seq. (2000).) Generally, the law requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

offered Student an IEP that would require his attendance at Miller Creek five full days a week. Mother consented to the implementation of portions of the offered IEP but continued to request partial home placement. At another meeting on October 28, 2014, the Dixie members of the IEP team again considered and rejected Mother's proposal for that program. Mother then filed the instant request for due process hearing seeking to obtain such a program.

5. Since the beginning of the 2014-2015 school year, Student's attendance at Miller Creek has been sporadic. He frequently arrives late, leaves early, or does not appear at all. He avoids physical education and art classes. He has attended school approximately 40 percent of the time and often does not turn in homework or assignments. As a result he is failing most of his classes.

DIXIE'S OFFERED IEP'S

6. Upon Student's re-enrollment for the eighth grade, Dixie offered Student a 30-day interim program including: 1) one 45-minute session a day of specialized academic instruction with a resource teacher; 2) 120 minutes a month of occupational therapy; 3) 60 minutes a week of parent counseling; and 4) participation in "Lunch Crew," a social skills group, for 30 minutes a week. Mother accepted the specialized academic instruction and occupational therapy but declined the counseling and the social skills group.

7. In fall 2014, Student's IEP team had no assessment information supporting Mother's view that Student suffered from anxiety so severe he could not attend school full time, five days a week. On September 5, 2014, Dixie sent Mother an assessment plan that would have authorized district assessments of Student in the areas of social and emotional condition and occupational therapy. Mother did not sign or return the plan.

At the September 16, 2014 meeting, Dixie staff again requested that Mother sign an assessment plan, but she declined to do so.³

8. At the September 16, 2014 IEP team meeting, Dixie offered Student a fuller program of services and supports. The offer included two 45-minute sessions a day of specialized academic instruction, individual counseling for 50 minutes a week, parent counseling for 50 minutes a week, and 120 minutes a month of direct occupational therapy. It offered goals in the areas of assignment completion, writing, self-regulation skills, identification of self-calming strategies, motivation, and school attendance. It offered several accommodations including shortened assignments, extended time to complete assignments, the opportunity to take two breaks of three to five minutes duration during each class, use of the resource room for breaks or test completion, access to the school counselor five to ten minutes a day, Lunch Crew for 30 minutes a week, and a peer buddy. Mother accepted portions of the offer but declined to consent to the additional period of specialized academic instruction, to any counseling, or to the social skills group.

9. At the September 16, 2014 meeting, the IEP team discussed at length Mother's desire for a partial home placement that fit her work schedule. Mother told the team that Student suffered from sensory processing disorder (SPD) and felt bombarded by stimuli at school. She also stated that he had unpredictable outbursts of anger and rage, and frequently felt so anxious and fearful that he could not cope with school, due in part to alleged bullying from the first grade onward. She presented two letters in support of her proposal which are discussed below.

³ On December 2, 2014, two weeks before the hearing, Mother signed the assessment plan. The assessments are underway but their results were not available by the time of hearing.

10. For a variety of reasons, the Dixie members of the IEP team did not agree that the proposed partial home placement was necessary to provide Student a FAPE. Their views were that Student had settled easily into the school's routine at the beginning of the school year, did not display the level of anxiety Mother claimed he had, and was succeeding in general education aside from his poor attendance. They also thought that not attending school full time might increase rather than decrease his anxiety, and would remove him from his peers and from school-based supports such as counseling. They noted that he seemed to attend school when he wanted to, and not otherwise.

11. At Mother's request, another IEP team meeting was held on October 28, 2014, to discuss her proposal for partial home placement. Mother gave the team two more letters of support, discussed below. The parties restated the positions they took at the September meeting, but no minds were changed and Mother's request was again denied. Dixie reiterated its September 16, 2014 IEP offer, and again Mother accepted portions of it, but Mother declined to agree to the additional period of specialized academic instruction, to any counseling, or to the social skills group.

12. Student does not challenge any of the goals, accommodations, services and supports offered by Dixie except insofar as they require him to attend school five days a week rather than three, and attend seven periods rather than six.

FAILURE TO ADDRESS STUDENT'S SENSORY PROCESSING DISORDER AND ANXIETY WITH A PARTIAL HOME PROGRAM

Mother's Opinions

13. Mother is a licensed marriage and family therapist who has worked in that capacity for 38 years. She has worked with many families and with children who are emotionally disturbed. She has extensive experience in direct counseling of children and adults, especially in the area of substance abuse rehabilitation, and also has significant

experience as a clinical supervisor of such programs. However, her background does not include any special training or experience concerning sensory processing disorders, and she does not claim any special expertise in that area.

14. Mother testified that Student is, in her opinion, too anxious and fearful as the result of his SPD to attend school full time. She testified that he becomes overwhelmed with sensory stimuli at school. She believes that he should not be forced to attend school when he does not want to attend, and that it does not work to “push” him; he just becomes more anxious and angry. Instead, school authorities should allow Student to come to school when, in his own judgment, his anxiety does not prevent it, and to leave when he does not believe he can cope with it. She believes that all his absences and tardies should be excused.

15. Mother further testified that Student has been bullied at school since the first grade and is traumatized as a result. She stated that he is also traumatized by teachers who yell at other students, and by being spoken to by adults in a stern or negative tone of voice. Mother witnessed one incident in which Student was spoken to harshly. She appeared with him at school for the first day of his seventh or eighth grade year. The two were late, and the principal said to Student: “School starts at eight” in a stern voice and a tone that Mother perceived as unduly negative. Otherwise, in describing Student’s history of being bullied and being traumatized by yelling teachers and other students, Mother relied entirely on reporting by Student, who did not testify. Student was not shown to be an accurate reporter of these events; his claims to Mother about bullying were not corroborated either by school records or by the memories of school staff.

16. Mother further testified that a partial home placement would benefit Student by giving him “down time” two days a week, during which he would not face the overstimulation of school, and give him time to concentrate on academics. She

believes that Dixie should provide Student a home teacher on Tuesdays and Thursdays, when she works at home, and allow him to leave after sixth period on the days he is at school.

Mother's Letters of Support

17. Mother was the only witness for Student at hearing. The rest of Student's evidence consisted of letters from professionals in support of Mother's proposal for two days of home instruction and a shortened school day. The letters were admitted in evidence without objection.

18. At both the relevant IEP team meetings, Mother presented a letter dated August 8, 2014, from Eric Reitz, a clinical psychologist and marriage and family therapist. Dr. Reitz stated that he had been working with Student since June 2014 because of his "considerable anxiety aris[ing] from his underlying condition of Sensory Processing Disorder." Dr. Reitz wrote in support of the prospect that Student would receive part-time home instruction because "[t]he school experience is necessary to his need for ongoing socialization while the home-based experience allows him time to 'cool off' his overactive and overwhelming sensory and emotional overload and to focus exclusively on his academic development."

19. Mother also presented to Student's IEP team two letters from Elysa Marco, M.D., who works in the child neurology clinic at the University of California at San Francisco. The first, dated August 1, 2014, was signed by Dr. Marco's nurse and stated: "We support [Student's] mother's requests for specialized schooling to provide [Student] with an environment that is most conducive to his learning, combining home instruction with opportunities . . . to attend traditional school environment part time." After the September 16, 2014 IEP team did not act on the letter from Dr. Marco's nurse, Dr. Marco herself wrote a letter recommending that Student be taught at home two days a week,

adding: “[Student] may be excused from last period on the classroom days but otherwise should attend the entire school day.”

20. For at least two or three years, occupational therapist Sharon Bertrand has been privately providing direct occupational therapy to Student, primarily at Mother’s expense.⁴ Ms. Bertrand wrote a letter on October 8, 2014, that was presented to the October 28, 2014 IEP team. In it she wrote that the primary focus of her work “has been on [Student’s] emotional health – as Occupational Therapy is also a ‘mental health provider.’” The letter discussed Student’s mild fine and gross motor difficulties but described those as secondary to his “socio-emotional state.” Ms. Bertrand stated that Student “gets overwhelmed by too much stimuli or when too much demand [is] placed on him” and “tends to fall apart after a long day.” This, Ms. Bertrand wrote, translates into behavior in which Student rages, throws and kicks things, and displays “symptoms of rage, anxiety, or depression.” Ms. Bertrand recommended shortened school days and proposed that Student should have his school work sent home “when he needs to leave early due to his emotional disability.”⁵

21. There is nothing in the record describing the education, credentials or experience of any of the authors of the letters described above. None of them appeared

⁴ While Student was enrolled in CAVA from January to June 2014, CAVA paid Ms. Bertrand for Student’s occupational therapy.

⁵ In March 2014, Ms. Bertrand conducted an occupational therapy assessment of Student. It addressed his fine and gross motor needs as well as his anxiety. It is not clear whether this assessment was ever given to Student’s IEP team, but it is assumed here that it was. Since the assessment was done while Student was at home full-time and enrolled in CAVA, it did not discuss any need for a partial home placement or shortened school days.

at either the September 16 or October 28, 2014 IEP team meetings, and none of them testified at hearing.

22. Finally, at some point Mother presented to Student's IEP team a miscellany of other statements from professionals.⁶ Dr. Jennifer Rice saw Student three times in psychotherapy sessions and recommended that Dixie defer to Ms. Bertrand's recommendations. Dr. Christine Bouckaert, a psychologist, stated that Student's problems were "neurological," and also recommended deference to Ms. Bertrand's recommendations. Dr. Suzanne Christie, Student's pediatrician, stated that Student "struggles with Sensory Processing Disorder and anxiety," and recommended a combination of home and school based learning. On his prescription pad, Dr. Neil Rojas of the pediatric Behavioral Medicine Clinic at the University of California at San Francisco diagnosed Student as having "severe school avoidance." There is nothing in the record concerning the education, credentials, or experience of any of these professionals, and none appeared at either of the relevant IEP team meetings or testified at hearing.

The Nature of Sensory Processing Disorder

23. As can be seen from the statements above, Mother and her supporters mix together the consequences of Student's SPD and those of the more general anxiety resulting from his emotional disturbance. No assessment or diagnosis establishing that

⁶ It is not clear when, or whether, Mother provided these documents to the IEP team; they are not mentioned in the notes of either IEP team meeting. It is assumed here that Dixie received them in time to consider them in its placement decisions.

Student has SPD was introduced in evidence. The only detailed description of SPD in the record was presented by Dixie's occupational therapist Megan Fuller.⁷

24. Ms. Fuller established that SPD is not a recognized medical disorder, nor does it appear in the Diagnostic and Statistical Manual of Mental Disorders (American Psychiatric Association)(DSM-V). It is, however, a condition occupational therapists sometimes encounter, and Ms. Fuller has treated children who have it. Those children typically do things like squeeze themselves under chairs; become startled or cry at loud noises; bounce around a classroom because they cannot stay in their seats; and bite everything. Those behaviors are "quite constant"; they do not come and go.

25. Ms. Fuller is familiar with Student; she assessed him in the first grade and found that his occupational therapy needs did not warrant inclusion in special education. During the 2013-2014 school year she provided occupational therapy consultation for Student pursuant to his 504 plan. When Student returned from CAVA to the eighth grade, his IEP included direct occupational therapy, which surprised Ms. Fuller because she did not think he needed it. Nonetheless, she provided direct therapy to him between five to ten times in fall 2014 and would have done so more frequently had

⁷ Ms. Fuller received a Master of Science degree in occupational therapy from San Jose State University in 1985. She has served as an occupational therapist at Duke University Medical Center and for several private therapy providers. For almost 30 years she has been licensed as an occupational therapist in California and is also licensed by the American Occupational Therapy Board, which requires qualifications beyond those of state licensing. Ms. Fuller was a staff occupational therapist for Progressus Therapy in San Rafael from 2002 until June 2014. She now works at Bright Path Therapists. In those last two roles she has provided therapy to students in Dixie's schools since 2003, and has worked with hundreds of children with neurological disorders such as SPD.

Student appeared more often at school. Ms. Fuller did not see any signs of SPD in Student in their therapy sessions, or in her occasional visits to his classes. Ms. Fuller emphasized that if Student's access to education was significantly impaired by SPD, the symptoms would be constantly apparent; they would not be present at some times and not at others.

26. No qualified professional appeared at Student's IEP team meetings, or at hearing, to dispute Ms. Fuller's description of SPD and her impressions of Student. There was no clear proof that Student has SPD, or (if he does) that it significantly interferes with his education.

Anxiety in General

27. To the extent that Mother argues Student cannot attend school five days a week because of the more general anxiety that led him to be made eligible for special education as emotionally disturbed, the evidence for that argument consisted solely of her opinion. None of the endorsement letters she presented squarely made that claim.

28. The evidence did not demonstrate that Student's attendance at only 40 percent of his classes was the result of his anxiety. On the contrary, the evidence showed that Student does not like to go to school, and arrives, leaves and attends more or less when he wants to, rather than when his condition requires it. It also showed that Mother encourages this behavior. She does not believe that "pushing" him to go to school is productive and leaves the decision whether to attend on a particular day largely to Student. She has frequently urged Dixie to excuse all his absences and tardies. She has purported to withdraw any permission for school staff to speak negatively to Student about his nonattendance. Student is well aware of his Mother's support in his nonattendance, and of the medical and psychological grounds for her belief. If he wants to leave school early, he signs out at the front desk and usually states "SPD" or "anxiety"

as the reason. On at least one occasion he used the front office telephone to call Mother and order her to pick him up.

29. In early December 2014, Dixie's school psychologist Christine Shields⁸ observed Student in his class for about 45 minutes for an upcoming assessment, and was told by the general education teacher that Student's behavior during that time was typical of his behavior in class generally. She attended both of Student's fall 2014 IEP team meetings. Student attended the October 28, 2014 meeting and was a forceful advocate for his and his Mother's position; this gave Ms. Shields an opportunity to watch Student relate to a group of adults

30. Ms. Shields established that a student with sensory processing difficulties can present with a wide range of symptoms in school. He may become overstimulated and shrink from loud noises, cover his ears, and need to be in a quiet space; or he might be insufficiently stimulated and seek sensory input. In her observations of Student, Ms. Shields did not see any of these signs of anxiety, or any indication that he was overwhelmed by sensory input.

31. Ms. Shields also established that SPD does not manifest as school avoidance; it has no relationship to that problem. She opined persuasively that to divide Student's instruction time between home and school would elevate rather than decrease

⁸ Ms. Shields received a master's degree in educational psychology from the University of Georgia in 1997. She is credentialed as a school psychologist and as a counselor, and has 3 years' experience as a special education teacher. She has worked as a school psychologist for about 15 years. She was employed in that role by Dixie in August 2014, having worked for the Larkspur Corte Madera District since 2005 and other districts before that. In her role as counselor she has worked with children having difficulty coming to school.

his anxiety. In middle school in particular, she explained, if a student misses a class it can be anxiety-provoking to return to it, not knowing what happened in the interim or what has changed. She also established that the less a student comes to school, the harder it is to get him to school; nonattendance becomes a pattern. The school's goal in supporting an anxious student should be to get him to school, where he can take advantage of the services and supports available there. The best way to work on anxiety is to get a student to school and work on his problems in the school setting. Ms. Shields established that Student needs to learn to manage his anxiety when in groups of people, not to avoid groups of people. He needs to learn to cope with his deficits across settings with a variety of adults and peers.

32. For nine years Todd Spengel has been the resource specialist for grades six through eight at Miller Creek.⁹ Student was in his class during his seventh grade year, while he attended Miller Creek in the fall semester. He is now enrolled in Mr. Spengel's class for eighth grade. Mr. Spengel is the teacher with whom Student is most comfortable, and who knows Student better than anyone else at school. Student's IEP allows him to use Mr. Spengel's resource room as a refuge when he is anxious, and he does so frequently.

⁹ Mr. Spengel has a bachelor's degree in psychology and sociology from the University of Colorado at Boulder, and he has clear Level I and Level II educational specialist credentials. He has previously worked for the Marin County Office of Education and the Los Angeles Board of Education. For three years he was also a special day class teacher of grades three through six at the Timothy Murphy School, where he helped emotionally challenged boys take interest in, and pay attention to, their schoolwork.

33. Mr. Spengel established at hearing that, at the beginning of eighth grade, Student settled in easily, was comfortable and cordial, and displayed no anxiety. Student is intelligent, and reads at or above his grade level. He does sometimes get overwhelmed, but his stress occurs when he is required to do things he does not want to do (for example, attend PE or art). His voice rises at such times and he becomes angry and resistant. He also can have difficulty with his peers in groups. But Mr. Spengel, who is experienced with students having sensory processing difficulties, has not seen signs of sensory processing challenges in Student. He confirmed that Student attends school when he pleases, as many students would do if given the opportunity.

34. Based on his knowledge of Student, Mr. Spengel opined persuasively that Student needs to attend school regularly, five days a week, to be successful. Repetition and routine are essential to Student's learning. Instruction occurs in every class. If he misses a class it creates more rather than less anxiety in him. This is particularly true now that the school follows Common Core standards, which require extensive group interaction and teamwork with other students. Student's ability to do the work, and his ability to build peer relationships, have been damaged by his absences.

35. Rebecca Minnich has been Dixie's special education coordinator since 2013.¹⁰ She does not recall that any student or teacher has reported that Student has been bullied. She examined Student's cumulative records and did not find any pattern of bullying that would result in significant anxiety. There were occasional verbal interactions between Student and other students, but from the fifth grade forward there are no written complaints about bullying either from Student or Mother. Mother testified that in seventh grade things were thrown at Student, but no information in Student's records corroborates those claims. The school's files do not disclose the pattern of bullying that Mother claims has occurred, and there was no independent evidence that these events occurred except Mother's testimony, which is based on Student's assertions.¹¹ Ms. Minnich testified diplomatically and credibly that school staff and parents sometimes disagree about whether various events constitute bullying.

¹⁰ Ms. Minnich has a master's degree in educational administration from San Francisco State University, and another master's degree in teaching and curriculum for the learning disabled from Columbia University in New York. She has a clear mild/moderate teaching credential, and also a credential in educational administration. She has been the program manager for the Marin Special Education Local Plan Area, and a special education teacher in Dixie's schools for seven years. She has extensive experience with special education students and their programs, and has received a number of awards for her work.

¹¹ Ms. Minnich's inspection of records did not go back through the fourth or earlier grades. Mother's testimony showed that most of the bullying she perceived occurred at another school in the third grade or earlier. Since Student managed to attend fourth, fifth and sixth grades full-time, it seems unlikely that he is so traumatized by those earlier incidents that he cannot attend school full-time now.

THE NEED FOR HARD COPY ASSIGNMENTS

36. Mother testified that she frequently could not obtain Student's assignments because they were not delivered to her home in hard copy form, and Student did not reliably bring them home on his own. Instead of using hard copy assignments, the school posts assignments on School Loop, an on-line program to which students and parents have access. Mother testified that she could not use School Loop well enough to get these assignments, and the private tutors she has employed for Student also had difficulty accessing it. She therefore was unable to ensure that Student completed his assignments at home with her assistance.

37. Mr. Spengel is skilled with computers. He was the technology coordinator in a previous job at the Timothy Murphy School in Marin County. He is familiar with a wide variety of computer programs, and at Miller Creek he teaches the use of School Loop to students, faculty, and parents. Mr. Spengel taught Student how to use School Loop. Student knew how to use it and has been observed using it without difficulty. Mr. Spengel offered to teach it to Mother and her tutors, but Mother has not accepted that offer.

38. Mother has considerable familiarity with School Loop. She routinely uses it to send email to school staff. At hearing she introduced an exhibit containing Student's most recent grades, which she had downloaded from School Loop the night before. Student himself has access to hard copies of assignments when he comes to school.

39. Creating hard copy assignments for Student to complete at home would require teachers to predict his absences, which they cannot do. It also might encourage those absences.

SPEAKING TO STUDENT IN AN UNDULY NEGATIVE TONE

40. Mother testified that in her opinion school staff should always use a positive or neutral tone in addressing Student, even when discussing his frequent absences. But there was no evidence that school staff had spoken to Student harshly, at least in recent years. Mother stated that Student's fourth grade teacher yelled at other students, but she apparently got this information from Student. She also found it offensive when she and Student arrived late at the beginning of seventh or eighth grade, and the principal told Student in a stern voice: "School starts at eight." There was no evidence of a significant or recent pattern of staff's speaking harshly to Student.

MOTION TO STRIKE

41. On January 20, 2014, Mother filed a closing statement making for the first time several factual allegations in support of her arguments. Dixie has moved to strike the new matter because it was not introduced at hearing. Because all of Student's new claims could have been made at hearing, and because Dixie has not had a fair opportunity to meet those claims, they will be stricken from the record. The specific passages to be stricken are set forth in the footnote below.¹²

¹² The passages to be stricken are:

Page 1: the sentence beginning "Recently, on 1/8/15 . . ."

Pages 2 and 3: the paragraph beginning "When [Student] was in 3rd or 4th grade . . ."

Page 3: in the paragraph beginning "The bullying events . . ." from the sentence beginning "Dr. Tom Lohwasser . . ." to the end of the paragraph.

Page 4: all but the last two sentences of the paragraph beginning "[Student] was explaining the world to me"

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹³

1. This hearing was held under the Individuals with Disabilities Education Act (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 (2006) et seq.;¹⁴ 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

Pages 4 through 6: in the paragraph beginning "Megan Fuller said . . ." from the sentence beginning "[Student's] private O.T. ..." to the end of the paragraph.

Pages 6 and 7: the paragraph beginning "I was looked down upon . . ."

Page 7: the paragraph beginning "When [Student] was in sixth grade . . ."

Pages 9 and 10: the paragraph beginning "The Dixie School District has spent a fortune . . ."

Page 10: in the paragraph beginning "We have a few months left . . ." from the sentence beginning "Before the Christmas break . . ." to the end of the paragraph.

Pages 11 and 12: the paragraph beginning "I was shocked to find out . . ."

Page 12: the paragraph beginning "Julia Wilbarger . . ."

Pages 12 and 13: the paragraph beginning "The Sensory Processing Foundation . . ."

¹³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹⁴ All references to the Code of Federal Regulations are to the 2006 version unless otherwise stated.

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)(A), (B); 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, provide an appropriate education, 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(a)(1); Ed. Code, § 56031, subd. (a).) "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(a); Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services.])

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [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 p. 200.)

4. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island*

School Dist. (9th Cir. 2010) 592 F.3d 938, 950-951 (*Mercer*) [In enacting the IDEA in 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.] Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases refer to the *Rowley* standard, which must be applied to determine whether a student was provided a FAPE. (*Mercer, supra*, 592 F.3d at p. 951, fn. 10.)

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)(A); 34 C.F.R. 300.511(a)-(d); Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) 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 [163 L.Ed.2d 387].) Here, Student bears the burden of persuasion.

FOCUS ON THE DISTRICT’S OFFER

6. As noted above, the IDEA does not require that a school district provide a student the best possible program. (*Rowley, supra*, 458 U.S. at p. 200.) Accordingly, an ALJ does not compare the merits of a program proposed by a district to those of a program proposed by parents. Instead, in determining the validity of an IEP, the ALJ must focus on the placement offered by the school district, not on the alternative preferred by the parents:

Even if the [placement was] better for [Student] than the District's proposed placement, that would not necessarily mean that the placement was inappropriate. We must

uphold the appropriateness of the District's placement if it was reasonably calculated to provide [Student] with educational benefits. (*Gregory K. v. Longview School Dist.* (9th Cir.1987) 811 F.2d 1307, 1314.)

LEAST RESTRICTIVE ENVIRONMENT

7. A school district must provide special education in the least restrictive environment. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and 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).)

MEDICAL REASONS FOR HOME PLACEMENT

8. In Student's age group, full-time attendance at school is compulsory. (Ed. Code, § 48200.) The California Code of Regulations imposes certain minimal requirements on an IEP team considering a home placement, one of which is:

When recommending placement for home instruction, the IEP team shall have in the assessment information a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. The report shall include a projected calendar date for the pupil's return to school . . . (Cal. Code Regs., tit. 5, § 3051.4, subd. (d))

FAILURE TO OFFER TWO DAYS OF HOME INSTRUCTION AND SHORTENED SCHOOL DAYS AS DENIAL OF FAPE

9. In Issue 1, Student contends that Dixie failed to offer him a FAPE because it failed to provide for two days of home instruction and shortened school days in his offered IEP. As noted above, the applicable standard is whether, in its 30-day interim program offered on August 18, 2014, and its fuller IEP offer on September 16 and October 28, 2014, Dixie provided Student a basic floor of opportunity consisting of access to specialized instruction and related services individually designed to provide Student educational benefit. To offer a FAPE, the program must have been reasonably calculated to confer some educational benefit on Student. (*Rowley, supra*, 458 U.S. at pp. 200; *Mercer, supra*, 592 F.3d at pp. 950-951.)

10. At its IEP team meetings on September 16 and October 28, 2014, Dixie had no persuasive reason to believe that Student could not be educated satisfactorily with his peers for seven periods five days a week. Mother's opinion, though sincerely held, was not based on any relevant expertise and was determined at least in part by her own work schedule. And even taken at face value, the letters of endorsement Mother presented did not establish that Student could not satisfactorily be educated at school five days a week. None of the letters forthrightly made that claim. The authors merely argued that part-time instruction was a preferable program and that they supported it.

11. In addition, the authors of those endorsement letters were unavailable to the IEP team (and to the ALJ at hearing). There was no way the IEP team (or the ALJ) could evaluate the factual assumptions underlying those opinions. "'Like a house built on sand, the expert's opinion is no better than the facts on which it is based.'" (*People v. Gardeley* (1996) 14 Cal.4th 605, 618 [quoting *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923].) The IEP team had no way of knowing what any of the endorsers knew or did not know about Student, about the sufficiency of the resources of the

school in dealing with his anxiety, about the wisdom of treating anxiety by removing a student from his peers two days a week, or even about education in general. It could not tell what Mother had told them and what she had not. It could not determine whether the endorsers had the expertise to offer the judgments they offered.¹⁵ It had no way of knowing whether the endorsers had given any thought to the IDEA's strong preference for educating disabled children among their nondisabled peers. And it had no way to find out any of this critical information, since none of the endorsers appeared before the IEP team, even by telephone. For these reasons, it was reasonable for the Dixie members of the IEP team to conclude that the opinions of those who wrote letters endorsing Mother's proposal were not persuasive.

12. At both of the relevant meetings, the IEP team had much more reliable information that Student was capable of attending school five days a week. It knew that Student's frequent absences were due to his desire not to attend school and Mother's encouragement of his nonattendance. It knew from Mr. Spengel, who remembered Student from seventh grade, that Student had had an easy time at first adapting to the routines of the eighth grade and was not anxious or fearful in the early part of the year. It knew that Student's records did not reflect the years of bullying Mother perceived. It knew from Ms. Fuller, Student's assigned occupational therapist (who attended both meetings), that she did not perceive any serious sensory processing issues or any notable anxiety in Student. The team members evaluating this information had the

¹⁵ For example, in her letter of October 8, 2014, Ms. Bertrand characterized herself as a "mental health worker" as well as an occupational therapist, and stated that her work with Student was primarily directed to his emotional state. The IEP team was entitled to be skeptical of this opinion, as it plainly exceeded Ms. Bertrand's professional licensing.

sources available to them around the table, where the quality of their views could be measured and discussed.

13. Student's IEP team was also entitled to question the wisdom of placing Student at home two days a week as a method of treating either his SPD or his anxiety. As Ms. Fuller testified, if Student suffered significantly from SPD, the symptoms of it would be constant and ongoing. Even Dr. Reitz opined in his August 18, 2014, letter in support of Mother's proposal that Student's SPD "is chronic and needs to be managed in an ongoing way." The team also knew from Mother that the occurrences of Student's anxiety were unpredictable. There was no reason for the IEP team to believe that Student would be able to overcome these challenges on Mondays, Wednesdays and Fridays, but not on Tuesdays or Thursdays. Likewise, if Student feared bullying, the IEP team had no reason to believe Student could overcome those fears three days a week but not the other two. A fixed schedule providing for six periods rather than seven, and two days at home, did not fit either with Student's ongoing SPD difficulties or with his unpredictable anxiety. Strictly scheduled "down time" is not an appropriate method of addressing needs that are either continuous or unpredictable.

14. The Dixie members of the IEP team believed that partial attendance would worsen, rather than improve, Student's difficulties. As Mr. Spengel pointed out, class work is ongoing and frequently done in groups. If Student missed a day, he would have to re-insert himself in a class that learned something the day before he did not know, and would likely have to rejoin a team whose work the day before had left him behind. Ms. Minnich gave as an example a science lab project, which would have been advanced a day by Student's teammates while Student stayed at home. Ms. Shields also credibly testified that such a part-time appearance at school would provoke rather than reduce anxiety, and also established that the more a student stayed away from school, the harder it would be to get him there when he was supposed to attend.

15. The views expressed by Mr. Spengel, Ms. Shields, Ms. Fuller and Ms. Minnich and described above were well founded. All of them knew Student well enough to have informed opinions. All four attended Student's IEP team meetings and participated in the discussion. At hearing, all four testified carefully and were well-qualified by training and experience to make such judgments. Cross-examination did not reveal any defects in their direct testimonies. The views expressed by Mr. Spengel, Ms. Shields, Ms. Fuller and Ms. Minnich were therefore persuasive and are given substantial weight here.

16. Student did not discharge his burden of proving that he required shorter school days in order to receive a FAPE. Dr. Marco's statement that Student "may be excused" from the last period of the day did not establish that Student could not attend a seven-period day.

17. Finally, since there was no evidence before Student's IEP team or at hearing that Student could not be satisfactorily educated five full days a week at school, Dixie's interim program and September 16 and October 28, 2014 IEP offer placed Student in the least restrictive environment, which partial home instruction would not. There was also no medical information before the IEP team that complied with the requirements of the California Code of Regulations set forth above concerning placement at home. On this record, Dixie could not lawfully have offered Student two days a week of home instruction without violating these legal requirements.

18. For all of the reasons described above, Dixie's interim program and September 16 and October 28, 2014 IEP offer were appropriate in requiring Student's attendance at school five full days a week. Student's offered programs gave him access to special education and related services, were individually tailored to his needs, and were reasonably calculated to provide him some educational benefit.

FAILURE TO PROVIDE HARD COPIES OF ASSIGNMENTS TO STUDENT AT HOME

19. Student did not discharge his burden of proving that Dixie's failure to provide hard copies of his assignments at home denied him a FAPE. The evidence showed that Student can and does use School Loop and that Mother uses it to some degree. Training in the program has been made available to both of them, and to Student's home tutors as well. In order to create hard copies of assignments and deliver them to Mother, teachers would have to anticipate (and possibly encourage) Student's absences. There was no evidence suggesting that Student himself needed hard copies of assignments, and if he did he had them available at school.

FAILURE TO SPEAK TO STUDENT IN A POSITIVE OR NEUTRAL TONE

20. Student failed to prove that Dixie denied him a FAPE because teachers and staff spoke to him in an unduly negative tone; there was no evidence they did so. The evidence did not show any need to admonish Dixie's staff to speak to Student in more positive ways. Neither yelling at others by a teacher years ago, nor a principal's single stern reminder to a tardy student, demonstrates any violation of the IDEA.

ORDER

1. Dixie's motion to strike portions of Mother's closing statement is granted. The portions stricken are those set forth above at pages 12 - 13, footnote 12.
2. 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, Dixie prevailed on all three issues.

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: February 23, 2015

/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings