

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

FREMONT UNION HIGH SCHOOL
DISTRICT.

OAH Case No. 2016041032

DECISION

Parents filed a request for due process hearing with the Office of Administrative Hearings on April 25, 2016 naming Fremont Union High School District.

Administrative Law Judge Cheryl Carlson heard this matter in Sunnyvale, California on June 21, 22 and 23, 2016.

Natashe Washington, Attorney at Law, represented Student. Mother attended most of the hearing and Father attended parts of the hearing. Student was not present at the hearing.

Melanie D. Larzul, Attorney at Law, represented Fremont Union. Nancy Sullivan, Fremont Union's coordinator of special services, was present throughout the hearing.

On June 23, 2016, the matter was continued to July 14, 2016 for the filing of written closing arguments. The parties filed closing arguments on that day, the record was closed, and the matter was submitted for decision.

ISSUE¹

Did Fremont Union deny Student a free appropriate public education by failing to offer Student an appropriate placement at the March 31, 2016 individualized education program meeting?

SUMMARY OF DECISION

This decision holds that Student did not demonstrate by a preponderance of the evidence that the March 31, 2016 IEP offer to Student of continued placement in the special day class at Westmont High School denied Student a free appropriate public education.

FACTUAL FINDINGS

JURISDICTION

1. Student is a 15 year old young man who resides with his Parents within Fremont Union's jurisdictional boundaries. Student was initially found eligible for special education and related services on December 18, 2003 under the eligibility category of intellectual disability. Student has been diagnosed with down syndrome.

THE 2015-2016 SCHOOL YEAR

2. On January 26, 2016, Carrie Silver, Ph.D., a licensed clinical psychologist with the Department of Pediatrics at the Palo Alto Medical Foundation, conducted a psychological evaluation of Student, at Parents' request. Dr. Silver performed cognitive

¹ The issue has been reframed for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified Sch. Dist.* (9th Cir.2010) 626 F.3d 431, 442-443.)

functioning tests and determined Student's cognitive age to be 16 months. Dr. Silver concluded that Student had low scores in the adaptive skills areas of communication, daily living skills, socialization and adaptive behavior. He has an intellectual disability and associated developmental and adaptive skill delays. Dr. Silver also found that Student met the diagnostic criteria for an autism spectrum disorder.

3. Dr. Silver recommended Student be placed in a classroom equipped with extensive visual supports that can address his behavioral, developmental and social communicative needs. The most important focus should be on Student's functional skills. She also recommended the integration of applied behavior analysis within his educational program and a focus on safety issues such as running away and the reduction of behaviors that interfere with the progression of Student's skills. Dr. Silver recommended that the family share the results of the assessment with Student's IEP team. Student provided the report to the IEP team to demonstrate Student may have an autism spectrum disorder. The report is otherwise consistent with the findings of the March 31, 2016 IEP team.

4. At the beginning of the 2015-2016 school year, Student transitioned from middle school to ninth grade in a moderate to severe special day class at Westmont High School, run by the Santa Clara County Office of Education. The special day class is located on the comprehensive Westmont public high school campus. Student's neighborhood school, Fremont High School, also has a moderate to severe special day class located in a separate classroom on a comprehensive campus.²

² Both Westmont and Fremont High Schools have two moderate to severe special day classes on their respective campuses. This hearing only addresses the appropriateness of the moderate to severe classrooms and not the appropriateness between the two moderate to severe classrooms at each school.

5. Student was not placed in the general education classrooms because his global developmental delays limit his ability to synthesize information, communicate verbally and navigate freely around the classroom. Student's placement in Westmont's moderate to severe special day class instead of his neighborhood school's moderate to severe special day class was partially due to the Fremont Union's IEP team members' concerns about Student's behavioral issues during middle school. These negative behaviors included attempting to run away approximately three times per day, and grabbing and pushing at staff when offered non-preferred activities. The program at the Westmont special day class was thought to be better equipped to deal with these behavioral issues than the moderate to severe special day class at Student's neighborhood school. Further, more of the students in the Fremont special day class generally functioned at a higher academic level than Student. As a result, Fremont Union feared that if Student was placed in the Fremont special day class, his needs would not be met and he would not achieve his educational goals.

6. When Fremont Union offered Student placement in the Westmont special day class at the IEP team meeting of April 15, 2015, Parents initially objected because they wanted Student placed in a special day class at their neighborhood school. Parents did not object to the Westmont class placement because of its distance from Student's home.³ Parents primarily objected because they believed the students in the Fremont class are less physically disabled than the students in the Westmont class and will serve as better role models for Student's needs and goals.

7. On April 27, 2015, Parents signed an amendment to the April 15, 2015 IEP agreeing to Student's placement in the Westmont special day class. However at an IEP

³ Westmont High School is six miles from Student's home and Fremont High School is two miles from Student's home.

meeting on September 9, 2015, Parents again objected to Student's placement in the Westmont class instead of the Fremont class. Mother had observed the special day class at Fremont High School on August 24, 2015. Afterwards she decided Student would do better in the Fremont class than the Westmont class not only because Fremont High is his neighborhood school but because she believed some of the students in the Fremont class were also at the same low functioning ability level as Student. Parents reported during the September 9, 2015 IEP meeting that some of the students in the Fremont class also needed help raising their hands, and they used icons to communicate like Student did.

8. During the September 9, 2015 IEP meeting, Parents also stated that they believed Student's placement in the Westmont class was not suitable "in terms of peers", and that students in the Fremont class were more physically mobile like Student. Further, some students in the Fremont class also needed one-to-one aides, used communication devices and did not talk. The Fremont Union IEP team disagreed; it believed the offer of placement in the County Office of Education basic special day class at Westmont was the more appropriate placement to meet Student's needs and goals. After the meeting, Parents decided to bring Student to school at the Westmont class because they did not believe they had any other choice at the time.

MARCH 31, 2016 IEP TEAM MEETING

9. At the March 31, 2016 IEP meeting, Parents did not object to the Student's areas of needs, present levels of performance, goals, and services. Parents' only objection was to Student's continued placement at Westmont.

Student's Areas of Needs, Present Levels of Performance, Goals and services

NEEDS

10. Student's areas of need at the time of the March 31, 2016 IEP team meeting were in the areas of readiness for English language arts; readiness for math; receptive language; expressive language; attention; and vocational skills. The boxes for Student's areas of need in self-care and social/behavioral/emotional skills were not marked, but the goals did address these areas of need. The evidence established that Student had needs in all of the above areas.

PRESENT LEVELS OF PERFORMANCE

11. Student's program in the Westmont special day class during the 2015-2016 school year was individualized for his specific educational needs and involved visual supports as well as one-to-one staff support to help him with his educational goals. By March 31, 2016, Student demonstrated pre-reading skills by identifying familiar pictures and icons to answer questions or express opinions. He often needed prompting to follow through with answering questions but he did have the skills to do so. Student could recognize his name in a field of ten. He held writing utensils of all varieties and could make marks on paper when asked. Student attended to a preferred task for as long as he was allowed to do so. Non-preferred tasks required some prompting and redirection to maintain his attention. Student took care of his own belongings, placed his backpack and jacket in designated spaces before class, put away his food and retrieved it at snack time. He completed a variety of tasks, utilizing both fine and gross motor skills. Student appeared to be a happy, healthy young man.

12. Regarding communication, Student's expressive language skills included a total communication approach involving picture/icon based communication, some sign language, verbal speech, and gestures. He verbally expressed himself using several

functional words and/or phrases throughout his school day, sometimes in imitation of others and sometimes spontaneously. Staff placed more emphasis on Student's verbal communication skills as the IEP meeting approached. Student did not understand social pragmatics such as requesting items or activities, making recurrent requests, asking to stop an activity by protesting or refusing a request, or by expressing an opinion or feeling.

13. With respect to Student's receptive language skills, Student followed simple one to two step directions in context with minimal to moderate prompting depending upon his attention. Student responded to his name by turning his head, looking at the speaker and smiling. He responded to commands, such as stop, wait, look, and routine directions spoken to him in the classroom. He looked at picture icons and objects shown to him. If Student was not interested in a task or question he refused to answer or he said, "Nope," or "We're all done." He also repeated certain phrases such as, "You made a big mess," or, "Don't run," sometimes out of context. Student understood a few functional positional words with a visual model such as in, out, under, on, pertaining to an activity. Student performed well in structured environments when he knew what was expected of him and what would happen next. He was cooperative and paid attention to the tasks presented.

14. Student demonstrated relatively good gross and fine motor skills. He received occupational therapy and also required full prompts for more challenging or new tasks. Student also participated in daily vocational work. In completing gross motor tasks such as stacking chairs and wiping down tables, Student required little prompting. Student completed a variety of fine motor vocational tasks but needed more support and prompting for these tasks. Parents requested that Student begin to work on preparing food, such as sandwiches. Student's teacher intended to introduce these skills to the classroom.

15. Regarding Student's social emotional and behavioral levels of performance, Student preferred interacting with staff, and generally did not initiate interactions with his peers. Student had reduced many of his negative eighth grade behaviors such as pinching others or running away, and seemed to enjoy his classroom routines and schedules in the Westmont class. He completed his behavioral goals from his last annual IEP. The class was well suited to him.

16. Regarding his adaptive/daily living skills, Student fed himself independently and retrieved his food from the refrigerator when asked. He needed help opening some packages but asked for help when needed with minor prompting. Student took care of his own toileting needs. He managed his own belongings and placed them in appropriate places when asked.

17. The evidence established that the levels of performance listed on the IEP document were accurate and consistent with the overall weight of the evidence at the hearing. Parent did not contest these levels of performance.

GOALS

18. The March 31, 2016 IEP team developed goals for Student in the following areas of need: academic math; academic and pre-academic skills; attending skills; community access; communication; self-care/independent living; and academic writing. Student made some progress toward the goals developed in his previous IEP on April 15, 2015, particularly with respect to his behavior and vocational skills. He did not make as much progress in math or writing.

19. In the area of academic math, Student could exchange a pre-counted amount of money for desired items at lunch, snack time, and in the community. His annual goal in this area was to identify the price of an item at school or in the community and match a pre-counted set of dollar bills to the price in order to make a purchase in four out of five trials with no more than two prompts.

20. In the area of pre-academic needs, Student could identify functional vocabulary words when staff modeled answers. His goal was to identify 20 functional vocabulary words by pointing to pictures of the words when spoken in four out of five trials with only verbal prompting as observed and recorded by staff.

21. With regard to Student's attending skills, when presented with a non-preferred task, Student exhibited sensory seeking behavior such as tapping on the table or laying his head on his arms. His goal was to choose a sensory object to provide sensory input prior to a non-preferred task and to demonstrate its effectiveness by attending to the task for no less than 20 minutes.

22. Student's community access skill was to carry his own ID and bus pass on community outings, but he required hand-over-hand assistance to use the pass when boarding public transit. His goal in this area was to successfully use his bus pass to board the bus on community outings with no more than one verbal prompt in four out of five trials as observed and recorded by staff.

23. In the area of communication, Student responded to simple what, where and who questions during classroom activities with 5 percent accuracy. His goal was to answer simple open ended questions using the total communication approach (verbal, icons, signs, voice output device) at least ten times throughout a school day with one or two verbal prompts with 80 percent accuracy as measured by the classroom teacher and the speech and language pathologist.

24. Student needed a full range of prompts to maintain on task behavior in the area of self-care and independent living. His goal was to perform one to two step functional tasks with one or two verbal prompts with 80 percent accuracy as measured by the classroom teacher and occupational therapist.

25. In the area of academic writing, Student could independently hold a writing utensil and could make scribbles on paper either vertically or horizontally when

asked. His goal was to use a writing utensil to trace the letter "F" with no more than two prompts in four out of five trials as observed and recorded by staff.

26. The evidence at the hearing established that the goals were measurable and appropriate for Student and reasonably calculated to confer some educational benefit. Parent did not contest the reasonableness of Student's goals.

SERVICES

27. Student's services include specialized academic instruction from a special education teacher for 1,840 total minutes delivered in a group per week. Student will also receive intensive individualized services from a one-to-one aide for 1,840 total minutes per week. The IEP offered speech and language services on an individual basis for 40 total minutes per week and on a group basis for 30 minutes per week.⁴ Student will also receive occupational therapy 30 minutes per week and consultation services from the occupational therapist for 240 minutes annually.⁵

28. The evidence established that during the 2015-2016 academic year, Student received educational benefits that met his unique needs in the Westmont

⁴ Fremont Union later agreed to offer speech and language services on an individual basis two times per week for 20 minutes each session, and on a group basis for 30 minutes per week.

⁵ An IEP amendment dated May 24, 2016 entered into after Parents filed the due process complaint specified that adaptive physical education consultation will be provided to Student and school personnel 30 minutes weekly in a separate class; consultation with augmentative communication and technology services will be provided to Student and personnel for 1,200 minutes annually in a separate class; and, Student's transportation to and from school will be curb to curb.

special day class and is expected to continue to receive educational benefit during the 2016-2017 school year at Westmont. Fremont Union accurately described Student's needs, present levels of performance, goals, and services in the March 31, 2016 IEP. The evidence at the hearing established that the services offered to Student were appropriate and would assist him in benefiting from special education.

Placement Offer

29. The March 31, 2016 IEP offered Student continued placement at the County Office of Education moderate to severe special day class located on the Westmont High School campus. Although Fremont High School, Student's neighborhood school, also offered a moderate to severe special day class, Fremont Union believed Westmont's class offered a more appropriate basic program better suited to Student's needs and goals than the Fremont class. Fremont Union's IEP team members wrote in the IEP document that special education services were not provided at Student's school of residence because the required program was not available at his home school.

30. The IEP offer provided that Student would be outside the general education environment for 84 percent of the time. For the remaining 16 percent of the time, Student would be in a general education environment. Student would participate in some general education classes with his typically developing peers with a focus on building social skills. During the 2015- 2016 school year, Student participated in a physical education and a chorus class from the general education curriculum. The evidence showed that this level of mainstreaming was appropriate for Student and could be implemented at Westmont or Fremont High Schools.

31. At the time of the March 31, 2016 IEP offer, Parents primarily objected to Student's placement in the special day class at Westmont High School because they believed the students in the Fremont class were less physically disabled and more

mobile than the students in the Westmont class. As a result, Parents believed the students in the Fremont class would serve as better role models for Student's needs and goals. Student is physically mobile and his parents want him to be with students who are more mobile than the students they observed in the Westmont class. Parents think Student will "fit in more" in the Fremont class. Student did not offer any legal authority to support his contention that Student must be placed among peers who are more mobile like he is. Further, the evidence established that the levels of the student's physical disabilities in both classes were similar.

WESTMONT SPECIAL DAY CLASS

32. Student's teacher at Westmont during the 2015-2016 school year was Kyle Folck. Mr. Folck testified at the hearing regarding Student's progress during the school year.⁶ Although it was Mr. Folck's first year teaching students with moderate to severe disabilities, he was supervised by a credentialed teacher and had extensive prior experience working with disabled children. He established a good relationship with Student who responded well to Mr. Folck's teaching style during the school year.

33. Mr. Folck taught nine students in his basic special day class during the 2015-2016 school year. The students had different disabilities and activity levels. Four of the students used wheelchairs but most were able to walk around the classroom with assistance. Three of the students were able to speak all the time and the others made various utterances and were occasionally verbal. Six paraprofessional aides were in the

⁶ Mr. Folck's educational background includes a bachelor of arts in environmental science which he received in 2010. He completed his special education teaching credential for children with moderate to severe disabilities in June 2016. He received his preliminary credential in June 2015. Mr. Folck grew up living at the Agnews Developmental Center and volunteered at events for the disabled since childhood.

class; three were one-to-one aides (including Student's aide), and three were general classroom aides. Student's aide bonded with him in middle school and continued to assist him at Westmont. Student was not distracted by the four children who used wheelchairs in the class.

34. The needs and goals of the students in Mr. Folck's class ranged from lower functioning students who primarily used picture icons to communicate, to higher functioning students who were able to piece together sentences. Mr. Folck primarily used a picture-based curriculum to teach the class as a group which included Unique Learning for language arts and Lexia and Starfall for pre-academic skills. The Unique Learning language arts curriculum included News 2 You, which can be used for students at different levels including the most basic level which is a picture supported version. Mr. Folck primarily used the picture supported version for students who were not yet reading. He used the Unique Learning language arts curriculum because it also provided the more advanced text version which allowed students who were reading to work on word identification with the same materials at the same time. The picture supported version benefited Student more because he uses picture icons and not words to communicate.

35. The language arts lessons in the Westmont class ranged from ten minutes to 30 minutes depending on the students' interests in the subject matter. The Unique Learning language arts curriculum worked well with Student's group since it differentiated between ability levels. It provided single choice options for basic needs up to multiple options for students who were reading sentences. The curriculum could be made appropriate for any level during the group lessons. Student was able to follow the curriculum by pointing to the picture icons with the hand-to-hand assistance from his aide.

36. By the end of the 2015-2016 school year, Student was paying attention

more to his lessons and was starting to direct his attention toward whomever was speaking during the lesson. The total communication approach used by Mr. Folck focused less on verbal output and more on increasing Student's total communication through gestures, pictures and words. Although Mr. Folck introduced Student to a partner-based communication device with preselected responses known as a PODD communication book during the year, this device was not effective for Student. He responded better to the total communication program through gestures, pictures and words. Student's increased attention over the course of the year increased his ability to answer questions either with gestures or icons. Student is in the middle of his class at Westmont in both communication and academic skills. Student made some progress on all his communication goals.

37. Student enjoyed the two outings per week the Westmont class took into the community. He was accompanied by his one-to-one aide and was very well behaved. If Student started veering off during the outing, he was easily verbally redirected. Occasionally he was redirected with gestural or partial physical prompts. Student was very safe during the community outings.

38. Student was introduced to two non-academic mainstreaming classes at the Westmont High School campus during the 2015-2016 school year. Although Student was overwhelmed at first in the physical education class, he was gradually able to stand at a ping pong table and scoot a ball around the table with a paddle during the class. Student adjusted more quickly to the procedures in the choir class.

39. During the school year, Student usually interacted with adults if he wanted a preferred item. Student's social interaction with his peers was minimal. Student largely did not pay attention to the other students in his classroom. He did not model the behavior of other students or interact with them. He did not negatively react to his fellow students' physical disabilities. However at the end of the year, Mr. Folck noticed

Student showing his “pom-poms” to another student.⁷ This was the first time Mr. Folck had ever seen Student initiate contact with a peer. Mr. Folck considered the incident a breakthrough.

40. Initially Mr. Folck focused on Student’s maladaptive behaviors. During the course of the school year, Student’s major behavioral problems such as running away and aggression toward staff largely disappeared. Student only showed aggression during a few instances when he was frustrated or did not want to do a task. In those cases, Student cleared objects from the table or pushed staff. Eventually Student settled into a predictable routine in the Westmont class. He used sensory items to calm himself such as using a pressure belt around his chest, sitting on a ball, or shaking his pom-poms. Toward the end of the school year, Student paid attention most of the time. His teacher and aide were able to easily redirect Student if he became distracted during a lesson in the classroom or while on an outing. Student met his behavioral goals during the school year. This allowed him to achieve his academic goals. Student’s behavior during the 2015-2016 school year improved because Mr. Folck offered Student a curriculum at his level, a precise schedule and predictable routines with appropriate levels of sensory input.

41. The evidence established that the adapted curriculum, staff supports and design of Student’s schedule at Westmont during the 2015-2016 school year appropriately addressed Student’s needs. Student benefited from the lessons as they were presented in the Westmont class. Student showed growth in his abilities to pay attention to instruction within the class structure during the school year; however, his ability to attend to seat work was almost completely dependent on the hand over hand

⁷ Student makes the pom-poms out of crushed up paper and string. He shakes the pom-poms to calm himself down.

prompting of the adult staff. Ms. Sullivan, the coordinator of special services for the Fremont Union High School District, believes the level of instruction in the Westmont class will continue to address the needs of Student's significant cognitive disability.⁸ Ms. Sullivan was a knowledgeable and logical witness and her testimony was given substantial weight.

42. Pamela Mills, E.D., Ph.D. testified on behalf of Fremont Union.⁹ Dr. Mills observed both the Westmont and Fremont special day classes on two different occasions. Dr. Mills noticed that while some students in the Fremont class did not speak, they were able to pick out icons to create sentences and to gather information. Student is not able to communicate this way. Other students were verbal but needed prompting to start a lesson. More students in the Fremont class worked independently and raised their hands to answer or volunteered to go up to the board than in the Westmont class.

43. Dr. Mills concluded that the Westmont class was an appropriate placement for Student and that the Fremont class was not appropriate for the following reasons: The students in the Westmont class were different but similar in abilities; Student

⁸ Nancy Sullivan received her bachelor of arts degree in child development from San Jose State University in May 1989 and her master of arts degree in special education from Santa Clara University in August 1999. She has worked in various teaching and special education positions since that date.

⁹ Dr. Mills has a master's degree in education and counseling and doctorates in clinical psychology and counseling psychology, and a certification in neuropsychological assessment. She is licensed as both a psychologist and an educational psychologist. Dr. Mills taught for about 15 years at the elementary and middle school level, and supervised student teachers. Dr. Mills is now a psychologist and educational consultant in private practice.

seemed very happy; he responded positively; he did not show anger or frustrations; and the skill set being taught was appropriate. Student fit in well with the other students. Dr. Mills acknowledged that he did not model higher performing peers, but, like other students who meet the diagnostic criteria for an autism spectrum disorder, Student focused on what was immediately around him and not on the other students in the class with him. As a result Dr. Mills does not believe it is necessary to place Student in a class with higher functioning peers for Student to model.

FREMONT HIGH SCHOOL SPECIAL DAY CLASS

44. The Fremont special day class, like the Westmont special day class is for students with moderate to severe disabilities and does not focus on a specific eligibility category. The special day class is located in the middle of Fremont High School, a comprehensive high school campus. According to Michael Martinez, a special education local plan area program specialist, students at the district programs such as the special day class at Fremont High School have less needs than students at county programs such as the special day class at Westmont High School.¹⁰

45. During the 2015-2016 school year, ten students were enrolled in Fremont's moderate to severe special day class. Of those students, three were orthopedically impaired; three were on the autism spectrum; and four had intellectual disabilities. Three were in wheelchairs; one student used the chair most of the time; one used it half the time; and the third was "in between." The class had one classroom aide and five one-to-one aides. The one-to-one aides were in the class primarily to support the students' physical needs, to adjust wheelchairs and to support students who needed help walking and standing. The aides also assisted with behavioral needs.

¹⁰ Michael Martinez is a special education local plan area program specialist for three school districts including Fremont Union.

46. Both the Westmont High School and the Fremont High School special day classes are for students with moderate to severe disabilities and are similar in many ways. Neither class focuses on a specific eligibility category. The students in both classrooms have different disabilities and activity levels. Students with orthopedic impairments, autism and intellectual disabilities were placed in both the Westmont and Fremont classes. Three to four students in both classrooms used wheelchairs. Classroom aides and one-to-one aides participated in both classrooms but the numbers in each classroom varied. The Westmont class had three classroom aides and three one-to-one aides; the Fremont class had one classroom aide and five one-to-one aides. Whether Student is placed in the Westmont class or the Fremont class, he will be around children with physical disabilities. Therefore Student's contention that fewer students in that class have physical disabilities is not supported by the evidence nor did Student show that he needed to be in a class with less physically disabled students in order to receive a FAPE.

47. The Westmont and Fremont special day classes had almost the same number of students in their classrooms during the 2015-2016 school year. Nine students were placed in the Westmont class, and ten students were enrolled in Fremont's class. The schedules at the two schools were similar although the lessons in the Fremont class typically lasted for approximately ten minutes longer than the lessons in the Westmont class.

48. Group instruction is utilized more in the Fremont class. The Fremont class uses the same Unique Learning curriculum used in the Westmont class. The Westmont class uses the beginning level of the Unique Learning curriculum and the Fremont class uses the standard, regular level of the curriculum. In the Fremont class, more of the students use a more advanced version of the curriculum, but some students in the Fremont class also access the more basic picture-supported version. The focus of the Fremont class was on academic skill building and life and vocational skills. The focus of

the Westmont class was on pre-academic skills.

49. In the Fremont language arts class, the students worked on reading skills, such as reading familiar words, reading back short sentences and reading the sentences out loud. Student is unable to perform any of these academic tasks. Students raised their hands independently to answer questions, waited their turn, and navigated their devices fairly independently. Most of the students required gestural prompting to look for an answer. This prompting is different from the hand-over-hand prompting that Student needs because it is not physically connected to the student and instead guides the student to the answer. Hand-over-hand prompting is more intrusive than gestural prompting. In the Fremont math class, the students worked on simple addition and subtraction and on how to use calculators. They also worked on the concepts of money, time, and measurement. Student does not have the math skills to participate in the Fremont math class.

50. Generally the Westmont class differs from the Fremont class in the following respects: the students in the Westmont class have more severe needs; the pace is slower; there is more prompting, including hand-over-hand prompting; there is less gestural and verbal prompting; the curriculum is at a more basic level and accompanied by pictures; and there is more individual instruction from the teacher and less group instruction.

51. The primary difference between the Fremont class and the Westmont class is that overall the Fremont students' academic skill levels such as reading, writing and communicating are significantly higher than the skill levels of the students in the Westmont classroom. The Fremont class curriculum delivery emphasizes more group based work and choral response within the group, that is, the students respond to questioning by calling out responses in unison. Students in the Fremont class are more likely to work towards meeting common core state standards than the students in the

Westmont class. In the Fremont class, communication skills and the ability to use augmentative and alternative communication supports were guided by staff with minimal prompting while the students' communication skills and supports in the Westmont class were guided by maximum levels of staff prompting.

52. Although the special day class teachers at both Westmont and Fremont use the same Unique and News-2-You teaching curriculum, more of the students at Fremont use a higher level of the curriculum than the Westmont students. More of the students participate verbally during the group lesson in the Fremont class.

53. The Fremont Union witnesses established that if Student is placed in the Fremont class where the program is generally taught at a higher level than the basic program in the Westmont class, Student will shut down and refuse to participate in the academic program at all. Ms. Sullivan is concerned that if Student is placed in the Fremont class, she will need to prepare an entirely different curriculum for Student so that his needs and goals can be met despite his placement in a class where the other students have overall higher ability levels than Student. Ms. Sullivan fears that the individualized curriculum will prevent Student from taking part in the group class instruction and will isolate him from his peers.

54. The Fremont Union witnesses also believe that if Student is placed in the Fremont class they believe is too advanced for him, Student will revert to the behavioral problems he exhibited in eighth grade. The witnesses believe that since the Fremont special day class students participate in more community outings than the Westmont students do, Student may run away from the group and staff will not be able to keep him safe. Student did not establish, by a preponderance of the evidence that his earlier behaviors would not reoccur if he was placed in a setting where more would be expected of him in the areas of attention, academics and communication. Fremont Union established by a preponderance of the evidence that Student's placement at

Westmont was appropriate for Student and that in that setting, his behaviors were under control.

55. Kristin Gross, Ph.D. testified on behalf of Student.¹¹ In January 2016, Dr. Gross observed both the Westmont and Fremont special day classes. She prepared an undated neuropsychological evaluation of Student prior to the March 31, 2016 IEP meeting which she presented at the IEP meeting. This report also included Dr. Gross's observations of the Westmont and Fremont special day classes.

56x. Dr. Gross observed students in a language arts lesson in the Fremont special day class on one occasion. She noticed some students in the class only used a few words. Five students used communication devices. Dr. Gross also noticed some children in the Fremont special day class were not engaged in the language arts lesson at all. Based on those observations, Dr. Gross believes if Student is placed in the Fremont special day class, he will not be the only child with limited communication skills.

57. After observing both the Westmont and Fremont special day classes, Dr. Gross concluded that the programs were not substantially different from each other but that the Fremont special day class would provide Student with social stimulation so he could learn "new communication and basic social skills". Dr. Gross did not address the

¹¹ Dr. Gross has been in private practice since August 2006 performing neuropsychological assessments of children and young adults. She received an M.S. and Ph.D. in clinical psychology from Palo Alto University in 2002. The California Board of Psychology granted Dr. Gross a psychology license in 2003. In 2003, Dr. Gross completed a Post-Doctoral Fellowship at the VA Palo Alto Health Care System's Neuropsychological Assessment Unit and Brain Injury Rehabilitation Unit. In 2004, Dr. Gross completed a Post-Doctoral Fellowship at the Children's Hospital in Oakland's Neuropsychological Assessment Services.

fact that Student does not interact with other students so he is unlikely to learn social stimulation particularly if he is placed in a class where most of the Students are more verbal and interactive than he is. Dr. Gross' testimony on these issues is not given much weight. Her opinion that Student would not be the only one with limited communication skills does not establish that the program was otherwise appropriate. More importantly, she testified that the language arts program at Fremont was not appropriate for Student. Although she also testified that the Westmont language arts program was not appropriate for Student, the evidence at hearing established that it was.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹²

1. This due process 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 et seq. (2006);¹³ Ed. Code, § 56000, et seq.; and 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 to prepare them for further education, employment, and independent living; and 2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to

¹² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.)

"Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) 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, 951 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. 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. §§ 1414(b)(6)(A), 1415(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.)

BURDEN OF PROOF

5. At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case Student bears the burden of proof.

APPROPRIATENESS OF THE MARCH 31, 2016 IEP PLACEMENT OFFER

6. Both federal and state laws require a special education child to be educated in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a) (2006); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with non-disabled peers "to the maximum extent appropriate." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (2006); Ed. Code, § 56040.1.) The least restrictive environment doctrine requires a school district, in making placement decisions, to offer a placement "as close as possible to the child's home." (34 C.F.R. § 300.116(b)(3) (2006); see 71 Fed.Reg. 46588 (Aug. 14, 2006) ["The Department has consistently maintained that a child with a disability should be educated in a school as close to the child's home as possible, unless the services identified in the child's IEP require a different location."].)

7. In *Sacramento City Unified School District v. Rachel H.* ((9th Cir. 1994) 14 F.3d 1398, 1400-1402), the Ninth Circuit held that the determination of whether a

particular placement is the “least restrictive environment” for a particular child involves an analysis of four factors, including: (1) the educational benefits to the child of placement fulltime in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting. However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects Congressional recognition “that some settings simply are not suitable environments for the participation of some handicapped children.” (*Rowley, supra*, 458 U.S. at p. 197.)

8. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*)

9. Given the severity of Student’s needs in March 2016, the parties agree Student cannot be educated in a general education environment, regardless of the level of support provided. Student has an established diagnosis of intellectual disability related to down syndrome. Cognitive functioning tests in January 2016 revealed Student’s age equivalent to be 16 months. Each witness who testified agreed that Student’s cognitive and academic skills fell so far below what could be accommodated in a general education setting that Student requires a special day class to benefit

educationally. Student's disability falls beyond the scope of what can be successfully remediated in a general education classroom or through a mild to moderate special day class. As a result no further analysis is required to determine that Fremont Union lawfully offered Student a placement for most of his school day outside of a regular education class. (*Rachel H., supra*, 14 F.3d at p.1403.) Instead, the appropriate analysis in this case is whether Fremont Union's placement offer to Student in the special day class at Westmont High School, offered a free appropriate public education in the least restrictive environment.

Westmont

10. Student contends that Fremont Union's placement offer in the March 31, 2016 IEP at Westmont is not FAPE and that Student should have been placed at Fremont. Fremont Union contends that the Westmont placement is appropriate for Student; he has received educational benefit, and the Fremont class is not appropriate for Student.

11. The Ninth Circuit discussed the standard for determining educational benefit during an analysis of whether a student was provided a FAPE. "Under the 1997 amendment to the IDEA, a school must provide a student with a 'meaningful benefit' in order to satisfy the substantive requirements of the IDEA." *N.B. v. Hellgate Elementary School Dist., ex rel. Bd. Of Directors, Missoula County, Montana* (9th Cir. 2008) 541 F.3d 1202, 1212-1213, citing *Adams v. Oregon*, (9th Cir. 1999) 195 F.3d 1141, 1145 (applying the "meaningful benefit" test); see also *Deal v. Hamilton County Bd. Of Educ.* (6th Cir. 2004) 392 F.3d 840, 862 ("[We] agree that the IDEA requires an IEP to confer a 'meaningful educational benefit' gauged in relation to the potential of the child at issue."). Earlier Ninth Circuit cases refer to *Rowley's* "some educational benefit" requirement simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way Sch. Dist.* (2004) 394 F.3d 634, 645; *Ash v. Lake Oswego School Dist., No. 7J* (1992) 980 F.2d 585, 587-88.)

Other circuits have interpreted "some educational benefit" as meaning more than trivial or *de minimus* benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341, 349.) The Third and Sixth circuits have required that the benefit be "meaningful." (See, e.g., *L.E. v. Ramsey Bd. of Educ.* (3rd Cir. 2006) 435 F.3d 384, 390; *Deal v. Hamilton Cty. Bd. Of Educ.* (6th Cir. 2004) 392 F.3d 840, 861-863.)

12. The Fremont Union witnesses provided evidence that Student made meaningful gains emotionally and academically at Westmont. He appeared to be happy in his current placement and he developed a good relationship with his teacher. The total communication approach used by Mr. Folck focused less on verbal output and more on increasing Student's total communication through gestures, pictures and words. The impact of Mr. Folck's educational approach was evident by the March 31, 2016 IEP meeting. By that time, Student was paying more attention to his lessons and was starting to direct his attention toward whomever was speaking during the lesson. Student met his behavioral goals during the school year and this allowed him to achieve his academic goals. Student did so well in the Westmont special day class because Mr. Folk's teaching style and the curriculum he offered to Student resonated with Student after his transition from middle school where his behavioral problems were more pronounced.

13. After Student was placed at Westmont, Student's major behavioral problems such as running away and aggression toward staff largely disappeared due to the efforts of Student's teacher. Mr. Folck focused on Student's maladaptive behaviors by showing Student how to use sensory items to calm himself such as using a pressure belt around his chest, sitting on a ball, or using his pom-poms. His teacher and aide were able to easily redirect Student if he became distracted during a lesson in the classroom or while on an outing. Fremont Union has shown that these behavioral gains will not be preserved if Student is forced to change schools. As Dr. Mills established,

Student's emotional functioning will be affected if he is forced to change schools since he had already changed schools the previous year from middle school to high school, and he would have to "get used to a new teacher, a new setting and new kids" if he was moved to the Fremont class.

14. Fremont Union's March 31, 2016 IEP placement offer outside of Student's neighborhood school was partly based on Fremont Union's opinion that when Student is placed in a group program that is too advanced for him, his behavior deteriorates and he does not pay attention to his lessons. Student participated safely during the community outings taken by students in the Westmont special day class. Concerns expressed by the Fremont Union witnesses that Student's behavior will deteriorate if he participates in more than two community outings per week or if he is placed at his neighborhood school, are well-founded.

15. Fremont Union established that its placement of Student in the Westmont special day class offered him FAPE. The Westmont program meets Student's unique needs, and comports with his IEP. The Fremont Union witnesses established that Student received meaningful educational benefit from the Westmont program during the 2015-2016 school year and that this will continue during the 2016-2017 school year. Therefore Fremont Union's placement offer does constitute a FAPE.

Fremont

16. The Fremont special day class offers a more advanced group program than offered by the Westmont special day class. In order for Student to attend the Fremont class, Fremont Union would have to design an individualized program for Student in the Fremont class which will isolate him from his peers participating in the group program. If Student is placed in the Fremont class, he will not be able to reach the academic levels he reached in the Westmont class. Student would not be able to participate during the group teaching since most of the students are verbal and can

respond to the teacher as a group. Student did not establish who would teach Student while he is receiving his individualized curriculum, while the teacher is instructing the other members of the class.

17. If Student is placed in the more advanced special day class at Fremont High School where the work is harder, he cannot participate in the group curriculum, the expectations are greater for paying attention, and almost daily outings in the community take place, his needs will not be met and he will not meet his goals. Further it is more than likely that his behavioral problems will return. Student did not show that the greater number of community outings were appropriate for Student or were required to provide him a FAPE.

18. Student did not offer any case authority to support his contention that Fremont Union has an obligation to create an individualized program for Student in the Fremont class when an appropriate program is located four miles away and already offers Student the ability to access the entire class' curriculum, including the group instruction with a classroom teacher who helped Student meet behavior goals and make substantial progress on his academic goals in the 2015-2016 school year.

19. Fremont Union established that Student's placement in the Westmont class offered Student a FAPE. On the other hand, Student did not establish that the Fremont class would offer Student a FAPE. Although Fremont is Student's "home" school if he were not disabled, in order for Student's placement at his neighborhood school to constitute a FAPE under the IDEA, it must be designed to meet Student's unique needs, comport with his IEP, and be reasonably calculated to provide Student with some meaningful educational benefit in the least restrictive environment.

20. Student has not shown that he will receive more than a *de minimus* or trivial educational benefit if he is placed at Fremont. In fact the opposite is true. The evidence established that placing Student in the Fremont special day class will have

potential harmful effects on Student as his behavior may deteriorate again and he will not be able to access his education as he has at Westmont.

Placement Not Required at Student's Home School

21. The contention in Student's closing brief that Student should have been placed in the Fremont class because it is his neighborhood school and he will receive some educational benefit in this class was not supported by the evidence. Student did not establish that he will receive more than a *de minimus* educational benefit in the Fremont class. (*N.B. v. Hellgate, supra*, 541 F.3d at pp. 1212-1213.).

22. Student's principal argument is that Student must be placed in a class as close to home as possible. However this contention amounts to a presumption that a student with a disability should always attend his or her neighborhood school. Student did not provide authority to support this contention. Instead cases from other circuits have found the opposite. (*McLaughlin, supra*, 320 F.3d at p. 673; *Hudson by Hudson, supra*, 910 F.Supp. at p. 1304; *accord Flour Bluff v. Lesa T., supra*, 91 F.3d at pp. 693-694.) *See also* In Letter to Trigg, (2007) 50 IDELR 48, the which the United States Department of Education Office of Special Education Programs stated that school districts have some flexibility in deciding the specific location of a child's special education services if more than one school offers a placement that comports with a child's IEP. While OSEP opinions are not legally binding, the Ninth Circuit has deferred to OSEP guidance in resolving issues where the IDEA is ambiguous. (*Hooks v. Clark Cty. Sch. Dist.*, 228 F.3d 1036, 1040 (9th Cir. 2000), *cert. denied*, 532 U.S. 971 (2002).)

23. The IDEA does not require a student with disabilities to attend the school located closest to his home if his IEP requires a different arrangement because the program that would offer the student a FAPE is located elsewhere. Title 20 United States Code section 1412(A)(5)(a) only requires that a student be educated "to the maximum extent appropriate" with nondisabled peers in the school he would attend if not

disabled, —unless the IEP of a child with a disability requires some other arrangement. The Code of Federal Regulations also states that "where it has been determined that a disabled student cannot be appropriately educated within her neighborhood school due to her special needs, the requirement of a school district is merely to place the student in an appropriate setting as close to home as possible." (34 C.F.R. § 300.552(a)(3).) State regulations similarly favor placement of a special education student in his "home" school and require documentation when such a placement is not made. (5 C.C.R. § 3042(b).)

24. Student concedes that his needs and goals were met during his placement at the Westmont day school. However he argues that Student has an absolute right to attend his neighborhood school despite his progress at Westmont. Student further argues that Fremont Union needs to lower the level of the entire Fremont class's curriculum to meet Student's needs because the Fremont class is his neighborhood school. Student relied on *Springsdale School Dist. V. Grace* (8th Cir. 1983), *cert. denied*, 693 F.2d 41 to support this argument; however, *Grace* is factually distinguishable. The *Grace* case involved a school district's plan to remove the child from her mainstreaming class to a school for the deaf in another district. As such this case is not relevant to the issue here. Instead the issue here is not one of least restrictive environment with respect to a general education classroom but rather which special education classroom setting is appropriate to address Student's individual needs." (See *McLaughlin v. Holt Public School Board of Education* (6th Cir. 2003) 320 F.3d 663, 673).

25. Under the code of federal regulations, "[t]he Department has consistently maintained that a child with a disability should be educated in a school as close to the child's home as possible, unless the services identified in the child's IEP require a different location." (34 C.F.R. § 300.116(b)(3) (2006); 71 Fed.Reg. 46588 (Aug. 14, 2006) Similarly in this case Fremont Union has shown that Student's educational needs and goals require that "the services identified in the child's IEP require a different location."

(Ibid.) Student cannot be appropriately educated within his neighborhood school due to his special needs. He can be appropriately educated in the Westmont class which is almost as close to Student's home as his neighborhood school. Although the special day classes may be in different districts, Westmont is only four miles further from Student's home than Student's neighborhood school. As such, the distance between Student's home and his proposed placement in the Fremont special day class is not a major factor to consider in determining Student's placement. District and Circuit court cases from other states considered whether the consideration of proximity results in a presumption that a disabled student attends his or her neighborhood school. The courts found that the correct analysis is whether the district offered a FAPE and not whether students should have attended their neighborhood schools and there is no presumption that a child will attend his home school. (*See Hudson by Hudson v. Bloomfield Hills Pub. Sch.* (E.D.Mich. 1995) 910 F.Supp. 1291, 1304; *accord Flour Bluff Indep. Sch. Dist. V. Katherine M. by Lesa T.* (5th Cir. 1996) 91 F.3d 689, 693-694)

26. Student has not shown that he can be appropriately educated within his neighborhood school due to his special needs. On the other hand, Fremont Union has shown that Student requires services that are not available at his neighborhood school. Student did not show that placing Student at Fremont was appropriate; however, even if he had, Student did not provide any legal authority showing that Fremont Union was prohibited from choosing between two appropriate placements for Student. Therefore, whether Fremont was appropriate or not, the Westmont placement was appropriate and therefore offered Student a FAPE.

27. Based upon the foregoing, Student has not met his burden of showing that the school placement offered in the March 31, 2016 IEP in the Westmont special day class was not the appropriate placement for Student in the least restrictive environment.

ORDER

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, Fremont Union prevailed on the sole issue.

RIGHT TO APPEAL THIS DECISION

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

DATED: August 1, 2016

/s/

CHERYL CARLSON

Administrative Law Judge

Office of Administrative Hearings