

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2016010404

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

SAN DIEGO UNIFIED SCHOOL DISTRICT,

OAH Case No. 2016020351

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on January 14, 2016, naming San Diego Unified School District. District filed a complaint against Student on February 4, 2016. District filed on that date to consolidate the cases for hearing. Student did not oppose, and consolidation was granted on February 9, 2016. The matter was continued for good cause on February 25, 2016.

On April 11, 2016, Student moved to amend her complaint. Leave to amend was granted by OAH on April 14, 2016.

Administrative Law Judge Chris Butchko heard this matter in San Diego, California, on June 9, 14, 15, 16, and 20, 2016.

Ashok Pathi, Attorney at Law, of Schwartz and Storey, represented Student. Student's Parent attended all days of hearing.

Jonathan P. Read, Attorney at Law, of Fagen, Friedman, and Fulfroost, represented District. Brian Spry, Due Process Administrator, attended all days of hearing on behalf of District. Jennifer Parks-Orozco, Program Manager for Due Process, attended the hearing on behalf of District on June 14, 20, and 21, 2016.

On June 20, 2016, OAH granted the parties' request for a continuance to allow the parties to file closing briefs. Upon timely receipt of the written closing arguments on June 30, 2016, the record was closed and the matter was submitted for decision.

ISSUES¹

Student's issues are:

1. Was Student denied a free and appropriate public education by District's failure to provide placement in the least restrictive environment, such as a classroom for mild to moderately disabled pupils, or in a general education placement with resource support?
2. Was Student denied a FAPE by District's failure to ensure that specialized academic instruction services were provided by appropriately credentialed staff?²

¹ The issues have been reorganized for this Decision. These are the issues heard and decided. The ALJ has the authority to redefine a party's issues providing no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

² Student did not brief issues 1A) and 5 listed in the prehearing conference order, and has condensed briefing on the remaining claims into the three issues listed above. Items 1B), 2, and 3 have been condensed into composite issue 1, and Student's issue 2 is further argument on composite issue 1. Composite issue 2 briefs issues 1C) and 4 from the prehearing conference order. Composite issue 3 melds issues 6 and 7 from the

3. Was Student denied a FAPE by District's procedural violations of:
 - a. Failing to consider a continuum of placement options; and/or,
 - b. Failing to allow Parents the opportunity to meaningfully participate in the individualized education program process?

District's issue is:

- 1) Did the November 12, 2015 offer of placement and services provide a FAPE in the least restrictive environment and may District implement the offer over parental objection?

SUMMARY OF DECISION

Student did not establish that she was denied a FAPE by District. Student was offered a placement in the least restrictive environment. Student did not establish that she was denied a FAPE by being provided with specialized academic instruction services by inadequately credentialed staff. Student did not carry her burden of demonstrating that District committed a procedural violation that resulted in a denial of her right to a FAPE. Student's IEP plans were designed to and did offer a program that was designed to meet her educational needs and allowed her to make academic progress. District established that its November 12, 2015 offer of placement and services was appropriate.

prehearing conference order. Issues 1a) and 5 appear to have been abandoned by Student. Because they were not presented in hearing and argued in briefing, Student has not carried her burden on these issues, and they are denied on that basis. To the extent that Student's argument that none of District's proposed placements were reasonably calculated to provide educational benefit presents an independent claim rather than a defense to District's action, it is denied as not raised in Student's complaint and not part of the prehearing conference order and therefore not at issue here.

FACTUAL FINDINGS

BACKGROUND

1. Student is an eight-year-old female who resides within District's boundaries and has just completed the second grade. Student has been eligible for special education services since January 2013 under the category of autism.

2. Student was diagnosed with autism in August of 2012. She began attending school within District at Scripps Elementary in February 2013. She has received applied behavior analysis therapy, speech and language services, and occupational therapy since November of 2012. Aside from her educational services, Student currently receives in-home ABA therapy and tutoring twice weekly.

3. Student performed well in kindergarten. Reading was a strength for her, but although she was at a proficient level at the start of the year, she began to fall off as the material became more difficult. At the end of the year she was at below basic level in writing and language conventions.

4. Student attended a first grade general education class taught by Jeannine Corry in the 2014-2015 school year. Student would be taken from class by Bruce Powelson for instruction in a separate classroom in a small group, although on some occasions he would 'push-in' to give her instruction in class. Student had a one-to-one aide, and Ms. Corry believed that Student made academic progress while in her class. Ms. Corry used peers to help Student, and sometimes Student was able to stay longer in class than her schedule dictated because she would not have what Ms. Corry referred to as "behavior interruptions." Ms. Corry was able to cope with Student's behavior issues.

5. In first grade, Student was rated as below basic in her reading comprehension skills, but with intensive support and significant extra time, she was able to approach grade level in writing. Student's math skills approached grade level standards except in application of mathematical concepts, which requires

comprehension of questions posed to choose the correct mathematical operation for the problem.

6. Student's January 2014 IEP placed her in general education for 20 hours per week and 7.5 hours per week in specialized instruction in a separate classroom.³

7. Following IEP team meetings on December 9, 2014 and January 26, 2015, Parents agreed on February 5, 2015, to an IEP that placed Student in general education for 16 hours per week and in a separate classroom for 11 hours per week. In addition, Student received occupational therapy, speech and language services, music therapy, and adaptive physical education. Parents were not fully in agreement with the increase in time out of general education, but consented to the implementation of this IEP. This IEP later became stay-put for Student.

8. Student had been classified by District since kindergarten as affected to a "moderate/severe" degree by her disability. Parent believed that Student was considered mild/moderate because Student had been pulled for services from her classroom along with students in the mild/moderate category. Parent discovered in March 2015 that Student was considered moderate/severe when the parent of a classmate in the mild/moderate program told her that Student was not being educated in the group with her child. On May 22, 2015, District informed Parents that Student's moderate/severe special day class at Scripps would be moved and consolidated in another location. On June 10, 2015, District informed Parents that Student's moderate/severe class was being moved from Scripps to Dingeman Elementary School.

9. Student filed a due process hearing request in July of 2015. The parties agreed to a settlement on September 9, 2015, where District would provide a one-to-one aide for Student during the school day, Student would be in general education for

³ A school week in District is generally 29.5 hours.

all but one hour each day when she would receive specialized academic instruction in a separate classroom, and District would fund an independent psychoeducational evaluation of Student by Dr. Rienzi Haytasingh. The placement and services would remain in effect until District made a new offer of FAPE, but not later than December 8, 2015.

10. For the 2015-2016 school year, Student was placed in a second grade class at Scripps taught by Emily Trinh. Ms. Trinh believed that Student made progress over the school year, but noted that she was not doing what a second-grader would do. Student would sometimes wander around the class and needed to be redirected by her aide. Although Student could read, she could not comprehend what she read. Student would bring in 'news' reports as a homework project, wherein she read a report on a trip she had taken and afterwards ask the class two questions about her report. When the others would answer her questions, Student was unable to say whether they were right or wrong, even though she had the answers written down on her paper. In addition, Student made it difficult for Ms. Trinh to teach her class. When Student was in her class, Ms. Trinh had to redirect classroom routines to avoid singing, noises, or activities that might cause Student to tantrum or perseverate, and Student's tendencies to vocalize out of context were disruptive to class.

11. Student received the hour of specialized academic instruction from Martha Smith, a credentialed special education teacher with an autism spectrum disorder authorization, until approximately October 15, 2015, when Lesley Roland, a substitute special education teacher, took over the bulk of that duty. Ms. Roland had no special education certification, but held a multi-subject clear credential and was supervised by Ms. Smith. Ms. Smith remained the case carrier for Student and would provide materials for Ms. Roland to work on with Student.

DISTRICT'S ASSESSMENT

12. A speech and language assessment report dated October 21, 2015, was conducted for the November 2015 IEP team meeting. The report noted that Student had been found to have severe expressive and receptive language disorders and severe pragmatic language deficits during an initial speech and language evaluation by a medical group in October 2012. When assessed in 2015, Student was found to produce scripted utterances and echolalia.⁴

13. Student scored particularly low on tests of comprehension, and testing was often discontinued when she ceased to give responses. In one test measuring the ability to understand relationships between words, Student picked the first two answer choices presented for every question. Testing was discontinued when she said "good night" and put her head on the desk. The test of understanding of spoken paragraphs was abandoned when Student would not respond to the trial questions. Student's attention span was brief and she needed frequent prompting to keep working.

14. The assessor noted that Student experienced difficulty understanding or processing language, especially as it increased in complexity. Student often vocalized to herself in the classroom by humming, singing, blurting out, repeating scripted phrases, and using immediate echolalia. The assessor noted that Parent and Ms. Trinh disagreed over whether Student would ask for clarification when she did not understand something.

15. During an observation in the separate classroom, Student was working on a math worksheet with her aide. Student needed constant prompting and reminders

⁴ Scripted speech and echolalia are types of non-functional communications where the speaker repeats dialogue memorized from movies or television or sounds she has just heard.

about her reward to keep working. She was easily distracted by noise in the room and would call out comments. If a problem was difficult for her, she would laugh, look away, and quote movie lines.

16. Student was also observed in the general education classroom. She had significant difficulty following, focusing, and attending to instruction even with prompts and repetition. Her aide was able to redirect her with visual prompts on a key ring. While sitting at her desk, Student blurted out "happy face" and "Is there anyone out there?" On another observation Student had difficulty staying with her class during a "run club" outing, wandering about and eventually going off to sit under a tree.

17. In Ms. Trinh's class, Student had difficulty following directions and classroom routines, could not ignore distractions, had difficulty predicting outcomes and drawing inferences, often talked or sang to herself, would blurt out in class, and had difficulty asking or answering "wh-" questions. Student could not participate in classroom discussions, carry on meaningful conversations, make relevant comments, understand humor or figurative language, ask for clarification, or interact with other students in the class. Student was not a full participant in the class.

18. A multidisciplinary assessment was also conducted for the November 2015 IEP team meeting by school psychologist Elizabeth June and education specialist Martha Smith. Observation of Student revealed that she was inattentive, refused to follow directions and would engage in vocally disruptive behaviors and physically self-stimulatory behaviors, including of her private areas. The observations took place early in the school year, and were at a time when Student was dealing with both grade transition and turnover in her support aides.

19. Observation in the general education math class for 15 minutes in the month of September found Student to be engaged in the class only four percent of the time and that she had to be prompted to work 1.27 times per minute. In addition, she

engaged in 2.5 vocal “stims” per minute.⁵ Another 30-minute observation during math class found her engaged 14 percent of the time, with vocal disruptions taking place 25 percent of time. Although part of the class session involved working with a partner, Student did not participate with a partner.

20. At the time of the November 2015 assessment, Student had atypical preoccupations and sensitivities. She had to cover her ears during the reciting of the pledge of allegiance and would perseverate on certain shapes or require that tasks be done the same way and to every item in a series. Student had difficulty transitioning in class, and would not do so without individual prompting. When she did transition, she was easily distracted and moved slowly. If not given her way in class, Student would have outbursts that included screeching, shouting, whining, and vocal perseveration.

21. Early in second grade, her parents reported that Student had significantly below average skills related to health and safety. She required substantial support in home and at school to be safe and engage in age-appropriate activities. In the early part of second grade, Student required reminders to use the restroom during the school day, although a goal to that effect was met before the end of the year.

22. The assessor found that Student was unable to answer simple questions about where she lived or went to school. When she did answer, she responded with non-sequiturs. Otherwise, she would hum, stare off, or self-stimulate. At the time of the assessment, Student would go to the slide at recess and only interact with her aide. Ms. June was told by Student’s aide Heather Baluski that Student was unable to sustain attention in a group of seven students, which is the typical size of a mild/moderate class. In addition, Student would refuse to follow what the other students were doing and be disruptive.

⁵ “Stims” is shorthand for self-stimulatory behavior.

23. At seven years and three months old, Student's cognitive development was at an age equivalence of three years, nine months. She struggled to match similar objects, nest objects, copy patterns, imitate folds in paper, or recall pairs of matched-color blocks. Testing with the Kauffman Assessment Battery for Children revealed that Student had areas of cognitive strength, approaching average levels in pattern reasoning, fluid reasoning, long-term retrieval, nonverbal story completion, hand movements, and block counting. She was significantly below average in comprehension knowledge, short-term memory, and visual processing.⁶

24. Assessed early in second grade, Student was to read text at first grade level, but was unable to answer any questions requiring comprehension of what she had read. As part of the Woodcock Johnson Tests of Achievement, Fourth Edition, Student read a story about a girl shopping for shoes and was asked to retell the story. Her response included the words drums, moon, and rock band, which had nothing to do with the story. Her ability to decode words was in the average range, but her comprehension level was at the mid-kindergarten level.

25. Other parts of the Woodcock Johnson test showed high abilities. Student achieved scores equivalent to middle third grade level in phoneme grapheme knowledge, word attack and spelling of sounds, and at or above grade level in basic reading skills and letter-word identification. She approached grade level in spelling. In the other 17 tested categories, however, she scored below grade level, including at kindergarten level in five and below kindergarten level in six more. In addition, testing

⁶ Although Student's overall index score on the test was invalid, according to the scoring instruction, because the spread between her highest and lowest scores was too great to allow a composite to be an accurate summary of her abilities, the individual section scores are reliable.

was done in a one-to-one setting and Student was given unlimited time to prepare her answers, which minimized the behavior and attention difficulties she had in class.

26. The assessment report noted that the grade level expectation was that students should independently write a paragraph, but that Student was unable to independently write a sentence. Student required constant intensive support and often 45 minutes or more to write one or two sentences.

27. Student has good skills at spelling, word decoding, and in simple arithmetic. Although she could read aloud, she was generally unable to explain what she had read or to retell what had taken place. Her developmental reading level in November 2015 was at level four, equivalent to early first grade. Her peers were expected to be at level 18 at that time. She was able to read words but did not get any meaning from them and did not comprehend what she read. In general, Student struggled greatly to comprehend written material.

28. Student's math abilities, as tested by the Woodcock Johnson, were closer to grade level. Her abilities in calculation and number matrices were near grade level, and her math calculation skills were in the low average range. Parent described a higher level of calculation ability than seen by District personnel, reporting that Student could do two-digit arithmetic and break down three-digit numbers. Beyond calculation ability, Student's broad mathematics and problem solving skills were at a kindergarten level, and her ability to apply math knowledge was below kindergarten level. Student was unable to solve problems requiring analysis. Student could add simple numbers, but was unable to reply when asked what happens when someone with three balloons is given two more.

29. The November 2015 multidisciplinary assessment report found that Student's learning was drastically impacted by off-task behaviors, difficulty in sustaining attention, and a lack of foundational academic skills such as reading comprehension.

The report found that Student was unable access the core curriculum in the current setting.

THE INDEPENDENT PSYCHOEDUCATIONAL ASSESSMENT

30. Dr. Haytasingh, assisted by Angela Aiello, conducted the independent psychoeducational evaluation. Dr. Haytasingh had been a school psychologist for over a decade before starting his own practice. He has assessed over 500 children and has worked with hundreds of children with autism. He has worked with District and is familiar with their programs. Ms. Aiello, the author of the assessment report, worked as a school psychologist for the San Diego Charter School Special Education Consortium for five years and has a master's degree in educational psychology. She has worked with over 1,000 special education students, more than 500 of whom had autism.

31. Their assessment report, dated October 29, 2015, did not include any academic testing because the assessors were only instructed to do a psychoeducational evaluation. Dr. Haytasingh administered the Autism Diagnostic Observation Schedule, Second Edition, and found that Student had a high number of autism indicators. Ms. Aiello administered the Naglieri Nonverbal Ability Test, which is an untimed test she believed to be better for children with short attention spans and lower language skills. Ms. Aiello believed the test would bring out Student's strengths because the language, working memory, and attention demands were all reduced on that test. Student's nonverbal abilities were found to be in the slightly below average range, or approximately 18 months behind her typical peers. Ms. Aiello also administered the Vineland adaptive functioning assessment, consisting of rating scales given to Parents and teacher, which found Student to have a typical profile for verbal autism. Student was rated as higher functioning by Parent than by her teacher, a common outcome Ms. Aiello attributed to differing expectations.

32. Dr. Haytasingh did not observe Student at school. He believed that

Student was likely at risk to model poor behaviors displayed by other students because she was capable of behavior modelling, and Parent told him that Student would come home with behaviors that Parent did not know from where they had come.

33. In total, Dr. Haytasingh observed Student for approximately three hours in his office. Dr. Haytasingh interacted with Student when he administered the Autism Diagnostic Observation Schedule and when Ms. Aiello was working with Parent. He informally assessed her writing ability by working with her on a 'bubble map' to help her write sentences on her preferred topic of outer space. With prompts and instruction, Student was able to write the idea seeds "Saturn," "stars," "galex," and "litte," and then produced the sentences "The Saturn has rings," "Sun is a star," "a galex has many," and "Star when see a niht." Student read a book aloud, but was unresponsive when asked "wh-" questions about the story. She demonstrated rigidity, repetitive behaviors, and insistence that routines be completed a specific way.

34. Ms. Aiello was able to observe Student in class. She saw Student working in the separate classroom with Ms. Roland. It was Student's first day working with Ms. Roland. Student was working on a math worksheet problem to subtract 7 from 14. Student's attention wandered and she talked to herself. On the fourth attempt to prompt Student to write an answer, Ms. Roland prompted her to write the number seven. Student did not comply. On the seventh prompting, Ms. Roland wrote the number seven and asked Student to copy it. Student continued to make noises and look around. After nine minutes of prompting, Ms. Roland moved on to another question involving a graph. After three prompts Student gave the correct answer, and then three more. Ms. Aiello observed that Student required constant prompting as she would not respond to Ms. Roland and was bouncing around in her seat and verbalizing. An attempt to get Student to draw four happy faces took 20 minutes and the intervention of two other adults.

35. Student then transitioned into the general education classroom, where Ms. Aiello observed her for approximately 15 minutes. Student constantly wiggled in her seat and was difficult to engage in her workbook despite the presence of her one-to-one aide and a token reward chart.

36. Ms. Aiello worked with Student for approximately four hours and observed her for another hour. She agreed with Dr. Haytasingh that Student was at particular risk of picking up bad behaviors from other students and that Student should not be placed in general education for instructional purposes due to her significant attention difficulties and other difficulties identified in the assessments. She found that although Student did not initiate or hold joint attention, she did sometimes respond to others and at times attempted to engage Parent in activities. Like Dr. Haytasingh, Ms. Aiello believed that for socialization purposes Student should be included for at least part of her day in general education.

37. Dr. Haytasingh believed that the distinction between mild, moderate, and severe autism is subjective and is not recognized by the state of California. Applying the standards of the Autism Diagnostic Observation Schedule, he believed that Student was best described as having a moderate level of autism. According to the results of the Naglieri, Student was two standard deviations below the average, or in the 12th percentile, in reasoning skills. He did not believe that Student could access the general education curriculum because she had difficulties with self-regulation, attention, and conceptualization, but believed that Student should have the opportunity to interact with general education peers in both academic and unstructured environments for social, transitional, behavioral, and language modelling.

38. The assessment prepared by Dr. Haytasingh and Ms. Aiello concluded that Student would be classified in the moderate level of impact from her autism, although it noted that such a classification was not part of educational criteria for autism. The

report found that the least restrictive environment for Student was one that could provide her with consistency, clear expectations, and support from behaviorally trained staff. It noted that Student should be educated around strong social models and students with strong social and communication skills. The assessment concluded that Student would not benefit academically from inclusion in general education, but that her social and adaptive skills would benefit if she were in general education for part of her day.

THE NOVEMBER 2015 IEP TEAM MEETINGS

39. Student's triennial review IEP team meeting was convened on November 3, 2015. At the meeting, the team discussed the District assessment and the Haytasingh/Aiello assessment. Both Dr. Haytasingh and Ms. Aiello attended the meeting and participated in the discussion. The meeting had to be continued to November 12, 2015, because it ran beyond the allotted two hours. At the continued meeting, Student was offered placement in a moderate/severe class with a specialist with a moderate/severe teaching credential, which was not available at Scripps. The proposed placement was at Dingeman, and District offered to provide transportation for Student. At the meeting, Mark Morici, the Vice Principal at Scripps, discussed District's placement offer with Parents and discussed the difference between the mild/moderate and moderate/severe programs with Dr. Haytasingh. Parent discussed her concerns about the proposed placement at the meeting.

40. Student's November 12, 2015 IEP team meeting report found that she had significant difficulties with verbal and nonverbal communication, social interaction, attention, and responding to changes. In addition, she was subject to repetitive or stereotyped behaviors and movements, including vocal stims, hand stims, and self-stimulatory behavior to her private parts. The team found that Student had cognitive abilities ranging from significantly below average to low average. Despite significant

support, accommodations, and one-on-one instruction, Student did not show consistent response to interventions.

41. The FAPE offer from the November 12, 2015 IEP team meeting recommended placement in District's moderate/severe program, with 13 hours per week of specialized instruction in a separate classroom and 10 hours per week in general education. In addition, Student was offered 12 hours per year of music therapy, 16 hours per year of occupational therapy and the same amount of adapted physical education, and 30 hours per year of language and speech services. Parent did not agree to the offer of FAPE and tried to get District to increase Student's time in general education even after the meeting.

42. District placed Student on stay-put services, using the January 26, 2015 IEP, signed by Parent on February 5, 2015, as the last agreed-upon placement. Student was to receive specialized academic instruction for 11 hours per week from "an Ed. Specialist and support staff" and be in general education for 16 hours per week, along with other services.

43. Following the meeting, District suggested that Parents revisit Dingeman Elementary with staff to give it fresh consideration as a potential placement. Parent had first visited Dingeman in spring of 2015 when she had been told that Student would be transferred into its moderate/severe program. She observed the students watch a toileting skills video, which she believed indicated that the program was below Student's level. Parent again visited Dingeman after the November IEP meetings and found the class chaotic, with students running about the classroom, one banging his head on a table, and another with his hands down his pants. She again did not see any academics and again found the class inappropriate for Student.

44. A further IEP team meeting was held on March 16, 2016, to see if Parents would consent to placement at the moderate/severe program at Dingeman. Parents

again did not agree to the placement. District suggested Parents view it again, this time with Dr. Haytasingh and Ms. Aiello. The IEP team meeting report included the self-care goal of learning how to button and unbutton clothing, although Student had met her January 26, 2015 goal of informing others of her need to use the bathroom before the November 1, 2015 IEP meeting.

45. Dr. Haytasingh and Dr. Aiello visited the moderate/severe class at Dingeman with Parent in April of 2016. Dr. Haytasingh did not see the students talk or use any language during their observation, although the class was being led by a speech pathologist. There were four to five students in the main group and two or three in another. Instead, the students silently cut out shapes from paper, then transitioned to simple addition and counting skills. Both Dr. Haytasingh and Ms. Aiello believed the class was below Student's level cognitively and behaviorally, although neither saw any negative behaviors demonstrated by children in the class. Dr. Haytasingh believed placement there would be detrimental to Student's development, even with differential education and mainstreaming. He saw no benefit to Student in being placed in that class.

46. Martha Smith is an education specialist for children with mild/moderate autism. She provided specialized academic instruction to Student with Ms. Roland for most of her second grade year, which was delivered on a one-to-one or very small group basis. Ms. Smith was able to control Student's undesirable behaviors such as crying, stomping her feet, or spitting so that they were not detrimental to her learning or to the class. However, because mild/moderate working groups are larger and do not allow much one-to-one instruction, Ms. Smith believed that Student would receive better service in a moderate/severe setting because she does not learn well in a group setting. Ms. Smith observed that Student would not do work without one-to-one support. Ms. Smith did not believe that Student should spend all day in the

moderate/severe class at Dingeman, but thought it would work if she was in general education for part of the day and had a quiet space into which to retreat.

47. Parent was told by Dingeman Principal Tamara Lewis that some students would get 'pushed out' to general education and that Student could be mainstreamed for improvement of her communication and socialization skills. Alexandria Lowe, the moderate/severe classroom teacher at Dingeman, told Parent that she would use differential instruction to teach Student at appropriate levels for her ability. The classroom at Dingeman had six students and two teachers, as well as three aides assigned to students in the class. Ms. Lowe believed that she could implement all of Student's goals in her class and by non-academic mainstreaming. She would maintain and improve Student's academic skills through differentiation and modification of curricula, scaffolding, and the use of specialized teaching programs such as UNIQUE, which is used for reading comprehension support. The moderate/severe program concentrates on self-care skills, as opposed to the mild/moderate class which provides support for students capable of doing core curriculum work. District's teaching staff agreed that Student would not be able to learn in the Common Core curriculum, which required comprehension abilities that Student has not yet displayed.

48. Parent did not believe that Student should be categorized as moderate/severe because Student was verbal, did not have self-care needs, and had academic skills, particularly in mathematics. She believed that Student's ability to perform on the assessments was negatively impacted by disruption caused by the transition from first grade and turnover in the aides and instructors working with her. In addition, she noted that Student had made friends in the general education class. Parent believed Student should be placed in a mild/moderate program like those she observed

at Mason Elementary or Miramar Ranch.⁷

49. Ms. June disagreed with Parent and the independent assessors. She believed that Student was severely impacted by autism based upon her Autism Diagnostic Observation Schedule score and the anecdotal evidence included in the independent assessment. On a 10-point scale with six as moderate and nine as high, Student was scored as an eight on the Autism Diagnostic Observation Schedule by the independent assessors. Ms. June believed that Student needed a high level of support and needed functional and social skills to be able to live independently. Ms. June believed Student could meet her functional and academic needs if placed with a moderate/severe class and that Student would be able to progress toward her socialization and communication goals through non-academic mainstreaming.

⁷ Student also presented the testimony of Advocate Kristiana Kelly, who met with Student and briefly toured mild/moderate and moderate/severe classes in District. Ms. Kelly has been a substitute special education teacher in District and has attended many IEP meetings, but has only taken one college class in the psychology of child development and no classes in educational theory or application. Although a trained and experienced advocate, her expertise does not extend to educational issues such as those at issue here. Her opinion testimony therefore was given little weight. She did report on her observation of Student in December 2015, which comported with the observations made in September and October. She described how the class was given an assignment to write a four-paragraph essay but Student, with maximal prompting by an aide, was only able to write her name and the date.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁸

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁹ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free and appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called

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

⁹ All subsequent references to the Code of Federal Regulations are to the 2006 version.

designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *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, 950 [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. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

STUDENT'S ISSUES

ISSUE 1: FAILURE TO OFFER EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT

5. Student's difficulties with attention and behavior in the general education setting resulted in District offering placement in a moderate/severe special day class. Student asserts that this constitutes a denial of a FAPE. She asserts that she would benefit more from education in a general education classroom than from instruction in a special education classroom, she would receive non-academic benefits from interacting with neurotypical students, she does not have a disrupting effect on other students or require undue time from her teacher, and it would be more cost-effective to educate her in a general education classroom. In the alternative, Student argues that her needs would be better served by placement in a class for mildly to moderately disabled children.

6. 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 education 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)).) In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116 .)

7. To determine whether a special education student is being placed in the least restrictive environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) the educational benefits of placement full-time in a regular class with appropriate aids and services compared to the educational benefits of a special education classroom; 2) the non-academic benefits of interaction with children who are not disabled; 3) the effect of the student's presence on the teacher and other children in the classroom; and 4) the cost of mainstreaming the student in a regular classroom. (*Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35

F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].)

8. If it is found that a child cannot be educated in a general education environment, then the least restrictive analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. The continuum of program options ranges from the least restrictive to the most restrictive, from general education settings to institutional settings. (Ed. Code, § 56361.) Educational classifications within a particular spot in the continuum are not part of least restrictive environment analysis.

9. Looking to the first *Rachel H* factor, Student's academic benefit from placement in general education classes must be compared to her academic benefit from placement in special education. Student argues that under *Rowley* she need only show that she has "some basic floor of opportunity" to gain "some educational benefit" from placement in general education. (*Rowley*, *supra*, at pp. 200, 203-204.) Such argument misapplies the *Rachel H* analysis, as that is not an element of the four-part test. To evaluate the first *Rachel H* factor, the benefit from that placement must be weighed against her benefit from placement in the special education class.

10. Applying the analysis, it is clear that first *Rachel H.* factor recommends

placement in the special education classroom. Dr. Haytasingh, Student's own expert, has stated that she cannot access the general education curriculum because of her difficulties with self-regulation, attention, and conceptualization, and that she would not benefit academically from inclusion in general education. The testing and observation performed by Dr. Haytasingh and Ms. Aiello found student's academic abilities to be significantly behind those of her peers and her ability to maintain attention severely impacted by her disability.

11. District performed cognitive and achievement assessments as part of its multidisciplinary evaluation report and reached similar conclusions. Student scored extremely poorly on all tests of comprehension and required constant redirection and prompting to produce work. Although she had strengths in reading and mathematics, they were concentrated in areas of rote exercises such as computation and letter sounds. Any task that required insight or application of principles presented insurmountable difficulty to her.

12. Student's teachers and the aides that worked with her also saw little academic benefit to her in general education classes. Student could not be included in group work because she could not complete her work on the same schedule as the other students. Her lack of reading comprehension made it impossible to match her with any other student in a reading group. For the most part, Student sat with her aide, who worked to get her to focus on the assignment and redirect her when she was distracted. Student was not a full or active participant in the general education classroom.

13. In contrast, the special education classroom offered an opportunity to match her academic strengths and work on her weaknesses through differentiated instruction. Since a significant number of Student's abilities had tested at the kindergarten level or below and the expert testimony all agrees that she gets no

academic benefit from mainstreaming, it confers no benefit upon her to sit in a general education classroom facing work that she cannot comprehend.

14. As Student has grown, the difference between what she is required to do by a general education curriculum and what she is able to do has become more stark. Student has learned simple calculations, but shows no ability to order or choose operands to solve problems. She has quite good ability to sound out words and can read well, but she does not comprehend what she reads. As the curriculum advanced from rote skills to application of those skills, Student's deficits became barriers. Under common core standards, pupils must be able to choose a process to answer questions and then explain why they proceeded as they did. District's observation of Student showed her unable to begin to calculate what happens when two more balloons are given to a person holding three. She could not benefit from attempting common core work. Student's comprehension difficulties in reading and math led all assessors to conclude that the general education curriculum, even if modified, would offer her no academic benefit at all. She may be able to make some academic progress in the general education setting, but it will not be on the general education curriculum.

15. It is certainly possible that Student's performance on the assessments was adversely affected by the transition to a new school year and by the turnover among her teachers or aides and that Parent's higher depiction of her abilities is more accurate. The presumption under 20 U.S.C. § 1412 (a)(5)(A) remains: all students should be mainstreamed to the maximum extent possible. However, the analysis of the first *Rachel/H* factor requires comparison of academic benefit to the child in each proposed placement. The long-term depiction of Student's abilities by her teachers matches the conclusion of both her own and the District's assessors: Student cannot now access the curriculum being offered in the general education setting regardless of the level of support provided. For purposes of assessing the first *Rachel/H* factor, the educational

benefits to Student of placement in a special education classroom are substantially greater compared to the educational benefits of full-time placement in a regular class with appropriate aids and services.

16. The next *Rachel H* factor examines the non-academic benefit of interacting with students who are not disabled. Student argues that she has benefitted socially, emotionally, and behaviorally from inclusion in general education. Ms. Aiello found that Student had the potential to grow socially, and Parent believes that Student has made friends in general education. Both District and Student's evaluators agree that Student should be mainstreamed during non-academic times for social and communication development. To a degree, Student is isolated because of the necessary presence of her aide and her behaviors may ostracize her if they are not corrected, but Student does derive benefit from interacting with neurotypical students.

17. Student's impact upon other students and her teacher's ability to do her job is less positive. Student lacks self-regulation, which causes her to vocalize, move about, and indulge in self-stimulatory behaviors. These activities are distracting and disruptive to the class. Student argues that she was never referred for discipline, but there has been no suggestion that Student has control over these actions. She also asserts that her presence teaches other students patience and acceptance of students with disabilities. These things have real value, but they are outweighed by the negatives.

18. Student was not a serious difficulty to her first-grade teacher, but her negative traits became more distinct as her peers matured and academic instruction became more difficult. Student was nearly constantly vocalizing, whether humming, scripting, or simply blurting out comments. She had difficulty sitting still. More seriously, she was still subject to tantrums or meltdowns when she was triggered by some sound or activity or did not get her way. Even though Student was supported by a one-to-one aide, her second grade teacher had to change her routines and plans when Student was

in her room, avoiding such things as clapping for good work, reciting the pledge of allegiance, and singing Happy Birthday. Student would react adversely by crying or shouting, or insist that the song be repeated over and over. As the pace of instruction accelerates in the higher grades, the gain in perspective provided to other students by Student's presence is outweighed by the distraction, changes, and delays that accompany her presence. The third *Rachel/H* factor predominately weighs against her inclusion in general education.

19. The last factor looks at the cost of educating Student in the general education classroom. District did not brief this aspect as it believed that cost was not an issue here; Student has argued only that a general education placement at Scripps would spare District the cost of transporting her to Dingeman. No testimony at hearing was devoted to this issue. Based on argument presented, the final *Rachel/H* factor leans toward Student's inclusion in general education.

20. Overall, the *Rachel/H* factors divide evenly, but the weight given to each tips the balance decidedly in favor of academic placement outside of general education. The non-academic beneficial effect of mainstreaming for Student is outweighed by the possible disruption to her classmates and impact upon her teacher. The clear lack of academic benefit to Student is far more significant than the savings to District from not having to transport Student to a new school. Student cannot benefit from the general curriculum, and needs support and basic instruction in both life skills and academics. Given that Student will receive mainstreaming for socialization, communication, and peer modeling as part of her special education placement, the *Rachel/H* factors lead to the conclusion that a special education placement is appropriate for Student.

21. Student draws a distinction between placement in a mild/moderate class and the proposed moderate/severe class. A moderate/severe class, she proposes, is a more restrictive environment than a mild/moderate class, and her experts all believe

that she could reach her goals in a mild/moderate class. She argues that she will be subject to poorer role models in a moderate/severe class and that her educational needs can be better met in a mild/moderate class. She argues that moderate/severe students are more likely to be ill-behaved than students with mild/moderate disability, and that their communication skills are also likely to be sub-par. Parent, Dr. Haytasingh, and Ms. Aiello all stated on the basis of their observation of the class that the students there were below Student's level in academics and functional behavior.

22. A restrictive environment is one that removes a student from general education for any period of time. The more a student is taken from a general education setting, the more restrictive the placement is. Within the continuum of placement options, there is no distinction based upon the peers with whom a student is grouped. Whether a student is the highest functioning student in a mild/moderate class or the lowest functioning in a moderate/severe class, they are both subject to the same level of restriction if they are mainstreamed for non-academic classes. Neither Student's experts nor District staff believe Student should be mainstreamed for academics given her current academic deficits. Both the mild/moderate and the moderate/severe classes would take Student from general education for the academic day and mainstream her for socialization for the same amount of time. They are equally restrictive placements. Accordingly, it is not a matter for least restrictive environment analysis whether Student is placed in a mild/moderate or moderate/severe class.

23. It can be argued that a placement is deemed more restrictive the less it resembles a regular classroom environment. (*See Letter to Johnson*, 213 IDELR 182 (OSERS 1988).) The mild/moderate class may have more students with higher functioning than the moderate/severe class, and thus may be seen as having a closer resemblance to a regular classroom. To weigh the appropriateness of those placements for Student, the *Rachel H* factors can be applied to compare placement in the

mild/moderate class and the moderate/severe class.

24. Again, academic concerns argue against placement in the mild/moderate class. Ms. Smith's experience was that Student could not learn in groups of the size commonly found in mild/moderate classes. Further, the purpose of the mild/moderate classes was to support students who were capable of doing grade-level work. Student would again be in a class oriented toward work she could not do, would be in a larger class, and would get less individual attention from her teacher.

25. Student's primary source of neurotypical role models and communication opportunities would again be the non-academic mainstreaming she would receive. Student's experts believe that her peers in a moderate/severe class would be worse-behaved and have less language than peers in a mild/moderate class, but those are assumptions and were not supported by their observations of the class. In addition, Student would have fewer and a lower ratio of adult role models and communication partners in the mild/moderate class.

26. Student's impact upon her classmates and teacher in a mild/moderate class would be less negative, but the positive effect of inclusion of a special education student would also be reduced, given that her presence in a special education classroom would not teach her peers patience and acceptance of disabled persons. Lastly, placing her in the mild/moderate class would again save on transportation costs and keep her in her home school, but the effect is not significant. Overall, again, analysis of the *Rachel H* factors leads to the conclusion that Student's placement in District's moderate/severe class is the least restrictive environment for her education.

ISSUE 2: FAILURE TO PROVIDE SPECIALIZED ACADEMIC INSTRUCTION BY AN APPROPRIATELY CREDENTIALLED TEACHER

27. Student contends that District materially failed to implement Student's IEP because it did not provide specialized academic instruction services by an appropriately

credentialed teacher. Student asserts that she was denied a FAPE because she was given most of her specialized academic instruction services from October 2015 through the end of the 2015-2016 school by Ms. Roland, who has no special education credential.

28. There is no requirement in the IDEA that special education students be taught only by instructors with a special education credential. However, California requires that teachers authorized to teach students with disabilities have a credential or authorization for the student's primary disability. (Cal.Code Regs. Tit. 5, §80046.5.) This requirement has been interpreted by the Ninth Circuit to mean that legal ramifications arise from a student's disability classification. (*Weissburg v. Lancaster School Dist.*, (9th Cir. 2010) 591 F.3d 1255, 1259.) Relying on that precedent, one United States Magistrate Judge has held that a teacher with a moderate/severe certification to teach students with "multiple disabilities" was qualified to teach a student with a speech and language impairment and intellectual disability. (*MM v. San Ramon School District*, (N.D.Cal. April 23, 2013, No. C-12-01337 JCS.) 2013 WL 1729827, **12-13.) Since FAPE requires that special education and related services "meet the standards of the State educational agency" (20 U.S.C. § 1401(9)), the specialized academic instruction given to Student since November 12, 2015, must be evaluated in light of the above requirement.

29. Ms. Roland has a clear teaching credential, but no special education certification. Although Ms. Roland was the primary instructor for Student, she was supervised by Ms. Smith. Ms. Smith remained the case carrier for Student when Ms. Roland took over the majority of Student's specialized academic instruction. Ms. Smith participated in the planning and direction of Student's education. Ms. Smith is appropriately authorized to deliver special education services and holds an autism spectrum disorder authorization. As the teacher authorized to teach Student, Ms. Smith held a credential in autism, Student's primary disability. To the extent that California

required such credentialing for Student's specialized academic instruction, District met the requirement.¹⁰

ISSUE 3: PROCEDURAL VIOLATIONS

30. Student asserts that District failed to give serious consideration to a continuum of placement options and that it failed to allow Parents to meaningfully participate in the IEP process.

31. School districts, as part of a special education local plan area, must have available a continuum of program options to meet an eligible student's needs for special education and related services. (34 C.F.R. § 300.115; Ed. Code, § 56360.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home or instructions in hospitals or institutions. (34 C.F.R. § 300.115(b); Ed. Code, § 56361.)

32. A district must make a continuum of placement options available, but need not discuss every one of them at every IEP team meeting. (See *L.S. v. Newark*

¹⁰ To the extent that Student argues that District failed to provide FAPE because it did not follow the terms of the January 26, 2015 IEP in stay-put, she has not established that this failure resulted in a denial of FAPE. In addition, the terms of the IEP required that Student's specialized academic instruction be delivered by "an Ed. Specialist and support staff," not solely by a credentialed special education teacher. There has been no material failure to implement Student's IEP. (*Van Duyn v. Baker School District* (9th Cir 2007) 502 F.3d 811.)

Unified Sch. Dist. (N.D.Cal., May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, **5-6 [nonpub. opn]; *Katherine G. v. Kentfield Sch. Dist.* (N.D.Cal. 2003) 261 F.Supp.2d 1159, 1189-1190.) Only placement options that are likely to be relevant to a student's needs must be discussed.

33. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.501(a); Ed. Code, § 56500.4; Ed. Code, §§ 56304, 56342.5.) "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City Sch. Dist.* (2007) 550 U.S. 516, 524 [167 L.Ed.2d 904]). A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*See, N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D. Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323, *7

34. Student asserts that there was no testimony that District considered any other placement than the moderate/severe class at Dingeman. Parent testified and asserts in briefing that District staff approached the discussions of the placement with a "take it or leave it" attitude. However, Parent admitted in testimony the phrase was not said by District staff, and that District instead reached a point after discussion of the options where it put an offer on the table for Parent's decision. Parent, Dr. Haytasingh, and Ms. Aiello all testified to some discussion of District's proposed moderate/severe placement and their argument for placement in a general education or a mild/moderate program.

35. At the November 12, 2015 IEP team meeting, Mr. Morici discussed Student's placement options and the difficulties his staff would face if Student were placed in the mild/moderate class. He and Ms. Smith discussed with Dr. Haytasingh

where Student would fit in in terms of goals and academics and how her support would be more appropriate in a moderate/severe class.

36. Parent recorded the IEP meetings, but has not pointed to any place in the recordings where District cut off discussion, refused to discuss options, or imposed a predetermined placement upon student. There were three placements in play: general education or the mild/moderate program at Scripps, and the moderate/severe program at Dingeman. Student has not argued that any other option should have been raised, and the record reflects that these placements were discussed at the IEP team meetings. Student has not carried her burden of establishing that District committed any procedural violation by failing to consider placement options or to allow parent to meaningfully participate in the IEP process.

DISTRICT'S ISSUE

Issue 1: Offer of FAPE

37. District asserts that its offer of placement and services at the November 12, 2015 IEP team meeting constituted an offer of a FAPE in the least restrictive environment.

38. Parents have the right to consent to all or part of the IEP. (Ed. Code § 56346.) If the school district determines that all or part of the IEP to which a parent does not consent is necessary to provide the pupil a FAPE, the school district shall initiate a due process hearing to obtain a ruling that the IEP provides a FAPE and allowing the District to implement the IEP without parental consent. (*I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164, 1169-1170; Ed. Code § 56346 subd. (f).)

39. There are two parts to the legal analysis of whether a local educational agency, such as a school district, offered a student a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Rowley*, supra.) The

second question is whether the IEP developed through those procedures was substantively appropriate. (*Id.* at p. 207.) When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

40. The IEP is the “centerpiece of the [IDEA’s] education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child, and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) The IEP must target all of a student’s unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term “unique educational needs” is broadly construed and includes the student’s academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500 [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

41. An IEP must contain a statement of measurable annual goals related to “meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum” and “meeting each of the child’s other educational needs that result from the child’s disability.” (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child’s goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs.,

tit. 5, § 3040, subd. (c).)

42. An IEP team is required to include: one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].)

43. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [a parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

44. Student contends that District has not offered her a FAPE because its offer of placement was not in the least restrictive environment and because it committed the procedural violations of failing to consider a continuum of placement options and of impeding parental participation. For the reasons set forth above, these arguments are not persuasive, and District was able to establish that its IEP offer provided FAPE. Review of the record and the text of the IEP of November 12, 2015 establishes that District

complied with the procedural requirements of the IDEA and offered a program that was designed to meet Student's educational needs and allow her to make meaningful academic progress in the least restrictive environment. Therefore, District offered Student a free and appropriate public education.

ORDER

1. District's November 12, 2015 IEP offered Student a FAPE in the least restrictive environment. District is entitled to implement its November 12, 2015 offer of FAPE over the objection of Student's parents. Student must either agree to the offer or forgo receipt of special education services from District.

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. District prevailed on all issues heard and decided at hearing.

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: July 15, 2016

/s/

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings