

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

V.

IRVINE UNIFIED SCHOOL DISTRICT.

OAH Case No. 2016020106

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on January 26, 2016, naming the Irvine Unified School District. OAH continued this matter on March 11, 2016.

Administrative Law Judge Robert Helfand heard this matter in Irvine, California, on May 31, 2016, and June 1, 2, 14, 15, and 16, 2016.

Kathleen M. Loyer, Attorney at Law, represented Student. Student's mother was present throughout the hearing. Student's father attended part of the hearing.

Jennifer L. Fant, Attorney at Law, represented Irvine. Melanie Hertig, Executive Director of Special Education, Jennifer O'Malley, Director of Special Education, and Allison Robbins, Director of Special Education for Secondary Schools, were present at times during the hearing.

At the request of the parties, the record remained open for the submission of written closing and rebuttal briefs. The record closed on July 11, 2016, upon receipt of closing and rebuttal briefs from the parties.

ISSUES¹

The following issues were determined:

1. Did Irvine deny Student a free appropriate public education from September 1, 2014, to the end of the 2014-2015 school year, by failing to:
 - (a) Provide and/or offer Student appropriate placement, services, accommodations and goals;
 - (b) Provide appropriate case management;
 - (c) Provide reports on Student's progress; and
 - (d) Provide appropriate transition planning to return Student to school?
 2. Did Irvine deny Student a FAPE in the May 18, 2015 Individualized Education Program, by failing to:
 - (a) Offer Student appropriate placement, services, accommodations and goals; and
 - (b) Offer appropriate transition planning to return Student to school?²
- As a remedy, Student seeks (1) Irvine to develop an appropriate IEP to address

¹ The issues have been rephrased and reorganized 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 School District* (9th Cir. 2010) 626 F.Ed 431, 442-443.)

² Issues 1(d) and 2(b) originally contended that Irvine failed to provide appropriate transition planning to return Student to school or participate in and have access to all activities equal to her nondisabled peers. On motion of the ALJ, the portion of Issues 1(d) and 2(b) dealing with Irvine failing to provide participation in and all access to all activities equal to Student's nondisabled peers is dismissed for failure by Student to present any evidence as to these subissues.

Student's needs as a chronically ill child; (2) Irvine to fund a private consultant who specializes in developing and implementing IEP's for children with chronic illnesses who are home bound and/or have limited ability to attend school until Student graduates; (3) Irvine to fund a private therapist experienced in addressing the social emotional aspect of chronically ill children and management of their illness until Student earns a diploma or ages out of special education; (4) Irvine to fund Student's attendance, where appropriate at the private school of her family's choice until Student receives her diploma or ages out of special education; (5) Irvine to reimburse Student's parents for out-of-pocket costs for all educational services privately provided; and (6) Irvine to provide and/or fund compensatory education.

SUMMARY OF DECISION

Student had a unique illness that impacted her physically and emotionally. Student complains Irvine denied her a FAPE when it failed to offer IEP's which provided Student with appropriate placement, services, goals, accommodations, and case management in the 2014-2015 school year and in the May 18, 2015 IEP.

Irvine asserts that its IEP's, including placement, accommodations, and services, were designed to remediate Students' unique educational needs. Irvine frequently amended its IEP's, attained personnel that had experience with Student's disability, and was receptive to Parent input.

The Decision finds that Irvine offered IEP's that adequately reflected the recommendations of both school and Student experts. Irvine appropriately updated and revised its IEP offers in a manner that met Student's changing developmental needs. Evidence showed that Irvine provided Student placement, accommodations, and services that were tailored to her unique physical and emotional delays, and that she benefited from her educational program. Consequently, Student is not entitled to remedies for this matter.

FACTUAL FINDINGS

1. Student was a 17-year-old young woman who resided with her family within Irvine's boundaries during the applicable time frame. Student originally became eligible for special education on May 22, 2006, under the eligibility category of specific learning disability. As of the hearing, Student was eligible for special education under the categories emotional disturbance and other health impairment.

2. In the summer of 2012, Student developed a viral illness, mononucleosis, which caused her severe fatigue. Student's fatigue continued and she was unable to attend school. At first, Student was diagnosed with post-viral fatigue syndrome. As her fatigue continued, Student was diagnosed with Chronic Fatigue Syndrome (CFS).³

3. During the first semester of school year 2012-2013, Student unsuccessfully attempted to attend school for two to three hours per day resulting in severe fatigue. In January 2013, Irvine classified Student as truant and began proceedings before the School Attendance Review Board. The truancy matter was eventually resolved, but resulted in bitter relations between Student and her family and Irvine.

4. Parents provided Irvine with a January 31, 2013 letter from Student's treating psychiatrist, Dr. Hisham Korraa.⁴ Dr. Korraa stated that Student did not present

³ CFS is a complicated disorder characterized by extreme fatigue that cannot be explained by any underlying medical condition. The fatigue may get worse with physical or mental activity, but it does not improve with rest. Although the cause of CFS is unknown, theories include viral infections to psychological stress. Treatment focuses on symptom relief. (www.mayoclinic.org/disease-conditions-fatigue-syndrom/basics/definition/con-2002009)

⁴ Dr. Korraa has maintained a psychiatric practice since 2002, emphasizing the treatment of mood disorders, psychotic disorders, and addiction. He has treated Student

with any symptoms of depression, but she felt overwhelmed as she was unable to keep up with school demands.

5. Student's parents provided Irvine outpatient notes by Dr. Andrew Shulman, a rheumatologist treating Student, dated February 5, 2013. He noted Student's continuing fatigue and resulting pain. He recommended that the school provide Student with a program to permit her to gradually resume full school attendance and full school work. He noted that cases like Student generally require a flexible program, which allows patients to keep up with school work at home and encourages a return to full attendance "as quickly as possible," and includes a vigorous aerobic exercise program to be most effective.

6. Student's IEP team convened an amendment IEP meeting on March 18, 2013. Student's father reported that Student had varying degrees of energy, but her tolerance for activity was limited to about two hours. The team adopted Dr. Shulman's recommendations. The IEP provided home instruction five days per week for one hour daily, individual counseling once a week for 15 minutes, one time per month, and attendance at two classes, directed language arts and directed math, which were the fifth and sixth periods.⁵ Student's mother consented to the amendment with the proviso that the Student be allowed to attend and receive home instruction on a regular basis.

7. In spring 2013, Student provided Irvine with letters from two doctors regarding Student's medical condition. The first letter was from Dr. Ying Peng, a child neurologist from Children's Hospital Orange County, dated March 13, 2013. Dr. Peng stated that Student was suffering "persistent physical fatigue and impaired concentration and shortened attention span following a preceding acute infectious

since February 2009.

⁵ Directed classes are special education classes.

mononucleosis," which "may possibly lead into chronic fatigue syndrome." Dr. Peng recommended that Student receive home instruction and transition back to school by starting her on a program designed to eliminate stress.

8. On April 22 2013, Dr. Alice Chang Hoftman, a pediatric rheumatologist from the David Geffen School of Medicine at University of California, Los Angeles, reported that Student had been diagnosed with CFS. Dr. Hoftman stated that "CFS patients are treated with cognitive behavior therapy by psychology, medications managed by a psychiatrist, and a graduated exercise program, all of which have been instituted by the family with her team of physicians." Dr. Hoftman noted that CFS is a chronic disease which may last for three-to-five years and is associated with cognitive deficits, including decreased concentration and attention, inability to focus, poor short term memory, disrupted reading ability, and poor problem solving. Dr. Hoftman observed that Student "is able to do school work/attend school only 30 minutes to 3 hours a day max, depending on her energy level." Dr. Hoftman attached recommended accommodations, which included a modified physical education program, extra time between classes, a place on campus for Student to be able to rest, second set of books for home, extra time to complete assignments, a designated staff person to assist in completing make-up work during periods of absences, and that all tardiness be excused.

9. Irvine retained Dr. Howard Taras, a professor of pediatrics and public health at the University of California, San Diego, as a consultant. Dr. Taras has been retained by numerous school districts as a consultant regarding the education of children with major health issues, including those with CFS. Dr. Taras considered his consulting as a bridge between the child's medical team and the school. Dr. Taras reviewed doctors' notes and conferred with several of Student's medical team, including Dr. Korraa. In his letter report of May 24, 2013, Dr. Taras agreed with Dr. Korraa that Student required a home-based educational placement with the goals of educational

advancement; meeting Student's medical and health needs; normal socialization; and giving Student a sense of accomplishment. They agreed that Student should receive one-to-one home instruction and to allow her to audit classes at school without being required to do any work. If she did attempt to do work in school classes, any poor grades or failed assignments should not "count officially" on her school record.

10. In February and March 2013, Student filed with OAH requests for Due Process Hearings. These matters were settled in a settlement agreement signed on June 4, 2013. The agreement placed Student at Irvine High School, seven hours per week of specialized academic instruction at home in two subjects, ability to attend any class listed on her schedule at Irvine High "without being required to participate or meet any other academic expectation," be able to access on-campus school activities, and her attendance would only be computed based on her home instruction. The agreement called for the following accommodations: allowance to complete school assignments within 14 days of the work being assigned; reduction in quantity of work; use of a calculator for math; and testing accommodations. Thus, the program set up by the June 4, 2013 agreement was in accord with the recommendations of Drs. Korraa and Taras.

2013-2014 SCHOOL YEAR

11. Following the agreement, Student was unable to attend her directed classes or to receive the daily one hour of instruction because of Student's continuing fatigue and physical struggles. Student was only able to earn three credits in English. On February 3, 2014, the parties entered into an agreement to modify the June 4, 2013 agreement. Student was placed at San Joaquin High School, an independent studies school. The parties agreed that Irvine would provide Student seven hours of home instruction per week in a single class to supplement her independent study. Each class would be broken down to permit Student to take an extended period of time to complete. The modified agreement provided accommodations of reduction in quantity

of work; use of a calculator for math; extended time for tests; and for Student to receive copies of class notes, study guides, and outlines to the extent available. Because Student had elected to not participate in education counseling services contained in the February 2014 settlement, school provided counseling was not included in the modified agreement.

12. San Joaquin was one of two non-traditional high schools operated by Irvine. As an independent studies program, San Joaquin students complete work assignments and drop-in to see their teachers periodically or as needed. San Joaquin operates on the traditional semester system, as does all general education high schools operated by Irvine. San Joaquin courses were designed to be completed in a three week period. Students took one or two courses at a time. San Joaquin, like the general education high schools, did not offer partial credit if a course is not completed. Although fast paced, Student was allowed to complete a course during the 15 week semester as an accommodation.

13. Wendy Huck has teaching credentials in multiple subjects, social studies, and mathematics, as well as a supplementary credential in biology. She has been a teacher since 1975. From 1980 to 1984, Ms. Huck was a home teacher at Capistrano Unified School District, where she taught Students who were ill or had mental health issues. Since 2012, Ms. Huck has been employed by Irvine as a home and hospital instructor. Additionally, she was a private tutor in mathematics since 1990. Ms. Huck has been Student's home instructor since December 2013. Ms. Huck described Student as a "real sweet girl" with a positive attitude. For each course Student took, there was an assigned teacher of record, who was responsible for providing her lessons and grading her work. For math, Ms. Huck was the teacher of record. For the other courses, Ms. Huck would receive lessons from the teacher of record and return completed assignments to that teacher. During home instruction, Ms. Huck may assist Student in those other

subjects as well teaching math. Student was unable to physically tolerate one hour of home instruction as she would become inattentive due to fatigue. Many times, Student would fall asleep. Ms. Huck estimated that Student could only tolerate 20-to-49 minutes of instruction.

14. On February 24, 2014, Dr. Korraa wrote a report stating that Student continued to be impacted by CFS and depression, which impeded her academically by affecting her ability to complete her work timely. Dr. Hoftman, in a March 3, 2014 letter, reported that due to chronicity of her illness and repeated relapses, Student has developed severe depression and anxiety. Dr. Hoftman noted that Student's CFS caused her to experience significant fatigue when she engaged in writing or reading for extended periods. Dr. Hoftman recommended that Student stay in home instruction, and that Student should continue instruction during the extended school year to complete required school work and be able to advance in accordance with her age.⁶ Parents submitted both letters to Irvine.

MAY 9, 2014 IEP ANNUAL MEETING AND AMENDMENT IEP MEETING OF JUNE 3, 2014

15. On May 9, 2014, Student's IEP team convened the Triennial and Annual IEP Team meeting. Attendees included Mother; Dr. Rebecca von Duering, Ph.D.;⁷ a program

⁶ Dr. Hoftman stated that Student's treating physicians were attempting to figure which modalities and medications to use in treating her illness.

⁷ Dr. von Duering has a Ph.D. in education with an emphasis in school psychology. She was certified as a school psychologist in California and the State of Washington. She was also a board certified behavioral analyst. She has been employed in education since 2002. From 2009 through 2015, Dr. von Duering was employed by Irvine as a school psychologist, preschool autism specialist, and program specialist.

specialist assigned to Student's case; Ms. Huck; Alnida Broughton, a special education teacher from Creekside High School and San Joaquin; and Melissa DiScala, Psy.D., a school psychologist. At this time, Ms. Huck reported that Student was unable to tolerate any more than 30 minutes of home instruction. It was reported that Student had earned three credits in English as of the date of the meeting. Prior to the meeting, Mother expressed concerns as to Student being able to stay on track to obtain her diploma. At the meeting, Mother complained that the English assignments were too rigorous. The team felt that the reading level of the assignments, which were at ninth grade level, may need to be adjusted. Ms. Broughton suggested that Student be placed in her Directed English class after she completes her credits in the San Joaquin class. Mother noted her concerns over Student's continuing fluctuating health. The team also reviewed the February 24, 2014 Dr. Korraa letter, and the March 3, 2014 Dr. Hoftman letter. The team offered Student five hours per week of home instruction during the 2014 extended school year in English. If Student completed the assignments, she could earn five credits. For school year 2014-2015, Student was to receive five hours of home instruction, and one period daily in Directed English at Creekside High School. Student would also receive 15 minutes of individual counseling per week. The IEP proposed accommodations thusly: (a) extra time on assignments and tests as needed; (b) small group setting for tests as needed; (c) reduced quantity of work; (d) preferential seating on campus; (e) use of calculator in math; (f) recorded lectures, and (g) copies of study guides in advance, when available. The last two accommodations were designed to minimize the need for Student to write notes due to her fatigue. The IEP team found Student eligible for special education under the primary category of specific learning

Currently, Dr. von Duering is an area manager in special services for the Vancouver, Washington public schools.

disability and secondary category of other health impaired, due to her illness. The IEP noted that Student had difficulty earning credits due to her limited ability to stay on task due to her CFS. The IEP included two goals. The first was in writing and sought to have Student edit and revise her written assignments. The goal listed the baseline as zero. Dr. von Duering stated that the zero baseline was because Student did not edit her written work. The second goal was in reading comprehension. It called for Student to be able to read a sixth-seventh grade level text, and score 75 percent comprehension in two-out-of-three trials using visual strategies. Student's baseline was listed at zero because Student failed to utilize visual strategies.

16. Creekside was a non-traditional high school operated by Irvine. It operated on a quarter system with completion of a quarterly course equaling two-and-a-half credits (now three). Creekside could give partial credit for work done although the student may not have completed the quarterly course. Creekside also permitted students to earn additional credits through independent study. Creekside comprised approximately 120 students with two full-time counselors and 11 teachers. The faculty had the ability to be flexible in the work assigned as well as to tests and workbooks utilized. There was an hour each day set aside to permit students to confer with their teachers during "Tutor Time," which was between two and three o'clock each day. Most classes numbered no more than 20 students, with directed classes at between five and ten. The campus comprised 16 portable buildings. The campus was small and had no stairs. Students worked at their own pace and could complete a year of work in a semester. Creekside could issue an adult diploma, which required 20 less credits than a regular diploma.

17. After a number of communications between Mother and Irvine staff regarding the just adopted IEP, the IEP team reconvened on June 3, 2014, to discuss parental concerns and to amend the May 9, 2014 IEP. The team decided to change

Student's primary eligibility for special education to other health impaired due to Student's ongoing health issues, which continued to significantly impact her ability to progress in general education. Student's secondary eligibility was changed to specific learning disability. The team acknowledged that math was an area of need. Student would enroll at Creekside High School to take Ms. Broughton's Directed English for 47 minutes per day. Any absences would not count against Student. The team noted that the amended IEP was "an experimental and highly supported transition back to the school setting." The amended IEP also added to Student's accommodations that she may submit writing assignments, where applicable, orally; Student would be permitted frequent breaks when needed, when writing was required for tests and assignments; and the use of a visual calendar as a visual support for large assignments. Under present levels of performance, the team noted that Student's difficulty with writing tasks was due to her CFS and not to a motor delay. The IEP also provided that Student would not be subjected to truancy proceedings so that Student would not feel pressured to attend class on campus. Mother gave her consent to the amendment.

SUMMER AND FALL 2014

18. Student's summer instruction commenced on June 30, 2014. Student was able to receive instruction on approximately 27 days, and absent approximately 18 days. Student was able to earn four credits in Directed English. For the 2014-2015 school year, Student was enrolled in a Directed English class at Creekside, taught by Ms. Broughton, and a math course in home instruction. Student requested, through Mother, to change her on-campus class to Biology, which Irvine granted. Student joined the Biology class taught by Megan Stock, shortly after the school year commenced. Dr. Rebecca Roberts, the Creekside principal and Irvine home instruction director, assigned herself to be

Student's academic counselor and to manage her case.⁸ Dr. Roberts, whose office was by the school's entrance, met with Student everyday that Student was at Creekside. Dr. Roberts also frequently communicated with Mother.

19. In early September 2014, Mother contacted Dr. Roberts regarding the poor condition of Student's biology workbook. Mother also brought up concerns about Student's diploma track, her inability to do homework, home instruction, and Irvine conducting an informal assessment of Student.

20. On September 17, 2014, Student met for the first time with Dr. Todd Jones, the school psychologist assigned to provide her counseling. During the interview, Dr. Jones inquired about Student's social opportunities, her hobbies and interests, her diet and sleep, and her use of social media in connecting with others who have the same medical condition. Student perceived that Dr. Jones was attacking her, and that she needed to defend herself. On September 19, 2014, Mother emailed Dr. Roberts objecting to Dr. Jones' interview, and rejecting the proposed Irvine counseling services.

21. Student was able to receive home instruction for 20-to-40 minutes per session, on three-to-four days per week. In her Biology class, she was able to attend the

⁸ Dr. Roberts has a doctor of education in educational leadership. She has been in education since 2000 serving as a math teacher, and assistant principal before joining Irvine in 2014. In 2014-2015, Dr. Roberts served as coordinator of alternative education at Creekside. Since 2015, she has been the director of alternate education which includes Creekside, San Joaquin, the Irvine Adult School, and home teaching services. Dr. Roberts has participated and supervised home hospital instruction since 2009. She has had experience working with children who have had chronic illnesses, including CSF. The programs she directs have instructed many students suffering from serious health issues which prevent them from participating in a normal school program.

45 minute class four days per week. Student often came early to class and stayed late to complete assignments. Ms. Stock described Student as integrating well into the class, always pleasant, and appeared fine physically. Student was not given any lengthy written assignments. She was given a reduced amount of work, and she was only graded on work Student completed. Although Student did not complete sufficient work to earn credits if at a regular campus, Student earned two-and-a-half credits with grades of C-plus and B-minus. In her home instruction, Student was able to access 40 minutes per session, four days per week. Student received two-and-a-half credits in basic math, with a grade of C.

22. Student's IEP team reconvened on September 15 and 29, 2014, and October 14, 2014. At the September 15, 2014 meeting, the team reviewed Mother's concerns as to the curriculum being used, and Student's decreased memory. Mother consented for Irvine to conduct an assessment in the areas of cognitive development and academics. On September 29, 2014, the team discussed the structure of education programming at Creekside, and the upcoming academic assessment. Additionally, Irvine requested authorization to confer with Student's outside therapist. Mother would only agree to authorize Irvine staff to confer with the outside therapist as to situations or circumstances unique to school. Thus, Irvine was unable to be fully apprised of Student's treatment and her condition. On October 14, 2014, the IEP team reconvened to review Student's progress. It was reported that Student continued struggling in math. Ms. Huck reported that Student was able to average 40 minutes per session. Mother requested that Student take an additional course. Mother indicated that Student desired to take an art class as an elective. Dr. Roberts suggested waiting until January due to the on-going assessment, and to ensure that Student was able to stay on top of her current school work. A draft Individual Transition Plan was reviewed.

November 12, 2014 Assessment Report

23. On November 12, 2014, an assessment written report was prepared by Dr. Jones and Ms. Broughton. Ms. Broughton administered the Wechsler Individual Achievement Test, Third Edition. The Wechsler Achievement measured academic achievement. Student received standard scores⁹ in the borderline range in math problem solving; low average in sentence composition and numerical operations; average in reading comprehension, word reading, pseudoword decoding, and math fluency-multiplication; and high average in math fluency-addition and math fluency-subtraction.

24. Dr. Jones administered the Wechsler Adult Intelligence Scale-Fourth Edition. The Wechsler Intelligence assessed cognitive ability for persons between the ages of 16 and 92. Student scored in the borderline range for processing speed. She scored in the low average range in verbal comprehension, perceptual reasoning, and working memory. Her full scale standard score was 78, which was in the borderline range.

25. Dr. Jones found that Student met special education eligibility under other health impairment because Student had limited strength, vitality, or alertness with respect to the educational environment due to a chronic or acute health problem, CFS, which adversely affected her educational performance. Dr. Jones concluded that Student no longer met the criteria for specific learning disability, because a predicted ability-

⁹ Standard scores are raw scores that have been transformed to predetermined mean and standard deviation. (Sattler, Jerome, *Assessment of Children, Cognitive Foundations*, Fifth Edition, Sattler Publisher, 2008.) A score of 100 represents the median and is in the average range. Scores from 70 to 80 are in the borderline range, 80 through 90 is low average, and average is 90 through 110.

achievement discrepancy analysis resulted in no severe discrepancy, 22 or more points, between Student's processing deficit and her Wechsler Intelligence scores.

November 12, 2014 IEP Meeting

26. On November 12, 2014, the IEP team reconvened to review the assessment report by Dr. Jones and Ms. Broughton, which was presented by Dr. von Duering,¹⁰ and Ms. Broughton. Based on Dr. Jones's recommendations, Student's eligibility for special education was changed to other health impaired only. Based on the results of the academic evaluation and her performance, the IEP team added two new goals. The first new goal was in math word problems, which required Student to solve math word problems with 85 percent accuracy in three of four trials. Student's baseline was established by her standard score of 74 in the Wechsler Achievement math problem subtest. The second new goal was for Student to turn in 90 percent of work assignments on or before the deadline. Student's baseline was that Student had missing or late assignments due to her illness. The IEP team also adopted an Individual Transition Plan which included college awareness and career awareness counseling for one hour per year each. Ms. Stock reviewed Student's progress in the biology class and reported that Student was a productive class member and would arrive early to class and stay later to complete assignments. Mother consented to the IEP amendment in December 2, 2014.

December 2014 and January 29, 2015 IEP Meeting

27. Student continued to attend biology class and receive home instruction at the same levels until the end of November. From December 4, 2014 to January 3, 2015, Student was hospitalized for an eating disorder and depression at the Center for Discovery. Following her release, Student entered into an extensive outpatient treatment

¹⁰ Dr. Jones was absent due to illness.

program at the Center.¹¹ Because of her fatigue associated with her CFS, Student was unable to receive any instruction from Irvine while attending out-patient treatment. On December 16, 2014, Irvine proposed to do a social/emotional assessment because of Student's hospitalization.

28. On January 29, 2015, the IEP team reconvened to discuss Student's progress. Mother expressed concern that Student's out-patient program was causing her significant fatigue, which prevented her from accessing her home instruction. Mother requested that Student be given packets to complete which would permit her to earn credits towards graduation. Dr. Roberts suggested that home instruction resume and offered Student packet work in science. Student would submit her work to Ms. Stock as she completed each unit to earn credits. The team discussed the California High School Exit Exam, and it was decided that Student would attempt it in March with no accommodations. Student resumed home instruction for only 30 minutes daily. Mother consented to the IEP amendment.

FEBRUARY 23, 2015 SUPPLEMENTAL PSYCHOEDUCATIONAL ASSESSMENT REPORT

29. The supplemental psychoeducational assessment was performed by

¹¹ There was contradictory evidence as to the out-patient program. Mother reported to Irvine that Student's program was for three sessions totaling 11 hours per week as stated in the notes of the March 16, 2014 IEP meeting. At hearing, Mother testified that the Center for Discovery out-patient program was five hours per day, five days per week.

Gabriela Albay, a school psychologist.¹² Ms. Albay reviewed Student's records; conducted interviews with Mother, Student, and Ms. Huck; observed Student during assessments at Creekside; and administered six surveys to Mother, Student and Ms. Huck. Ms. Huck related that Student always attempted to do her best although she was functioning at a very low level academically. Student was rarely able to concentrate more than 30 minutes per session before nodding off. Often during instruction, Student was inattentive due to being fatigued. During the administration of several rating scales at Creekside, Student worked diligently and did not appear tired after 20 minutes of working. Testing demonstrated that Student was not demonstrating attention deficit hyperactivity. The testing demonstrated that Student was in the clinically significant range for depression and anxiety, working memory, and learning problems.

30. Ms. Albay determined that Student was eligible for special education under the category of emotional disturbance. Ms. Albay noted that Student met two of the five criteria for emotional disturbance. Student had a pervasive mood of unhappiness or depression based on her medical diagnosis of depression and the results of the rating scales administered. Student also had a tendency to develop physical symptoms or fears associated with personal or school problems. On the rating scales, Student demonstrated significant levels of anxiety. On the Behavior Assessment System for Children-Second Edition, both Mother and Student ratings were in the significant range for anxiety. On the Multidimensional Anxiety Scale for Children-Second Edition, Mother reported that Student exhibited very elevated levels of anxiety including physical symptoms and obsessions/compulsions. Also, Student herself reported high

¹² Ms. Albay has a master of arts in educational psychology and a school psychology credential. She has been employed as a school psychologist since 2011. She has been with Irvine since January 2014.

levels of anxiety and worry on the Clinical Assessment of Depression.

THE FEBRUARY 24, 2015 AND MARCH 16, 2015 IEP TEAM MEETINGS

31. On February 24, 2015, the IEP team reconvened to review the Supplemental Psychoeducational Assessment. The team accepted Ms. Albay's recommendation and changed Student's primary eligibility for special education to emotional disturbance due to a general pervasive mood of unhappiness or depression, as well as a tendency to develop physical symptoms or fears associated with personal or school problems. The team also determined that Student's secondary eligibility be other health impaired. The team noted that Student was not able to receive her home instruction and that her participation in her out-patient therapy had diminished.

32. On March 16, 2015, the IEP team reconvened to review Student's progress. The IEP team had received no information from the Center for Discovery or Student's doctors, although Mother reported she was improving. Student was making progress as she was attending three sessions per week in her out-patient program and receiving 40 minutes home instruction three times per week. Student was not attending class on campus. Mother requested that Student take additional classes. The team recommended that Student could take on-line courses offered by Irvine to all students. The team amended the November 12, 2014 IEP, by the addition of individual counseling services and the adoption of a social-emotional goal. The new goal was for Student, in a counseling session, to identify five coping strategies or relaxation techniques to decrease her anxiety with social interactions and school activities with 80 percent accuracy over four sessions. Student's baseline for this goal was that she was able to name coping strategies with 40 percent accuracy. To accompany this goal, Student would receive four diagnostic counseling sessions with a behavior counseling specialist at home. The team also discussed Student taking the May administration of the CAHSEE at home with accommodations including the use of a calculator and allowing Student to

type her answers. Mother objected as Student was expected to fail the test, had missed considerable school time, and there was no benefit to her. The home instructor was to begin a CAHSEE prep course for both English and math, which awarded credits.

DIAGNOSTIC BEHAVIORAL COUNSELING

33. Following the March 16, 2015 IEP team meeting, Student's file was referred to Irvine's coordinator of educationally related mental health services, Amil Alzubaidi. Mr. Alzubaidi has a B.A. in psychology and a M.A. in marriage and family therapy. In addition to being a licensed marriage and family therapist, he possesses credentials as a school psychologist and in administrative services. He was a clinical therapist with the Riverside County Department of Mental Health from November 2001 through January 2009. He has maintained a private therapy practice since 2006. From January 2007 through March 2012, Mr. Alzubaidi was a special education program specialist for Murrieta Valley Unified School District. In March 2012, he became coordinator for mental health services at Temecula Valley Unified School District. He assumed his current position in February 2015. Mr. Alzubaidi has had experience dealing with persons suffering from CFS, anxiety, and depression.

34. Mr. Alzubaidi assigned James Holmes, one of six behavior counseling specialists on his staff, to Student.¹³ The referral was for four diagnostic sessions to determine Student's level of emotional ability, her ability to cope with her illness, and to

¹³ Mr. Holmes has a bachelor of arts in sports injury management, a bachelor of science in psychology, and a master of science in counseling and guidance. From 2000 to 2008, Mr. Holmes was employed as a child care counselor at Canyon Acres, a residential care facility for autistic and emotionally disturbed children. From 2009 to 2013, he worked as an assistant site director at Olive Crest Academy, a special education school. Mr. Holmes joined Irvine as a behavior counseling specialist in December 2013.

determine the extent her health issues were impacting her access to education instruction. The result of these sessions was to also aid in developing goals. As part of his diagnostic counseling, Mr. Holmes interviewed both Ms. Huck, her Creekside teacher, and Mother. He conducted two-to-three sessions with Student at her home. Mr. Holmes found it difficult to establish a rapport with Student due to her antagonistic feeling that Irvine officials were attempting to compel her to attend school. He attempted to explore Student's interests and her coping skills. Mr. Holmes prepared four proposed goals for Student's upcoming annual IEP team meeting based on these sessions.

THE MAY 2015 ANNUAL IEP TEAM MEETINGS

34. Ms. Huck provided Student with home instruction during March, April, and May 2015. During that period, Student was able to increase her ability to receive instruction 40-to-45 minutes per session, three days per week. Ms. Huck assigned 15-to-20 minutes of homework at each session. Student was able to complete 50 percent of these assignments on time. Ms. Huck gave Student time to complete the homework at each session. During this time, Student never spoke of school. For the spring 2015, Student earned one credit for her CAHSEE English prep class and two credits in the math prep class. At the end of the 2014-2015 school year, Student had earned 20 credits towards graduation.

35. Mr. Alzubaidi felt that Student's IEP team needed to adopt a plan to transition Student back to school. This plan would be used as a guideline to slowly transition back to attending class on campus. The plan would create a series of steps and be flexible to permit changes based on Student's medical condition and ability to attend to instruction.

May 4 and 18, 2015 Annual IEP Team Meetings

36. In preparation for the annual meeting, Sheri Kulungian, a school nurse,

unsuccessfully attempted to gather information as to Student's then current condition from her medical and psychiatric team.¹⁴ Student's IEP team convened for her annual IEP team meeting on May 4 and 18, 2015. The team comprised Mother; Dr. Roberts; Ms. Broughton; Mr. Holmes; Ms. Huck; Ms. Albay; Mr. Alzubaidi; Valerie Bueno, program specialist; and Ms. Kulungian.¹⁵ The team found Student eligible for special education under the primary category of emotional disturbance and the secondary category of other health impairment. In describing how Student's disability affected her involvement in general curriculum, the team adopted the following, with considerable input from Mother:

[Student] is diagnosed with Chronic Fatigue Syndrome (CFS). As a result of managing her fatigue, [Student] has developed a general pervasive mood of unhappiness or depression, including a sense of inadequacy and poor self-esteem. Furthermore, [Student] exhibits physical symptoms or fears associated with personal or school problems, including anxiety when having to leave her home or being around many people, which adversely affect her educational performance and cannot be corrected without special education services. [Student] also has limited strength,

¹⁴ Ms. Kulungian sent fax requests followed by a phone request. Student's physicians did not respond to these requests.

¹⁵ Ms. Bueno took over as the program specialist for Student following Dr. von Duering leaving the employ of Irvine. Ms. Kulungian only attended the May 18, 2015 session.

vitality, and alertness due to a chronic or acute health problem (diagnosis of CFS). This health problem adversely affects her educational performance and cannot be corrected without special education.

37. During the team meeting, Parents stated concerns regarding Student's ability to access the curriculum and to earn credits toward high school graduation. The IEP noted Student's present levels of performance, that she was able to access only 25-to-30 minutes of her one hour daily home instruction, completed half of her designated task or project components, and had difficulty with writing projects because of fatigue related to her medical condition, and difficulty with organization including time management and prioritization of tasks. On the California Standards Test, Student had improved her English skills 41 points to "basic" from "below basic." On the math portion of the test, Student continued to score "below basic." In social-emotional, Student was unable to speak to a trusted staff member when frustrated or had perceived negative interaction with peers, or utilize coping strategies.

38. The IEP team drafted five goals. Goals one through four were in the area of social-emotional. Goal one, which had a zero baseline, was for Student to verbalize to a trusted staff member three positive attributes about herself, in four out of five opportunities. Goal two, which also had a zero baseline, required Student to utilize two strategies from a list of coping strategies developed by Student and her counselor, in four out of five opportunities. Goal three, which had a zero baseline, was for Student to speak to a trusted staff member when reporting frustration and thoughts of perceived interactions with peers, in four out of five opportunities. Goal four involved academic attendance. The goal four baseline indicated that Student was attending four out of five home instructions per week. The goal called for Student to attend class on campus by May 20, 2016, and to report any feelings of anxiety, fatigue, and/or frustration to a

trusted staff member, four out of five opportunities. The fifth goal, in executive functioning, required Student to use a student planner and complete 70 percent of tasks on or before deadline, for three consecutive weeks, by May 20, 2016. The baseline for this goal was that Student was turning half of her assignments in three consecutive weeks.

39. The IEP team adopted accommodations based on Student's demonstrated needs. Most of these accommodations relate to when Student would attend class on campus. The accommodations provided Student with (a) extra time on tests and assignments as needed; (b) small group setting for tests as needed; (c) reduced quantity of work; (d) preferential seating while attending class on campus; (e) use of a calculator in math; (f) recorded lectures when available; (g) copies of study guides given in advance when available; (h) frequent breaks when needed when writing was required for assignments and tests; (i) use of a calendar as visual support for large assignments; and (j) to dictate responses, in lieu of writing, when needed.

40. For the remainder of the 2014-2015 school year (which ended on June 18, 2015), the IEP continued one hour of home instruction daily, with four 30 minute counseling sessions with the behavior counseling specialist. During the 2015 extended school year (June 22, 2015 through July 17, 2015), Student would receive four 30 minute counseling sessions with the behavior counseling specialist. This counseling was to prepare Student for the next school year. The IEP team recommended that Student enroll in an independent study course in physical education from San Joaquin. This course required Student to keep a daily log of her physical activities, which would earn her credits and go to meet physical education graduation requirements. Additionally, Student could complete science work packets which could earn her further credits.

41. Irvine's offer of service was designed to transition Student to attend class on the Creekside campus in a methodical and systematic five step plan. Irvine IEP team

members stressed that the plan was a guideline which would be frequently reviewed and modified depending on Student's progress or lack thereof. The five steps were as follows:

Step one: From August 26 to September 25, 2015, Student would continue to receive home instruction for one hour daily, and four 30 minute individual counseling sessions at home monthly.¹⁶

Step two: From September 28 to October 9, 2015, Student would receive home instruction for one hour daily, and two 30 minute individual counseling sessions at home.

Step three: From October 12 to November 6, 2015, Student would receive one hour of home instruction daily, attend one period of Directed Studies daily on the Creekside campus, two 30 minute individual counseling sessions per month at home, and two 30 minute sessions with the Creekside school psychologist per month.

Step four: From November 9, 2015 to January 29, 2016, Student would receive home instruction for one hour three days per week, attend one period of Directed Studies class,¹⁷

¹⁶ All individual counseling would be provided by a behavior counseling specialist.

¹⁷ Directed Studies was a study skills class which would assist in teaching Student note taking techniques and organization in the school milieu.

and one period of Directed English class on the Creekside campus, daily, three 30 minute individual counseling sessions monthly, and three 30 minute sessions with the school psychologist, monthly.

Step five: From February 1 to May 3, 2016, Student would attend one period each of Directed Studies, Directed English, and Directed Math on the Creekside campus, four 30 minute sessions of individual counseling monthly at home, and four 30 minute sessions with the school psychologist, monthly.

42. Additionally, Student's Individual Transition Plan, which the IEP team had discussed at the meeting, called for Student to receive the following services between May 4, 2015, through May 3, 2016: six 20 minute sessions of college awareness; six 20 minute career awareness sessions; and four 20 minute travel training sessions in the use of public transportation.

43. The IEP team recommended that an adapted physical education assessment be conducted to determine the type of physical education which would meet Student's needs as well as to establish a program which could be implemented to meet the state physical education requirement for high school graduation. Mother consented to the assessment at the meeting. Mother was also presented with a release of information to permit Irvine to communicate with Dr. Korraa. Mother opted to not sign the release. Mother withheld consent to the IEP so she could review it.

44. On May 19, 2015, Mother emailed Ms. Albay, withdrawing her consent to the proposed adapted physical education assessment. As to the proposed IEP, Mother commented that the step-by-step transition was "not in concrete," and it would add a great deal of stress for Mother if there would be frequent IEP addendum meetings. She

also noted that it would be Student who would determine the outcome of the program which sets “the bar with high expectations” which will be “a recipe for disaster.” Mother also objected to home instruction being eliminated during the 2015 extended school year and to science packets.

45. On June 4, 2015, Mother emailed Ms. Bueno and stated she did not consent to the May 18, 2015 IEP, and was “invoking” stay put. Pursuant to the last agreed to IEP, Irvine provided five hours of home instruction per week with Ms. Huck. Student received home instruction on eight days in July, three in August, and nine in September. Following the September sessions, Student refused further services.

LETTERS FROM STUDENT’S MEDICAL PROVIDERS

46. Dr. Korraa forwarded a letter to Irvine dated June 24, 2015, in an attempt to assist Mother in her objection to Student being given science packets. Dr. Korraa reported that Student’s treatment had been complicated by many physical ailments which had been “detrimental to her progress.” He recommended that Student should focus on English and math, areas where she demonstrated some strength and interest. Dr. Korraa failed to cite any facts in support that Student was suffering from physical ailments. Dr. Korraa also recommended that Student be assessed at the Diagnostic Center for Southern California, operated by the California Department of Education, to “elucidate {Student’s} concerns and educational needs.”

47. In August 2015, Mother submitted to Irvine a letter from Dr. David Kaufman of the Open Medicine Clinic of Mountain View, California, which specialized in treating chronic conditions like CFS. Student was examined by Dr. Kaufman on May 11, 2015. Dr. Kaufman noted that Student “remains very symptomatic with debilitating symptoms, that include, wide spread body pain, fluctuating levels of severe fatigue that confine her to the couch for days.” Student’s fatigue affected her ability to focus for more than 30-to-40 minutes of home instruction. Student exhibited persistent feelings

of nausea, weakness, and autonomic nervous system dysfunction which included dizziness and near fainting. He also reported that Student was using a wheelchair since January 2015 for most outings. Student's ability to retain information had declined, and she had difficulty engaging in normal conversation due to lost train of thought. Student had been given a medicine regiment which was unsuccessful in alleviating her symptoms. Dr. Kaufman concluded that until Student demonstrates marked improvement, her educational program should be geared to her current capabilities, and that attempts to push her beyond her capabilities would result in further harm to her health and recovery.

AUGUST 2015 TO MAY 12, 2016 IEP TEAM MEETINGS

48. On August 17, 2015, Ms. Bueno emailed Mother confirming receipt of the Dr. Kaufman and Dr. Korraa letters. Ms. Bueno requested to schedule an IEP team meeting to consider these letters and review Student's progress over the summer. Additionally, she stated that Irvine agreed with Dr. Korraa's recommendation to refer Student to the Diagnostic Center for assessment. Irvine did not receive a response. Irvine attempted on numerous occasions to schedule IEP team meetings from September 2, 2015 to March 16, 2016; Parents failed to respond to these requests.

49. On February 9, 2016, Irvine forwarded a letter to Parents reviewing their attempts to schedule an IEP meeting, its offer of stay put, and requesting consultation between Dr. Taras, who had been retained again as Irvine's medical consultant, and Student's medical team. Additionally, an application for Parents to fill out to the Diagnostic Center for assessment accompanied the letter. Once again, Irvine did not receive a response.

50. On March 16, 2016, Irvine held an IEP team meeting without attendance by Parents. The IEP team adopted accommodations from the prior IEP and offered to continue home instruction one hour per day.

51. Student's annual IEP team meeting occurred on May 3, 2016, with Mother and her attorney in attendance. Mother reported that Student had been again hospitalized for 13 days for severe depression and self-harming behaviors. Upon release, Student entered a medical residential facility on April 13, 2016, due to depression and eating disorders.¹⁸

52. On or about May 12, 2016, Dr. Korraa issued a letter report. He reported that Student had suffered "severe, recurrent Depression, Generalized Anxiety Disorder, Binge Eating Disorder (that involves both binge eating and restrictive food intake) and poor, maladaptive behaviors (including self-harm and suicidal ideation) that necessitated intensive treatments in acute hospital, residential and intensive outpatient settings." In the letter, Dr. Korraa opined that Student's experiences with school personnel and procedures (including truancy proceedings, evaluations, and attempts to transition her to a school setting) have caused her intense anxiety and emotional burdens. He also cited as a contributing factor her poor self-image coupled with being overweight. He found that Student's decline had made it impossible for her to be assessed by either Irvine or the Diagnostic Center. This contrasts with Dr. Korraa's previous letters which never mentioned Student's experiences with school procedures and personnel as major contributing factors to her depression, anxiety, and eating disorders. During his testimony at hearing, Dr. Korraa referenced Student's frustration as to increasing fatigue and resulting eating disorders as major factors towards Student's regression.

DR. KORRAA'S TESTIMONY

53. Dr. Korraa noted that Student's ability to cope with her physical state is a

¹⁸ Mother refused to identify where Student was hospitalized or the residential facility.

convoluted situation. To be able to improve, Student needs to come to a place of acceptance of her condition. Dr. Korraa reviewed Student's placement at Creekside and the accommodations in her IEP's. He acknowledged that the ability to earn partial credits, being graded only on completed work with no penalty for missing assignments, attendance not being negatively counted against her, and the other accommodations in her IEP's met his recommendation for flexibility. In sum, Dr. Korraa's testimony persuasively supported the IEP's that Irvine provided.

DR. ROBERT PATTERSON'S TESTIMONY

54. Dr. Robert Patterson was called as an expert by Student. Dr. Patterson has multiple degrees including a doctor of psychology in psychology and family therapy, a master of arts in developmental therapy, and a master of arts in education psychology. He is both a licensed clinical psychologist and education psychologist. Dr. Patterson has been a teacher, administrator, and school psychologist. He has been in private practice since 1991. In preparation for his testimony, Dr. Patterson only reviewed an evidence packet. He did not meet or interview Student, confer with her teachers or school staff, Dr. Taras, or confer with any member of Student's medical treatment team, including Dr. Korraa. For these reasons, limited weight was given to his testimony.

55. As to Student's May 9, 2014 IEP, as amended, Dr. Patterson made several observations. Although he found the two goals adopted at the May 9, 2014 meeting appropriate, he opined that the IEP team should have adopted a goal to deal with Student's anxiety. The information available to her IEP team at the May 9 and June 3, 2014 meetings were letter updates from Dr. Korraa, dated February 21, 2014, and Dr. Hoftman's letter, dated March 3, 2014. Neither letter refers to Student suffering from anxiety due to her education. He also opined that Irvine should have conducted an educationally related mental health assessment to determine if Student was faking the extent of her emotional difficulty. However, the IEP team properly relied on the expertise

of her treating physician, Dr. Hoftman, and treating psychiatrist, Dr. Korraa, plus parental reports that Student was not faking. As to Student's enrollment at Creekside, Dr. Patterson felt that it was not appropriate, as the Creekside student body included students with behavior problems, based on Dr. Patterson's "understanding" of the school; although he did acknowledge that the small class size, flexibility in assigning work, and staff guidance were positive factors. Dr. Korraa, on the other hand, more persuasively testified that this placement met his recommendation for a flexible program. Dr. Patterson found that the zero baseline for goal one, writing-revision/editing, was not appropriate. However, this baseline was appropriately established because Student never edited or revised her written work. Dr. Patterson also criticized that Student's home instructor was not a credentialed special education teacher. Yet, he did not elaborate as to why the home instructor needed to have a special education credential, and he ignored her vast experience as a home hospital teacher, who had experienced working with ill and special needs children.

56. Although not an issue, Dr. Patterson disagreed with the finding of Dr. Jones in his November 12, 2014 assessment report, that Student no longer met the qualifications of special education eligibility under the category of specific learning disability. Dr. Patterson admitted that eligibility using the discrepancy model requires an 18 to 25 point discrepancy between cognitive ability and achievement. Dr. Patterson would not have recommended that she did not qualify under specific learning disability. He failed to demonstrate how Student would be eligible under that category. Student scored a full scale score of 78 on the Wechsler Adult Intelligence Scale-Fourth Edition, placing her in the "borderline" range of cognitive ability. Student's subtest scores on the Wechsler Individual Achievement Test-Third Edition were between 74 and 118, indicating no discrepancy.

57. Dr. Patterson's criticism of the five step transition plan was that he

believed Student would be unable to fully transition to returning to school in six months. He ignored that the plan was to be used as a guideline and was designed to be altered based on Student's progress and her condition both medically and psychologically. Mr. Alzubaidi, who was one of the authors of the plan, more persuasively stressed that the plan was a guideline to follow and would be amended each step based on Student's ability to go to the next step. Dr. Patterson did not offer an alternative plan, or state why it was not appropriate based on the information in possession of the IEP team at that time.

DR. TARAS' TESTIMONY

58. Dr. Taras testified as an expert for Irvine. Dr. Taras has never met Student or her parents. He has reviewed Student's education file, conferred with Dr. Korraa in 2013 and 2016, and reviewed Dr. Korraa's treatment notes. Dr. Taras opined that the five step transition plan in the May 18, 2015 IEP was appropriate. He opined that the plan complied with his and Dr. Korraa's 2013 recommendations for flexibility. He further opined that the plan was designed to be a guideline for transition with each step not being mandatory. The plan was subject to change according to Student's ability to move to the next step. Additionally, the counseling portions of the IEP was to aid in Student's transition and provide her with someone on campus that she would feel comfortable communicating with.

59. Consequently, the evidence, including the witness testimony, submitted at hearing supported the appropriateness of the IEP offers.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA¹⁹

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)²⁰ 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 FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's 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.*

¹⁹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

²⁰ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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 (*Mercer Island*) [In enacting the IDEA, 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. 950, 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); 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, § 56505, subd. (i).)

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 matter, Student had the burden of proof on all issues.

THE IEP

6. The IEP is the “modus operandi” of the IDEA. It is a comprehensive statement of the education needs of the student and the specifically designed instruction and related services which are to be used to meet the student’s needs. (*School Committee of Burlington, Mass. V. Department of Education* (471 U.S. 350, 368 [105 S.Ct. 1996, 85 L.Ed.2d 385].)

7. The ALJ must determine whether the IEP developed “is reasonably calculated to enable the student to receive educational benefit.” (*Rowley, supra*, 45U.S. at 206-207.)

8. An IEP is evaluated in light of the information available at the time it is developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* At 1149, citing *Fuhrman v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

9. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child’s education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324(a).) For each area in which a special education student has an identifiable need, the IEP team must develop measureable annual goals that are based upon the child’s present levels of performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

10. The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, and a statement of measureable annual goals designed to make progress in the general education curriculum. The goals are based upon the child's present levels of academic achievement and functional performance. The IEP must also include a description of how the child's progress toward meeting the annual goals will be measured, and when periodic reports of the child's progress will be issued to the parent, a statement of the special education and related services to be provided to the child, and a statement of the special education and related services to be provided for the child, and a statement of individual accommodations for the child related to the taking of state and district-wide assessments. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.) An IEP must contain the projected date for the beginning of the services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).) Here, there is no dispute that the IEP's at issue included information as to Student's present levels of performance, the goals included measurements or objectives, and contained the projected dates of the beginning of services, frequency, location and duration of services.

11. A Student's parents or legal guardians are considered necessary members of the IEP team. (34 F.F.R. § 300.321(a)(1); Ed. Code, §§ 56341, subd. (b); 56342.5 [parents must be part of any group that makes placement decisions.]) Thus, the parents or legal guardians of a student with disability must be afforded an opportunity to participate in the IEP meetings. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) Here, Student's parents were active participants at all of the IEP team meetings at issue.

12. An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (DDC 2002) 238 F.Supp.2d 127, 139 [IDEA

does not provide for an “education...designed according to the parents’ desires”], citing *Rowley, supra*, 458 U.S. at 207.)

13. In addition to special education instruction during the regular school year, school districts must provide extended school year services in the summer if the IEP team determines, on an individual basis, that the service are necessary for a child to receive a FAPE. (34 C.F.R. § 300.16; Ed. Code, § 56345, subd. (b)(3).)

ISSUE 1: THE 2014-2015 SCHOOL YEAR

14. Student failed to meet her burden to establish that she was denied a FAPE during the 2014-2015 school year. The IEP, as amended, provided Student with appropriate placement, services, goals and accommodations. The placement, services, and accommodations were designed to provide Student with education benefit and to conform to the recommendations of Student’s medical team. The IEP team met frequently to monitor Student’s condition and progress on her goals. The IEP was designed to provide Student with home instruction and to permit access to instruction on campus, which would result in her being able to take more instruction at school. Additionally, Student failed to meet her burden that Irvine did not appropriately provide case management services. Student exhibited receiving educational benefit by successfully completing her classes during fall 2015, and by improving her English score on the California Standard Test from “below basic” to “basic,” an improvement of over 40 points.

Placement, Services, Accommodations, and Goals

15. Student’s annual IEP team meeting for the 2014 extended school year and the 2014-2015 school year, occurred on May 9 and June 3, 2014. The IEP team possessed information from Dr. Taras, Irvine’s retained consultant; Student’s medical team (Drs. Korraa, Shulman, Peng, and Hoftman) from 2013, and the 2014 updates from

Drs. Hoftman and Korraa. In her update, Dr. Hoftman referred to Student's severe depression and anxiety, not as a result of school, but as to her continuing day-to-day struggles with her constant fatigue, and resulting physical pain which interfered with "her tolerance to activities of daily living and basic outings." Dr. Korraa, in his February 24, 2014 letter, only mentioned that Student's condition "impedes on her ability to address her academics in a timely fashion." Mother added her concerns that Student was not able to earn credits toward her high school diploma and that her English assignments were too rigorous. The team, taking this information into account, plus Student's performance during the 2013-2014 school year, adopted an IEP designed to meet Student's unique needs and to enable her to receive educational benefit by taking two courses, math at home and one 47-minute class (which was one period of 47 minutes daily) at Creekside. As to parental concerns, the team agreed to have Student's English assignments adjusted to a lower reading level, and to have her enroll in a Directed English class after she completed her current English class.²¹ In line with her physicians' recommendations that Student's program be flexible and to permit her to attend school at her option, the Directed English class, and later her biology class, was to be either home or on campus. She was also provided five hours per week (one hour daily) of home instruction where Student could complete classes in math and history, as well as receiving help in her campus class. Additionally, Student was provided 15 minutes of counseling services regarding educational issues, even though Student had opted not to receive counseling services from Irvine during the 2013-2014 school year. Dr. Patterson opined that it would be difficult to add another therapist into the mix of therapy that Student was already receiving from her treatment team. This misses the

²¹ At Student's request, the Directed English class was changed to biology in mid-September.

point of the school based counseling. Irvine was not attempting to provide therapy for her ongoing medical-psychiatric condition, but was seeking to assist Student in her return to school. After Student was forced to miss instruction due to her hospitalization and extensive out-patient treatment for eating disorders and depressions, the team amended her IEP to permit her to earn credits by providing textbook and work packets in science in addition to home instruction.

16. The IEP team adopted accommodations to assist Student due to her fatigue and processing concerns. These accommodations included extra time for assignments and tests, reduced quantity of work, use of calculator, copies of recorded lectures, dictating responses to assignments and tests, and copies of study guides which would allow Student to not take class notes, were all designed to assist with her fatigue.²²

17. The two goals adopted by the team were related to academics. Goal one related to Student's unwillingness to edit and revise her written work, and Goal two related to Student's problems in reading comprehension, which was a subject of Mother's concerns, were designed to improve Student's areas of academic weakness.

²² Dr. Patterson opined that Irvine should have conducted an assistive technology assessment to determine what may be required to permit Student to provide oral responses. Although the accommodation did not state in what manner Student could provide oral responses, the methodology appears to be at her option. Options would include dictating oral answers to her teacher, home instructor, or to another person who would put the responses down in writing. Neither Mother, Ms. Stock, nor Ms. Huck testified that Student had ever opted to provide oral responses to any assignment or test. At no time did Student or Mother request Irvine to provide a recorder or other device.

Student made progress on her goals as evidenced by her successful completion of her two classes, which demonstrated educational benefit. Dr. Patterson opined that the two adopted goals were appropriate. His criticism was that the team failed to adopt a goal to address Student's anxiety. However, at the time of the adoption of the 2014-2015 IEP, Student's doctors had not reported that Student was suffering anxiety specific to her school work. In his February 24, 2014 letter, Dr. Korraa stated that Student's continuing CFS and depression impaired her ability to do her school work in a timely manner only. Dr. Korraa, as Student's treating psychiatrist, was in the best position to alert the team if her education was causing serious anxiety. The team took into consideration Dr. Korraa's report by adopting these accommodations.

18. The annual IEP placement at Creekside was appropriate. This placement met the flexibility recommended by Drs. Korraa and Taras because (a) Creekside operates on a quarterly calendar with the ability of a student to complete class courses quickly and to make up credits; (b) small classes; (c) permitted a student to work on his or her own pace, which permitted the student to earn additional credits; (d) awarded partial credits; and (e) could award an adult diploma, which required less credits. Additionally, Student would be graded solely on work completed, and not penalized if she failed to submit assignments. Dr. Patterson's criticism that Creekside was not appropriate was based on his understanding that the school body was mainly comprised of behavior problem students. Dr. Patterson offered no basis for this understanding. On the other hand, Drs. Taras and Korraa opined that Creekside met their flexibility recommendations. Creekside also resolved Mother's constant concerns of Student to make up high school graduation credits, or earn the credits at a faster pace, since Creekside offered opportunities to earn additional credits by completing independent study work, ability to earn partial credit, and the ability to alter the quantity of work.

19. The IEP team regularly reviewed Student's progress on her goals and academically, addressed parental concerns, and amended the IEP to reflect Student's changing needs. The IEP team convened meetings on September 15, 2014, September 29, 2014, and November 12, 2014, prior to Student's December 4, 2014 hospitalization. The team convened meetings on January 29, 2015, February 24, 2015, and March 16, 2015, to continue monitoring Student's condition, report on assessment information, and review her return to instruction prior to convening for her annual IEP team meetings on May 4 and 18, 2015. Therefore, Irvine provided reports on Student's progress on her goals. Following the social-emotional assessment, the team adopted emotional disturbance as her primary eligibility category and adopted goals to address Student's mental health issues. Social-emotional and work completion goals were adopted to assist her in learning and adopting coping strategies. The team also provided behavior specialist counseling to determine student's levels to prepare for her 2015-2016 annual IEP, and to introduce a person whom Student would feel would be a trusted person on campus when she returned to school.

Case Management

20. Student failed to offer any evidence regarding Irvine's inappropriate case management after September 1, 2014. Dr. Roberts assumed responsibility for Student's file by appointing herself as Student's advisor. Dr. Roberts had contact with Student whenever Student was at Creekside. Dr. Roberts was in frequent communication with Mother. Student's expert, Dr. Patterson, did not find that case management was not appropriate after September 1, 2014, as he opined that Dr. Roberts got everything organized and "got it right."

21. Student also contends that Irvine's handling of Student's case was not appropriate because the personnel responsible for developing Student's IEP were inexperienced working with chronically ill children, especially those suffering with CFS.

Irvine's alternative schools, Creekside and San Joaquin, and the home hospital teaching program have provided instruction for many students who suffer from serious health issues which interfere with their ability to complete a normal school program. Student's IEP team included experienced school psychologists, counselors, and teachers. Irvine's team included persons who had experience dealing with chronically ill children including: (a) Ms. Huck, the home instructor, has been a home hospital teacher since 1980, and has taught numerous children dealing with mental health, physical, and medical issues; (b) Irvine retained a medical consultant, Dr. Taras, who is a professor of pediatrics at the medical school of the University of California, San Diego, and who regularly consults and acts as a liaison between school districts and medical providers in cases of chronically ill children, including those with CFS; and (c) Mr. Alzubaidi, who is an experienced therapist and counselor who has worked with children suffering from CFS, anxiety disorders, and depression while at Riverside County Mental Health Department, and as coordinator for mental health at the Temecula Valley Unified School District.

ISSUE 2: THE MAY 18, 2015 IEP

22. Student failed to meet her burden to establish that she was denied a FAPE in the May 18, 2015 annual IEP offer, for the 2014 extended school year and 2015-2016 school year. The IEP was appropriate based on the information then in possession of the IEP team. Because of the unsuccessful attempts to receive input from Student's treatment team, the IEP team failed to have an update on Student's medical and psychiatric condition. The information possessed by her team consisted of the following: (a) Student was near pre-hospitalization levels accessing her home instruction; (b) Student was completing half of her homework assignments timely; (c) Student continued to be fatigued during writing assignments; (d) the report of Mr. Holmes regarding his diagnostic counseling sessions; (e) the social-emotional assessment by Ms. Albay; (f) Mother's constant concerns of Student not being able to earn graduation

credits; and (g) that no real progress had been made to date in Student transitioning to school, as the IEP's did not include a step-by-step plan to slowly transition her to learning on campus.

Placement and Services

23. Student did not offer any evidence that the services offered were not appropriate. Student's contention was that the five step plan, comprising placement and services, was not appropriate. Dr. Korraa had originally noted that it was important for Student's IEP to be flexible. Dr. Patterson criticized the five-step plan that Student would not be able to fully transition back to the Creekside campus in a six month period. Dr. Patterson ignores that the plan was designed to be flexible and the IEP team would meet periodically to determine whether Student could take the next step, or whether it needed to be deferred or amended. Dr. Korraa had earlier stressed that Student needed to have a feeling of accomplishment to aid in accepting her condition and desiring a return to school. By completing each step and increasing her academic achievement, she would be able to obtain a feeling of accomplishment. A step-by-step plan would aid the IEP team in assessing Student's readiness academically and her ability to tolerate increased instruction.

Accommodations

24. The accommodations in the May 19, 2015 IEP were identical as those adopted in the prior IEP. Student offered no evidence that she required any additional or new accommodations at the time of the IEP team meeting. Therefore, Student failed to demonstrate that the accommodations contained in the May 19, 2015 IEP were not appropriate.

Goals

25. Student contends that the goals contained in the May 19, 2015 IEP were not appropriate. Dr. Patterson opined that the goals were valid but were not in sufficient depth. Dr. Patterson did not elaborate on this further. Each of the goals clearly stated what was expected, contain objectives, and baselines. Goals one through four involve social-emotional issues. The baselines were developed by Mr. Holmes during his diagnostic counseling sessions. The fifth goal was to improve the timeliness of Student completing homework timely. Its baseline was established by the amount of work timely handed in to her home instructor. Thus, Student failed to meet her burden to demonstrate that the goals in the May 18, 2015 IEP were not appropriate.

ORDER

Student's claims for relief are denied.

PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must the extent to which each party has prevailed on each issue heard and decided. In accordance with that section, the following finding is made: Irvine prevailed on all issues heard and decided.

RIGHT TO APPEAL THIS DECISION

This Decision is a final administrative determination and is binding on all parties. (Ed. Code, § 56506, 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).)

DATE: July 27, 2016

/s/

ROBERT HELFAND

Administrative Law Judge

Office of Administrative Hearings