

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

GOLETA UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017020596

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on February 14, 2017, naming Goleta Unified School District. On April 4, 2017, District filed a copy of a letter dated March 28, 2017 in which District responded to the issues raised in Student's complaint. OAH continued the matter for good cause on April 6, 2017.

Administrative Law Judge Marian H. Tully heard this matter on June 28 and 29, 2017 and July 3, 5, 6 and 7, 2017, in Goleta, California.

Attorneys Andrea Marcus and Monique Fierro represented Student. Mother attended the hearing.

Attorney Melissa Hatch represented District. Deputy Superintendent Margaret Saleh and District's Coordinator of Special Education, Amanda Martinez-Iqbal attended the hearing.

The ALJ granted the parties' request to continue the matter to August 7, 2017 to file written closing arguments. The parties timely filed closing arguments, the record was closed and the matter submitted on August 7, 2017.

## ISSUES

1. Did District deny Student a free appropriate public education at the Individualized Education Program team meetings held in August and September 2016, denying Mother's right to meaningful participation in the IEP team meetings by (a) misinforming Mother as to the law and facts regarding the placement decisions discussed; (b) predetermining that Student's home school was not an option which would be offered; and (c) failing to consider how Student could be supported so she could be educated in a less restrictive environment?
2. Did District deny Student a FAPE by failing to properly assess all of Student's areas of need, when presented with a signed assessment plan on May 11, 2016, covering such areas?
3. Did District deny Student a FAPE from August 8, 2016 to February 13, 2017, by failing to offer her appropriate goals, which if met, would indicate that Student had received more than de minimus educational benefit?
4. Did District deny Student a FAPE by failing to provide prior written notice when it denied Mother's request for placement in her home school and one to one aide support?

## SUMMARY OF DECISION

The evidence demonstrated Mother fully participated in IEP team meetings on August 18 and 22, 2016. The Decision refers to the IEP resulting from those meetings as the August 2016 IEP. There was no evidence the IEP team met in September 2016. More than four hours of audio recordings of both IEP meetings demonstrate District, Parents

and their representatives, engaged in vigorous comprehensive discussions about Student's placement. Mother was articulate, knowledgeable and persistent in asking questions, clarifying facts, voicing her concerns and supporting her opinions. Mother made it clear at each IEP team meeting that she wanted Student placed in a general education classroom with supports, at the school closest to her home. District considered and acknowledged Mother's concerns and her preferences. The audio tapes of the two IEP team meetings demonstrate that District did not misinform Mother as to the law or facts or failed to consider how to support Student in a less restrictive environment than the program District offered in the August 2016 IEP. There was no evidence that District predetermined the placement offered in the August 2016 IEP.

Student did not prove District failed to properly assess Student according to the May 11, 2016 assessment plan, that the goals in Student's IEP were not appropriate, or that District failed to provide required prior written notice.

## FACTUAL FINDINGS

1. Student was 9 years old at the time of the hearing. She lived with her Parents and four siblings within District boundaries at all relevant times.

2. Student was abandoned in a hospital in Russia at birth. She had gastrointestinal surgery at 21 days and heart surgery at 10 months. Parents adopted Student from an orphanage in Russia and brought her to the United States in November 2011 at the age of four. Student's early childhood experience resulted in emotional, social and language difficulties. Student has a medical diagnosis of Down syndrome with an associated intellectual disability and delays in adaptive living skills. District first determined Student eligible for special education under the primary category of intellectual disability, and a secondary category of speech or language impairment, in January 2012. District offered Student an IEP with placement in a pre-school special day program at Mountain View Elementary School for the 2012-2013 school year. Mother

decided not to enroll Student because Student needed more time for bonding and socialization.

3. Mother home schooled her children. Mother established Alpha Omega Academy in 2009. Alpha Omega Academy was a private school with five pupils; Student and her siblings which Mother described as ages zero through 14. Mother developed curriculum and an individual learning plan for each child. She taught multiple subjects and managed all the schedules and activities for her children.

4. Before establishing Alpha Omega Academy, from 2001 to 2006, Mother was a substitute high school teacher and an instructional assistant for bilingual special education high school students for the Santa Barbara County Educational Office, and taught Sunday school at Calvary Chapel from 2002 to 2008. Mother held a B.A. in International Studies and Spanish, a California Basic Educational Skills Test Certificate, and a Substitute Teaching Permit, California Commission on Teaching Credentialing. Mother also participated in a number of conferences and specialized trainings including California Home Educators Association Annual Conference on teaching methods, curriculum and learning styles and time management in 2009 and 2016; two conferences on adoption and brain trauma in 2010, a 2012 summit with Christian Alliance for Orphans and an Empowered to Connect Training Conference in 2015; and two conferences about teaching children with Down Syndrome 2012 and another in 2015; and an Institute for the Achievement of Human Potential seminar on brain development and brain disorders in 2015.

5. As part of Student's curriculum, she participated in group educational activities co-taught by Mother and other parents. For example, Mother co-taught and Student participated in a marine science class attended by 10 home-schooled children ranging from 1st to 5th grades.

6. Student participated in field trips and Sunday school with typically developing children. Ashley Griffen was a credentialed general education teacher employed by Inspire Charter Schools, an on-line school. She was previously employed with California Virtual Academies as a kindergarten through eighth grade community day teacher. Student participated in three field trips conducted by Ms. Griffen. Ms. Griffen recalled Student went on a field trip to Costco with approximately 20 other students, from transitional kindergarten through 6th grade, and parents. Student was accompanied by an aide. Ms. Griffen recalled there was nothing out of the ordinary about Student. She did not recall whether Student interacted with other children. No reading or writing activities were involved. Student sat quietly with other students in a circle. The second field trip was to Santa Barbara Airport. There were about 30 students, from transitional kindergarten through 8th grade, and parents. Student had an aide and blended in well with the group. The third field trip involved a science project. Over 50 children participated. Ms. Griffen did not remember Student. In Ms. Griffen's opinion, Student's goals could be taught in a general education environment.

7. Kevin Shrout knew Student from Sunday school. Mr. Shrout was the director of the kindergarten through fourth grade classes. Mr. Shrout organized teachers for each classroom, prepared lessons and curriculum and led Bible lessons and music. He described Student as very sweet with some special needs. She got along with peers, was sociable and listened "fairly well." He thought Student's biggest need was something to help her retain focus. Student was one of eight or nine disabled children in his classrooms. In his opinion, Student understood the Bible curriculum.

8. Parents did not attend a District school during the 2013-2014 or the 2014-2015 school years. On April 7, 2016, Mother completed enrollment materials from Isla Vista Elementary School. By age, Student would be entering fourth grade at Isla Vista. Based upon Mother's home school curriculum, Student was enrolled in second grade.

9. District met with Parents on April 20, 2016. They discussed updating Student's present academic and developmental levels and conducting assessments. District arranged for Parents to observe Isla Vista, the school nearest their home, and Mountain View, the location of the preschool placement offered in 2012. On May 3, 2016, District's Special Education Coordinator Amanda Martinez-Iqbal accompanied Mother to observe Isla Vista and Mountain View. Ms. Martinez-Iqbal also prepared an assessment plan on May 3, 2016. By education and experience Ms. Martinez-Iqbal was qualified to prepare the assessment plan.

10. District gave Mother the assessment plan on May 4, 2016. The areas to be assessed included academic achievement, health, intellectual development, language/speech communication development, motor development, social/emotional skills and adaptive behavior. District received Mother's signed consent to the assessment plan on May 11, 2016.

#### ASSESSMENTS

11. District conducted assessments in June, July and August. Assessments were conducted by school psychologist Misty Brewer, special education teacher Henly Ngai, speech and language pathologist Alexa Dell, and the school nurse. Ms. Brewer assessed cognition, visual motor and overall motor skills, social/emotional and adaptive skills. Mr. Ngai conducted Student's academic assessment, including information about Student's graph motor and writing skills. Speech Pathologist Ms. Dell assessed Student's language/ speech communication development. Student's health assessment was completed by a school nurse. All of the assessors were qualified to conduct the assessments and knowledgeable about Student's disabilities. The assessors used a variety of formal and informal methods of collecting information including interviews, rating scales, observations, standardized tests and information provided by Parents and from therapists that worked with Student through the Center for Developmental Play

and Learning. The assessors prepared a comprehensive 28 page report dated August 16, 2016.

12. Student's cognitive level and functional academic ability varied depending on the task. Student had significantly below average general intellectual functioning. Her cognitive range was from below average to significantly below average compared to peers of the same gender and age group nationwide. On non-verbal reasoning tasks, an area of Student's personal strength, she was in the far below average range.

13. Academically, Student performed in the far below average range when compared to same aged peers nationwide. In basic reading, reading comprehension, written expression, and listening comprehension, Student was in the 1st percentile. Student was in the 2nd percentile in math. Student went under the table, walked away from her chair and scribbled on the table when presented with challenging academic tasks. Other task avoidance behaviors included looking away, asking to use the bathroom, and putting her head down. She needed frequent reminders to keep working.

14. In social/emotional and adaptive skills Student was in at risk levels for functional communication. Student fatigued easily during challenging tasks, had difficulty focusing and paying attention and was easily distracted. Student was overly focused on food and needed supervision to prevent her from hoarding or covertly take food, over eating or eating too quickly. Mother's behavior rating scales reflected low overall adaptive skills across all settings. Student scored significantly below average across all standardized language measures with significant deficits in receptive and expressive language.

15. Student's overall motor skills were rated in the low range compared to same aged peers. Student was unable use scissors to cut in a straight line. Student could climb on and off objects such as a slide and hop on one foot. She could not walk down

stairs alternating her feet or catch a beach ball size ball from six feet away. The report recommended further evaluation of Student's gross and fine motor skills.

16. The assessment report was sent to Parents. An IEP team meeting was scheduled for August 18, 2016. Parents read the assessment report before the August 18, 2016 IEP team meeting. District convened a second IEP team meeting on August 22, 2016. Student and District audio recorded both meetings.

#### AUGUST 18, 2016 IEP TEAM MEETING

17. Parents, Jeanne White MFT from the Center for Developmental Play and Learning, and Jennifer Griffen<sup>1</sup> from the Alpha Resource Center attended the August 18, 2016 IEP team meeting. Deputy Superintendent, pupil services, Dr. Margaret Saleh was the administrative designee and conducted the meeting. Ms. Brewer, Mr. Ngai, Ms. Dell, adaptive physical education teacher Michael Galvan, occupational therapist David Wright, and Ms. Martinez-Iqbal, as coordinator of special education and general education teacher, attended. The team met for approximately two and one-half hours.

18. Dr. Saleh began the meeting by asking everyone to introduce themselves. She explained that the team would begin by reviewing the assessments; consider Student's eligibility for special education, discuss Student's present levels of performance, prepare goals in Student's areas of need, consider accommodations and services to address Student's needs, and then discuss placement and the school site where Student's IEP could be implemented.

19. The IEP team reviewed the assessments in detail. District assessors asked Parents, as to each page, whether they had any questions. Mother offered detailed

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<sup>1</sup>It did not appear that Ashley Griffen from Inspire Charter School and Jennifer Griffen from Alpha Resource Center were related.



corrections to facts stated in the reports and District made those corrections. For example, Mother directed Ms. Brewer to a portion of her report that was incorrect and Ms. Brewer agreed to strike that portion of the report. The assessors presented the results of each standardized test, the raw and scaled test scores and the significance of the information produced by the test. Mother informed the team that she believed Student could do better than standardized tests reflected in some areas. Parents asked a substantial number of questions and the assessors responded to each. For example, in response to a Parent question, an assessor explained the difference between the terms "at risk" and "clinically significant" in a rating scale. Ms. White and Ms. Griffen provided information about Student based upon their experience with her and asked questions about the assessments. The assessors responded to their questions.

20. Ms. Brewer reported that Student could become distracted. Mr. Ngai reported behaviors including task avoidance, difficulty completing assignments, and difficulty attending to teacher. He noticed Student's hand shaking or a hand tremor while Student was being tested. Based upon the assessors' reports and the information obtained during the IEP meeting Dr. Saleh suggested further assessment of gross and fine motor development.

21. District staff asked Parents if they had any other questions about the assessments before the team considered Student's eligibility; Mother said no. The IEP team then discussed several possible eligibility categories including intellectual disability, processing disorders, and speech and language impairment. Dr. Saleh and Ms. Brewer appropriately responded to Mother's questions concerning eligibility under the IDEA. The IEP team determined Student was eligible for special education and related services as a student with an intellectual disability.

22. The IEP team began to develop goals for Student. The IEP team reviewed 13 draft goals. The goals were based upon state standards for kindergarten. Mother

requested a goal for reading sight words and a goal for social communication and interactions. Dr. Saleh asked Mother, as Student's teacher, to send Ms. Martinez-Iqbal information for baseline information for the goals Mother requested so that District could draft goals in those areas. Of the 15 goals offered in the August 2016 IEP, Student challenged the goals numbered 7, 9 and 10 in this matter.

23. Goals number seven and nine addressed math skills. Goal number seven was recognition of numerals from one to 20. The baseline indicated that Student was able to count to 20 with a few inconsistent missing numbers and she was unable to read any numerals. The goal was: when given number of cards from one to 20 Student would verbally state the number with 80 percent accuracy in four out of five trials measured by data collection. Goal number nine addressed counting. The baseline indicated Student could count to 20 with some inconsistency and she was unable to understand numerals one through 10 by matching the correct quantity of objects with the printed numeral. The goal was to verbally count to 20 with 90 percent accuracy in four out of five trials as measured by data information. The baselines for goals seven and nine were based upon information obtained by the academic assessment conducted by Mr. Ngai. Mother informed District that she thought Student's math skills from academic testing did not reflect Student's full ability. District informed Mother that new or different goals could be developed at any time Student met any of her goals.

24. Goal number 10 addressed focus and staying on task. According to Mother's report to the IEP team, Student was able to sit through 15 to 20 minutes of a preferred activity. The goal was: Student would participate in teacher directed activity for its full duration up to 20 minutes, with no more than three additional visual and/or verbal prompts across 80 percent of opportunities as measured by observation and data collection.

25. The team discussed what grade Student would attend. Based on Student's chronological age, she would be entering fourth grade. In Mother's opinion, Student should attend a regular classroom in a lower grade at Isla Vista where the children's learning and development was closer to Student's levels. In Dr. Saleh's opinion, it would not be appropriate to place Student in kindergarten, first or second grade. District agreed to placement in third grade.

26. Mother inquired about her preference for general education placement at Isla Vista. Dr. Saleh and other members of the team informed Mother, essentially, that it was premature to have a discussion of school site placement until goals were developed and the team discussed accommodations and related services. The IEP team needed to meet again to discuss the goals Mother suggested and determine services and placement.

27. District gave Parents an Assessment Plan for Adaptive Physical Education and Occupational Therapy on August 18, 2016. Parents did not consent to the August 18, 2016 assessment plan.

#### AUGUST 22, 2016 IEP TEAM MEETING

28. The IEP team met again on August 22, 2016. Mother, non-attorney advocate Sandy Shove, Ms. Brewer, Mr. Ngai, Ms. Dell, Ms. Martinez-Iqbal and Dr. Saleh attended. The team met for more than two hours. Dr. Saleh began the meeting by asking Mother if she had any further questions about District's assessments before the team continued to discuss goals and move on to discuss services. Mother and Ms. Shove clarified some of the information contained in the assessments and asked questions about the assessments. District answered the questions and adopted most of the corrections voiced by Mother and Ms. Shove.

29. Some of the goals developed on August 18, 2016 were revised on August 22, 2016, to reflect additional input from Mother and Ms. Shove. A sight word goal and

a communication goal to complete five circles of communication were developed from Mother's baseline information. The team discussed Student's goals in detail.

30. Parent and Ms. Shove asked questions about, and sought clarification of, almost every goal. The appropriate District team member answered their questions. For example, Ms. Shove informed the team that Mother felt some of the goals, such as the reading goal, were too low. Student's reading goal was to recognize 80 percent of alphabet letters; Mother wanted the goal to be 100 percent. Ms. Shove asked to raise the letter recognition goal to 90 or 95 percent. Dr. Saleh explained, comparing an assessment from 2013 to the assessment in 2016, that Student did not recognize any letters in 2013 and in 2016 Student recognized seven upper case and six lower case letters. This progress was very slow. Dr. Saleh further explained that goals must be based upon a reasonable estimate of what Student can do. Some goals were reworded or changed during these discussions.

31. Mother informed the team that she preferred a reading methodology that was successful with children with Down syndrome that focused more on sight words than on recognizing letters. District team members explained District's reading program and why reading readiness skills, such as letter recognition, was an appropriate method to address Student's academic needs in reading.

32. The team discussed services, including a recommendation from Mr. Ngai for adult support throughout the school day. Mother expressed some safety concerns, for example, Student might try to take food from other children's lunchboxes. Dr. Saleh explained adult support meant an adult would meet Student when she arrived at school, be with her after school until she was picked up, and an adult would have "eyes on" Student during breaks, recess, lunch and in addition to the teacher in the classroom. Adult support did not mean a full time one to one aide. Dr. Saleh explained that a one to one special circumstance instructional aide would require an assessment, which was

referred to as a "SCIA" assessment, to determine whether Student needed that level of support. Neither Mother nor anyone on her behalf asked for an assessment in this area. Dr. Saleh suggested a functional behavior assessment could be done if Student exhibited behavior needs upon her return to a classroom environment.

33. The team discussed the specialized academic instruction Student needed and the credentials necessary to teach the instruction required. The only placement available at Isla Vista would have been a general education classroom or a mild/moderate special education classroom, both of which would have presented common core third grade curriculum with modifications and supports. Mountain View offered a moderate/severe special education classroom where Student would be taught a modified, or alternative, curriculum that worked on her goals and was age appropriate.

34. Mr. Ngai was a credentialed moderate/severe special education teacher. He was familiar with the third grade moderate/severe special education classroom because he had taught in the Mountain View fourth grade classroom for two years. Most of his students matriculated from the third grade class to his fourth grade class. His class contained five students and was staffed with three instructional assistants under his supervision. He explained that the Mountain View special education classroom would provide Student with the intensive specialized academic instruction she required, allow her to work on the extensive number of goals in her IEP, and provide mainstreaming opportunities to assist Student with social and communication skills.

35. Mother advocated placement in a regular third grade classroom with pull-out resource specialist support and/or a one to one aide in the classroom on the Isla Vista campus. Dr. Saleh explained Student required a level of specialized academic instruction that was not available at Isla Vista. For example, a third grade general education teacher was not trained to modify the third grade reading curriculum for a child that was developing reading readiness skills such as letter recognition. A third

grade general education teacher was not trained to supervise a one to one academic aide to teach Student the modified curriculum Student required. Dr. Saleh explained, if Student was to make meaningful progress on her academic goals, she needed instruction from a teacher with a special education credential to teach children with moderate to severe disabilities.

36. Mother asked what goals, such as teaching letters, could not be addressed by a third grade general education teacher, other adult, or a resource specialist teacher, while the third grade teacher taught Student's typical peers using the third grade curriculum. The team discussed the reading programs District used for children from the kindergarten level through third and fourth grade. The program for prekindergarten, kindergarten and first grade was age appropriate to introduce reading readiness and teach reading. The program was not age appropriate to teach older children pre-reading and beginning reading skills. For older children that need to develop pre-reading and beginning skills, the program and methodology was different in order to remain age appropriate. A resource specialist program would not meet Student's needs because it was developed for children that have rudimentary reading skills but have additional needs, or need corrective reading help. The Mountain View program had skilled staff and credentialed teachers trained to teach children that did not yet have fundamental reading skills upon which to build to grade level reading.

37. Mother asked whether Student could be supported at Isla Vista by having services delivered on that campus. Dr. Saleh agreed speech and language services and occupational therapy services could be provided at Isla Vista. Dr. Saleh did not think Student could make progress on her educational goals in the general education classroom at Isla Vista with speech and language services and occupational therapy services. Dr. Saleh explained that District had an obligation to offer a FAPE where, by District's estimation, Student would make meaningful progress on her goals.

38. Mother, Ms. Shove, Dr. Saleh and other team members thoroughly discussed, over the course of an hour, whether Isla Vista or Mountain View would be the least restrictive environment for Student. Mother maintained, based on her research, that full inclusion was the best way to educate Student and Isla Vista was the school Student would attend if she was not disabled. Dr. Saleh acknowledged Parent's preference but informed Mother that District had a responsibility to offer a program in the least restrictive environment that would allow Student to be appropriately instructed on her particular goals and at her level to meet the needs assessed. Parent was informed that Isla Vista would not be the least restrictive environment for Student because she would receive specialized academic instruction in isolation within the classroom while her classmates were engaged in the regular third grade curriculum. Student would not have the opportunity for reciprocal learning with peers that were working on similar things. The third grade general education teacher at Isla Vista would not have the credentials, skills and knowledge to adapt the third grade curriculum so that Student could make progress on her goals. The special education program at Mountain View grouped kids with similar needs and provided reciprocal learning not based on grade level, but based on learning the curriculum. Mountain View would provide substantial inclusion opportunities while addressing Student's needs in reading, writing and math.

39. Dr. Saleh offered Parent the opportunity to observe a third grade general education class for a day at Isla Vista. Ms. Shove asked that Parent have the opportunity to observe a resource support program classroom. Dr. Saleh offered to continue to meet with Mother but explained that District was required to give Parents District's offer of a FAPE even if Parents did not agree with it. Dr. Saleh suggested, since Student had never been in public school, that they try the Mountain View placement and hold an IEP team meeting after Student had a chance to adjust to it.

40. On August 26, 2016 District received an email from Parents. Parents informed District that they were concerned about District's assessments and requested private assessments funded by District. They reiterated their disagreement with the placement offered in the August 2016 IEP. On September 9, 2016 District sent a prior written notice letter to Parents denying the request for private assessments and asking Parents to return the signed consent to the occupational therapy and adaptive physical education assessment plan.

41. On September 11, 2016, Mother wrote another letter in which she specifically disagreed with District assessments and requested an independent educational evaluation. On September 19, 2016, District consented to the request for an independent psycho-educational evaluation and again asked Parents to return a signed consent to the assessment plan for occupational therapy and adaptive physical education. On September 30, 2016, Mother consented to the August IEP with exceptions. She attached a note in which she stated she did not agree with the determination of intellectual disability, she did not agree with the assessments, and she did not agree to the placement offered.

42. There was no evidence the IEP team met at any time after August 22, 2016. In November 2016 Parents enrolled Student at Inspire Charter School. Inspire was chartered by Maricopa Unified School District.



## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>2</sup>

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)<sup>3</sup> 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).)

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<sup>2</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>3</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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. On March 22, 2017, the Supreme Court revisited and clarified the *Rowley* standard in *Endrew F. v. Douglas County School District* (2017) 580 U.S. \_\_\_, [137 S. Ct. 988], 2017 WL 1066260.) *Endrew F.* explained, under *Rowley*, when a child is fully integrated in a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, 2017 WL 1066260 at p. 11.) However, both *Rowley* and *Endrew F.* declined to hold that advancing from grade to grade proved a student was receiving a FAPE. (*Endrew F.* at p. 14, fn. 2; *Rowley*, 458 U.S. at p. 202 [no one test for determining adequacy of educational benefits]; see also *id.* at p. 203, fn. 25.); *Endrew F.* held, as applied to a student that was not fully integrated in a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew F.*, at p. 11.) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

4. Procedural violations of the IDEA constitute a denial of FAPE only if the violation: (1) impeded the student's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1208, quoting *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.) A procedural violation may be harmless unless it results in a loss of

educational opportunity or significantly restricted parental participation. (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) 556 F.3d 900, 910.) A loss of an educational opportunity is shown if there is a “strong likelihood” that, but for the procedural error, an alternative placement “would have been better considered.” (*Doug C. v. Hawaii Department of Education* (9th Cir. 2013) 720 F.3d 1038, 1047 (quoting *M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 657 (Gould, J., concurring).)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [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].) Student had the burden of proof in this matter.<sup>4</sup> Here, Student has the burden of proof.

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<sup>4</sup>Student contends that District should have the burden of proof because, under Education Code section 56346, subdivision (f), and *I.R. ex rel. E.N. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164 (*I.R.*), District was required to file a request for a due process hearing when Parents did not consent to the August 2016 IEP. Education Code section 56346, subdivision (f), requires a school district to “expeditiously” request a due process hearing when a district determines, for a student who is already receiving special education and related services, any portion of an IEP to which a parent does not consent is necessary to provide the student with a FAPE. The Ninth Circuit explained, “If, in the school district’s judgment, the child is not receiving a FAPE, the district must act with reasonable promptness to correct that problem by adjudicating the differences

## ISSUE 1: PARENT PARTICIPATION

6. Student contends Deputy Superintendent Dr. Salehmis informed Parents during team meetings about the credentialing requirements required for a teacher working with Student and “cut off” members of the IEP team, including Parents, from meaningful discussion of how Student could be supported at Isla Vista. Student further contends District predetermined Student’s placement at Mountain View and stopped the team from discussing placement at the August 18, 2016 team meeting.

7. District contends it provided for substantial parent participation in the IEP development process by arranging for Mother to tour two schools, meeting with Mother with the parents.”(805 F.3d at p. 1170.)*I.R.* does not apply in this case because Student was not in a district placement nor receiving special education from District. (805 F.3d at p. 1169.)

Student further argues that District defaulted or that it waived its right to put on evidence of affirmative defenses because District did not file a formal “Answer” within 10 days of the date Student’s complaint was filed. The IDEA requires a school district to respond to a parent’s due process complaint within 10 days. (20 U.S.C. § 1415(c)(2)(B)(i)(I).) When a school district fails to file a timely answer, the ALJ must order a response. Absent the filing of a response or a prior written notice that serves the same function, a hearing cannot proceed. (20 U.S.C. §1415(c)(2)(B)(i)(I); *M.C. v. Antelope Valley Union High School Dist.*(9th Cir. 2017) 852 F.3d 840, 851.)The copy of the letter District sent Parents on March 28, 2017 and filed with OAH on April 4, 2017 put Student on notice of District’s position on Student’s issues, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified School Dist.*, *supra*, 2017 WL 2330662, \*\* 6-7.)Student cites no legal authority for the sanctions she requests.

to develop an assessment plan, and conducting two IEP team meetings in which Parents and the people that attended with them, asked questions about all aspects of the process and advocated for Mother's preference for placement at Isla Vista.

#### Authorities

8. 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); Ed. Code, §§ 56304, 56342.5.) A parent is a required member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, § 56341, subd. (b)(1).) The team must consider the concerns of the parents throughout the IEP process. (20 U.S.C. § 1414(c)(1)(B), (d)(3)(A)(i), (d)(4)(A)(ii)(III); Ed. Code, § 56341.1, subds. (a)(1), (d)(3), (e).) 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 team 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 Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [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].)

9. Districts are required to consider parents' preferences. The IDEA does not require a school district to accept parents' choice of program, but it must consider suitable alternatives. (*Blackmon v. Springfield R-XII School Dist.* (8th Cir. 1999) 198 F.3d 648, 658.) While the IEP team should work toward reaching a consensus, the school district has the ultimate responsibility to determine that the IEP offers a FAPE. (App.A to 34 C.F.R. part 300, Notice of Interpretation, 64 Fed.Reg. 12473 (Mar. 12, 1999).)

10. A school district that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to

participate in the IEP process. (*Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 858; see also, *Ms. S. ex rel G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) School officials and staff do not predetermine an IEP simply by meeting to review and discuss a child's evaluation and programming in advance of an IEP meeting. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693 fn.3.) The test is whether the school district comes to the IEP meeting with an open mind and several options, and discusses and considers the parents' placement recommendations or concerns before the IEP team makes a final recommendation. (*Hanson v. Smith*, (D. Md. 2002) 212 F.Supp.2d 474, 486; *Doyle v. Arlington County School Board* (E.D.Va. 1992) 806 F.Supp. 1253, 1262.)

#### Analysis

11. Student contends the central issue in this case is whether District denied Parents meaningful participation regarding Student's placement in the least restrictive environment. Audio recordings of the meetings did not support Student's contentions. Parents read the assessment report before the August 18, 2016 meeting and were fully informed about every part of the assessments. Parents, and the people attending the meetings on their behalf, vigorously asked questions and voiced their concerns at every stage in both meetings leading up to the team's consideration of placement. Mother was articulate, knowledgeable, persistent and voiced her disagreement with the recommended placement. She supported her opinions with her experience and her research. District listened and acknowledged her position.

12. Student first argues that Dr. Salehmis informed Parents as to the law concerning teaching credentials during discussions of Student's placement. Student refers specifically to sections of the recordings by hour, minute and seconds. The cited portions of the recordings present a combined total of less than three minutes out of more than four hours of recorded meeting time. The recordings of each meeting were

clear as to what was said. Nothing Dr. Saleh, or any other District IEP team member said in either meeting was misleading or misinformed Parents as to the law or the facts. Student did not prove that any of Dr. Saleh's comments impeded Parents' right to participate in the development of Student's IEP.

13. Student next argues District predetermined Isla Vista was not an option and District failed to consider how Student could be supported in a general education third grade classroom at Isla Vista. There was no evidence that Student's placement was predetermined. District arranged for Parents to visit two schools that might be considered by an IEP team after assessments were completed. The two schools were selected because one was the school nearest Student's home and the other was the school District previously offered when Student initially qualified for special education in 2012. District provided the assessments to Parents before the August 18, 2016 meeting and Parents read the assessments before the meeting. There was no evidence District team members met before either team meeting to determine placement or that District determined to offer the Mountain View program before the team met to review the assessments and develop an IEP. District prepared a draft IEP but did not come to the meeting with a take it or leave it offer.

14. The IEP team meetings proceeded step by step: reviewing the assessments; determining eligibility; developing goals, including goals suggested by Parents; and engaging in a comprehensive discussion of services; before considering placement. It is clear from the recordings, that during the team discussion concerning eligibility and during discussions about Student's abilities and the proposed goals, District deferred Mother's questions as to her preference for general education at Isla Vista and explained that placement would be discussed after the IEP team developed goals and determined the related services and accommodations necessary for Student

to make progress on those goals. By that process, all members of the IEP team were fully informed and prepared to discuss placement.

15. It is clear from the audio recording that when the entire IEP team discussed placement there was a vigorous informed discussion as to the programs and staffing available at both schools. Parent informed the other members of the team that she believed placement in the general education classroom with appropriate supports was the least restrictive environment for Student. She stated the reasons she preferred placement at Isla Vista and the reasons she disagreed with placement at Mountain View. District considered Mother's experience teaching and her knowledge about children with Down syndrome. District further considered Student's participation with typically developing peers in activities such as weekly Sunday school, field trips and classes with other home-schooled children.

16. The audio recording did not support Student's contention that District denied Parent participation by failing to consider how to support Student at Isla Vista. District listened, and responded, to Parents' preference to place Student in a full-time regular education class at Isla Vista with resource support for academics. The IEP team discussed Mother's input regarding methodology focused on sight word reading rather than pre-reading skills such as learning the alphabet. District responded to Mother's questions as to whether goals and curriculum modifications could be implemented by a third grade general education teacher, or other adult with supervision. The team discussed adult supervision throughout the school day and the difference between that level of support and a full time one to one aide instructional aide. Neither Mother, nor her non-attorney advocate, asked for a special circumstances instructional aide assessment during the meeting or after.

17. Mother disagreed with placement in the program at Mountain View. She voiced her concern that placement in the program at Mountain View would exclude



Student from participating with her regular peers and that it would be better to allow Student to make some educational benefit in the third grade class at Isla Vista. District members of the team explained that a highly individualized program at Isla Vista was more restrictive than the Mountain View program. District explained the reasons it was offering the program at Mountain View and why District could not fully implement Student's program or meet Student's educational needs at Isla Vista. With the program Mother proposed at Isla Vista: Student would not participate with reciprocal learning in the classroom; she would be isolated within the classroom; resource specialist help in a separate classroom would not provide the kind and level of specialized academic instruction Student needed; and the general education third grade curriculum could not be modified for delivery in the third grade class so that Student could meet or make progress on her goals with age appropriate instruction.

18. By the end of the August 22, 2016 meeting, the IEP team, including Mother, agreed another meeting was not necessary. Dr. Saleh offered Mother an opportunity to visit the general education classroom at Isla Vista for a day, to revisit Mountain View and to continue to meet with Mother about her concerns.

## ISSUE 2: ASSESSMENTS

19. Student contends District failed to assess Student in all areas of suspected disability because District did not conduct occupational therapy and adaptive physical education assessments as part of the May 11, 2016 assessment plan. Student also argues that the Psycho educational Report was flawed and over generalized.

20. District contends the signed assessment plan District received on May 11, 2016, was sufficient to identify the types of assessments to be conducted and included all of the key areas including academics, health, intellectual development, language/speech communication development, motor development, social/emotional and adaptive/behavior.

## Authorities

21. School district evaluations<sup>5</sup> of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student's educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)

22. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21.) Such notice may come in the form of concerns expressed by parents about a child's symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child's behavior. (*Id.* at p. 13 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796 and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].)

23. Individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county office, or special education local plan area" must conduct assessments of students'

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<sup>5</sup>An assessment under California law is equivalent to an evaluation under Federal law. (Ed. Code, § 56303.)

suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The determination of what tests are required is made based on information known at the time. (*See Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

24. Individuals who conduct assessments shall prepare a written report, as appropriate, of the results of each assessment. The report shall include, but not be limited to: (a) whether the pupil needs special education and related services; (b) the basis for that determination; (c) the relevant behavior noted during the observation of the pupil; (d) the relationship of that behavior to the pupil's academic and social functioning; (e) educationally relevant health and development, and medical findings; (f) for pupils with learning disabilities, the discrepancy between achievement and ability that cannot be corrected without special education services; (g) a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and (h) the need for specialized services, materials, and equipment for pupils with low incidence disabilities. (Ed. Code, § 56327. Districts are obliged to produce an assessment that was appropriate, not perfect. (See 34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

25. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 Fed.3d 1025, 1031-1033; *Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21.)

#### Analysis

26. Student was initially found eligible for special education in 2012. Student did not attend a District school between 2012 until April 2016. District met with Parents

on April 20, 2016. They discussed Student's academic and developmental levels and the need for assessments. The May 11, 2016 assessment plan included motor development. The assessment plan served to both inform the IEP team to determine Student's current eligibility and to help the IEP team identify the special education and related services Student required.

27. District assessed motor development in June and July 2016. Ms. Brewer assessed overall motor skills. Mr. Ngai evaluated graphomotor and writing skills. Ms. Brewer and Mr. Ngai reviewed a 2012 assessment report as part of their 2016 assessment. They recommended further assessment for gross and fine motor skills. Based upon the information District obtained during the 2016 assessments, and information obtained during the IEP team meeting on August 18, 2016, District suspected more information about gross and fine motor development was necessary. Four days later, on August 22, 2016, District gave Parents an Assessment Plan for Adaptive Physical Education and Occupational Therapy, which Parents did not sign. Student did not meet her burden to prove District denied Student a FAPE for failing to assess Student for occupational therapy and adaptive physical education.

28. Student next argues District failed to appropriately assess Student in all areas of suspected disability because the Psycho educational Report was flawed and over generalized as evidenced by various excerpts selected from the audio recordings. Student avers that these excerpts demonstrate that the Psycho educational Report prevented the IEP team from making full and accurate decisions about Student's needs and the least restrictive environment.

29. The evidence demonstrated District's assessors were knowledgeable about Student's disability and competent to perform the assessments they conducted. They assessed Student based upon the information they knew at the time. They produced a comprehensive 28 page written report which the IEP team discussed page by page over

the course of two meetings. The Psycho educational Report included Student's need for special education and related services, the reasons for, and basis of, the determination; Student's behavior during observation, and the relationship of that behavior to her academic and social functioning; educationally relevant health, development, and medical findings; and consideration of the effects of Student's early childhood medical, environmental, social and cultural disadvantages.

30. The Psycho educational Report, considered as a whole, and as presented at the IEP team meetings, did not demonstrate District failed to assess Student in all areas of suspected disability.

### ISSUE 3: GOALS

31. The IEP contained 15 goals. Student's closing brief challenges goals number 7, 9 and 10. Goals 7 and 9 involve math skills. Student contends these goals provide only de minimus educational benefit because Mother believed Student had accomplished goals 7 and 9 at the time of the IEP meetings and there was a discrepancy in the testing. Goal 10 involves participation in teacher directed activity. Student contends Student had also met goal 10 at the time of the IEP team meetings. District contends the baselines for the goals were based upon the assessments and Parent input and that the goals were appropriate.

### Authorities

32. An IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably

be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

33. In addition, the IEP must include "appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved," and a statement of how the student's progress toward the goals will be measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. § 1414(d)(1)(A)(i)(III).) An examination of an IEP's goals is central to the determination of whether a student has received a FAPE. In *Adams*, the court stated: "[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit." (*Adams, supra*, 195 F.3d at p. 1149.)

#### Analysis

34. As for the two math goals, Mother believed Student could rote count to 20 and that test results might not have reflected Student's true counting ability. The two math goals addressed rote counting to 20 consistently and recognition of written numerals and the association between the number of objects and the corresponding numeral. Mr. Ngai's academic testing in math showed that Student was in the second percentile in math, did not count to 20 consistently and did not recognize numerals or associate the number of objects with a numeral. Dr. Saleh explained that, once Student was in school and met these goals, the goals could be modified or new goals developed.

35. As for goal number 10, Mother reported that there were "a lot of things" Student could do for 20 minutes. The baseline for goal 10 is consistent with Mother's report as to Student's attention during preferred activities. However, the goal addresses attention to teacher directed activities and focus, areas of need observed by District assessors and Mr. Shrout. Student did not prove that the baselines for goal 10 were

inaccurate or that participation in teacher directed activity and attention to task would not provide meaningful educational benefit to Student.

36. Student failed to prove that the goals challenged were not based on appropriate objective criteria and evaluation procedures or that the goals were not reasonably calculated to confer meaningful benefit.

#### ISSUE 4: PRIOR WRITTEN NOTICE.

37. Student contends District was required to send prior written notice following the August 22, 2016 IEP team meeting because District refused to offer placement at Isla Vista with supports, supplements and a one to one aide to make sure Student stayed safe and on task.

38. District contends it met the prior written notice requirements because Mother raised these issues during the IEP team meeting, the team discussed them, and the IEP documents the placement, services, and supports and did not offer a one to one aide. Parents signed consent to the IEP with exceptions and reiterated her disagreement with the placement offered on September 30, 2016. District argues that it was not required to send a prior written notice after September 30, 2016 because District was not required to repeat its position when the IEP documents fully reflect the consideration of Parents' requests.

#### Authorities

39. The IDEA requires an educational agency provide "prior written notice" whenever the agency proposes or refuses to initiate or change "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education." (20 U.S.C. § 1415(b)(3); see also 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must contain: (1) a description of the action proposed or refused by the agency, (2) an explanation for the action, and (3) a description of the

assessment procedure or report which is the basis of the action. (34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (b).)

40. The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopin School Dist.* (3d Cir. 2010) 606 F.3d 59, 70.) An IEP document can serve as prior written notice as long as the IEP contains the required content of a prior written notice. (*Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed.Reg. 46540, 46691 (Aug. 14, 2006)(Comments to 2006 Regulations).)

#### Analysis

41. The August 2016 IEP stated District's proposed placement and services at Mountain View. The August 2016 IEP explains the reasons for, and a description of the assessments which were the basis of, District's FAPE offer of placement at Mountain View. The procedures relating to prior written notice were met in this case by the IEP document.

#### ORDER

All Student's claims for relief are denied.

#### PREVAILING PARTY

Pursuant to 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. In accordance with that section, the following finding is made: District prevailed on all issues.

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: August 23, 2017

/s/

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MARIAN H. TULLY

Administrative Law Judge

Office of Administrative Hearings