

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

GLENDALE UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017031019

DECISION

Student filed a Request for Due Process Hearing with the Office of Administrative Hearings, State of California, on March 21, 2017, naming District. On April 12, 2017, OAH granted the Parties' joint request for continuance.

Administrative Law Judge Vernon Bogy heard this matter in Glendale, California, on May 30 and 31, 2017 and June 1, 2 and 9, 2017.

David German, Attorney at Law, represented Student. Mother attended each day of the hearing. Student did not attend the hearing.

Melissa Hatch, Attorney at Law, represented District. Kimberly Smith, Attorney at Law, assisted Ms. Hatch on May 30, 2017. Tamra Kaufman, Attorney at law, assisted Ms. Hatch on June 9, 2017. William Gifford, District Coordinator of Special Education, attended each day of the hearing. Beatrice Fojo-Bautista, District Director of Special Education, attended each day of the hearing except June 2, 2017.

At the conclusion of the hearing, the matter was continued until June 28, 2017, to allow the parties to file and serve written closing arguments. Upon timely receipt of written closing arguments, the record was closed and the matter submitted for decision on June 28, 2017.

ISSUE

Did District deny Student a free appropriate public education by failing to offer him a French-speaking behavior aide capable of communication in the classroom's language of academic instruction, thereby denying Student the individual support necessary to access his academic program and causing him to regress academically?

SUMMARY OF DECISION

Student did not meet his burden of proof that District denied him a FAPE by failing to offer a one-to-one French-speaking behavior aide capable of communication in the classroom's language of academic instruction, or that District's educational placement and services did not provide him meaningful educational benefit.

Student made meaningful educational progress as evidenced by his levels of performance reported at individualized education program team meetings. He met or made progress on most of his educational goals. He progressed in acquiring fluency in the French language as documented by his teachers at the beginning and end of each school year. He improved his behaviors after District assigned him English-speaking behavior aides.

District had discretion to determine the methods necessary to meet Student's needs, including selecting behavior aides who did not speak French. District provided qualified one-to-one aides and addressed Student's social needs and behavior difficulties. Student received educational benefit from the comprehensive program offered in his IEP's and implemented by District. Student's requests for relief are denied.

FACTUAL FINDINGS

1. Student was a nine-year-old boy who at all relevant times resided with Parents within the geographical boundaries of the District. At the time of hearing, he

was in third grade. He was eligible for special education under the categories of autism and other health impairment due to attention deficit hyperactivity disorder.

2. Student was born in Russia, and adopted by Parents at the age of two years and eleven months. His first language was Russian. When he was adopted, Parents lived in France, and Student attended a French pre-school. Father is a native French speaker, and Mother is fluent in French. In August 2013, Student moved to Glendale, California, with Mother and an older sister. He learned English from Mother at home, and could communicate in English sufficiently to access his education.

3. His home school was Balboa Elementary School. At Mother's election, he attended District's optional, lottery-based Benjamin Franklin Elementary School in the Foreign Language Academy of Glendale Dual Immersion French language program. Balboa Elementary did not offer the FLAG dual language immersion program.

DISTRICT'S FOREIGN LANGUAGE ACADEMY DUAL LANGUAGE IMMERSION PROGRAM

4. Mother signed a waiver upon Student's enrollment in the FLAG program, opting out of English-only instruction and requesting 50 percent or more of instruction in the immersion language. The FLAG program was available to all students from kindergarten through sixth grade. Kindergarten and first grade students receive 90 percent of instruction in French and 10 percent in English; 80 percent in French and 20 percent in English in second grade; 70 percent French instruction and 30 percent English instruction in third grade; 60 percent French and 40 percent English in fourth grade; and thereafter 50 percent French and 50 percent English. However, Student received special education services delivered in English outside of the classroom. By third grade approximately 50 percent of his instruction was in French and 50 percent in English.

5. Student received instruction in French from teachers with a bilingual authorization credential, who taught literacy, reading comprehension, vocabulary

development and writing skills in French. The teachers were assisted by interns who were native and fluent French speakers. The interns worked on a one-to-one and small group basis with the students to assist in the instruction.

6. Student's teachers administered the Stanford Foreign Language Oral Skills Evaluation Matrix to Student at the beginning and end of each school year to assess his progress in the French language immersion class. The FLOSEM evaluates comprehension, fluency, vocabulary, pronunciation, and grammar in French for students in kindergarten through twelfth grade. The exam rates students, for each area tested, on a range from "extremely limited ability" through "native-like ability." Using the exam, teachers or evaluators can assess the listening and speaking skills of students in a dual language emersion program like FLAG at all proficiency levels.

7. Based upon the FLOSEM at the beginning of the kindergarten, Student was in the low to average range. He could comprehend the main points of a short dialogue or passage, but some repetition was necessary. He could effortlessly express himself, but occasionally faltered on more complex ideas or words. He was beginning to master some sounds and sound patterns, but had difficulty with making others understand what he meant. He could produce utterances which showed that he understood sentence and question patterns, although grammatical errors existed, which sometimes obscured the meaning of what he was communicating.

MAY 22, 2014 INITIAL INDEPENDENT EDUCATIONAL PROGRAM(IEP)

8. District conducted an initial assessment for special education eligibility during the spring of the 2013-2014 school year. All required District personnel attended. Mother participated in the meeting.

9. The IEP team discussed, reviewed, and documented Student's present levels of academic achievement and functional performance. The IEP team considered the assessments of the speech-language pathologist, the occupational therapist, the

District psychologist, and District physician. The IEP team also discussed the findings of Student's general education and special education teachers with respect to Student's academic testing.

10. Student could focus and follow simple directions when working individually. Although he was able to narrate what was happening in his environment and what he was thinking, he was often off-topic when speaking, and demonstrated weaknesses in the areas of expressive, receptive and pragmatics. Student had weaknesses in fine motor and visual motor skills, struggled with correct letter formation and word size, and had difficulties in following the teacher's directions. Student also had weaknesses in the areas of reading, writing and number sense.

11. The IEP team found Student eligible for special education services under a primary eligibility category of other health impairment based on symptoms of attention deficit hyperactivity disorder, and a secondary eligibility of speech and language impairment based on a communication disorder in the areas of expressive language, receptive language and pragmatics. The IEP also included various accommodations and strategies, including reduced and shortened assignments, adapted paper as needed, preferential seating, cues, prompts and the use of sensory strategies, extended time to complete assignments, only one task or direction at a time, repeated or rephrased instructions as necessary to ensure that he understood the instructions, and alternative responses for classroom tests. The IEP team offered continued placement in the FLAG program at Benjamin Franklin with 300 minutes per week of specialized academic instruction, 30 minutes per week of occupational therapy services, and 60 minutes per week of language and speech services. Mother consented and signed the initial IEP.

12. At the end of the 2013-2014 school year, Student's French comprehension had increased, and he could effortlessly express himself, but might occasionally falter on more complex ideas or words. His fluency in French remained the same, but his

vocabulary had improved, and he had an adequate working vocabulary, including beginning to understand synonyms and alternate ways of expressing ideas. Student's French pronunciation had improved, and he demonstrated control over a larger number of sounds and sound patterns, although some repetition was necessary to clearly express himself. In grammar, he remained in the low average range, and was able to produce utterances which showed that he understood sentence and question patterns, although grammatical errors continued to exist.

FIRST GRADE AND MAY 18, 2015 IEP

13. At the end of the first grade, Student' comprehension score had increased; he could comprehend almost everything at a normal rate of speech. In fluency, Student began the year able to effortlessly express himself, but he might occasionally falter on more complex ideas or words. By the end of the year, his score had increased; he was generally fluent with only occasional minor lapses. In vocabulary, he had an adequate working vocabulary, including beginning to understand synonyms and alternate ways of expressing ideas. By the end of the year, his score had increased and he could clearly demonstrate his knowledge of synonyms and alternate ways of expressing simple ideas. In pronunciation, his scores increased by two levels by the end of the year, meaning that his pronunciation and intonation approached a near native-like ability. In the area of grammar, his score increased one level; he was beginning to show an ability to use a few complex constructions, although not always successfully and grammatical errors were present which made meaning ambiguous.

14. District convened Student's annual IEP team meeting on May 18, 2015, at the end of first grade. All requisite IEP team members, including Mother, who actively participated, attended the meeting.

15. The IEP team discussed, reviewed, and documented Student's present levels of academic achievement and functional performance. The IEP team heard

reports from the speech-language pathologist, the occupational therapist, the District psychologist, and District physician. The team also discussed the findings of Student's general education and special education teachers with respect to Student's academic testing. His eligibility remained other health impaired with a secondary category of speech and language impaired.

16. Student's general education French teacher reported he had improved in the past semester as he could stay on-task and showed improvement in comprehension, speaking, and writing. His motivation in math had improved, as had his writing mechanics. While Student was able to speak phonetically in French, and had shown improvement in high frequency words and comprehension, he still needed further progress in those areas.

17. District's team members reported Student met six of his annual goals related to reading sight words, writing/spelling, math visual motor, communication/expressive language, and communication/expressive language. He partially met his goal relating to reading/decoding. He made progress on his goals relating to writing/cursive/print, communication/pragmatics-peer conversations, and pragmatics/staying on topic.

18. The IEP team updated Student's annual goals in the areas of reading, writing, math, behavior, reading comprehension, fine motor control and coordination, visual motor vestibular processing and visual perceptual skills, sensory processing, expressive language, and pragmatics. The team also developed a behavior intervention plan to address Student's inappropriate behaviors and social interactions with others. The behavior intervention plan included goals to "follow instructions with frequent reminders and redirection" and "pay attention in class for a limited time."

19. District offered placement in a general education classroom at Balboa Elementary, 300 minutes per week of specialized academic instruction for math and

English, 30 minutes per week of occupational therapy at school, and 60 minutes per week of clinic based occupational therapy at a service provider's location, and 60 minutes per week of language and speech in a small group setting. District team also offered extended school year and transportation to summer school, as well as transportation from school to the occupational therapy clinic. Mother did not consent to the IEP.

2015 PSYCHOEDUCATIONAL ASSESSMENT

20. Student's overall learning potential and visual motor integration skills fell within the average range. His academic skills were in the below-average range, and his fluency with academic tasks and his ability to apply academics skills were found to be in the low-average range. Student's language skills were determined to be in the below-average range. His broad achievement, which showed an overall measure of performance in reading, writing and math, were in the low range. His scores in broad reading, broad mathematics and broad written language, fell in the low range. Student exhibited mild to moderate symptoms of autism spectrum disorder.

OCTOBER 2, 2015 IEP TEAM MEETING

21. On October 2, 2015, the IEP team met to review Student's various assessment results, present levels of performance and progress on his goals, and to discuss Mother's concerns and make revisions to the IEP as necessary. The IEP team changed Student's eligibility to a primary category of autism, and a secondary category of other health impairment. The IEP team recorded his progress and updated his goals, and included a behavior intervention plan to assist with following instructions and paying attention. Mother expressed concerns at the meeting about Student's academic progress in writing, spacing, size and neatness; coordination with outside services; his behavior at school; and, his attention to tasks, social skills and interaction with his peers.

Mother reported that Student was disruptive at school and disrespected and failed to comply with adults outside the classroom. She requested that District assign Student an adult aide to monitor him during lunch, snack-time and during his after-school program. She also asked District to assign to Student a French-speaking one-to-one behavior aide to shadow Student during the entire school day including during the French immersion classes.

22. District offered placement at Balboa Elementary, 600 minutes per week of specialized academic instruction services in English and math, 30 minutes per week of occupational therapy services with 60 minutes per week of occupational therapy in the clinic setting, and 30 minutes per week of speech and language services and extended school year. The IEP team adjourned the meeting to allow Mother to review Student's assessment reports.

NOVEMBER 10, 2015 IEP TEAM MEETING

23. The team reconvened on November 10, 2015. Mother attended and participated. District team members established measurable goals in the areas of comprehension, semantics, pragmatics, language, reading, math, writing, behavior, English language development; math number sense; self-care; fine motor control and coordination; visual vestibular processing and visual perceptual skills; and, sensory processing.

24. The IEP team offered placement at Balboa Elementary, specialized academic instruction for math and English, and related services in occupational therapy, language and speech in a group setting, and clinic based occupational therapy. The IEP team also offered extended school year and related transportation, and transportation from school to the occupational therapy clinic. Mother again requested that District provide Student with a French-speaking behavior aide for the school day. District offered to conduct a functional behavior assessment, and a special circumstances

instructional assistance assessment. Mother consented to those assessments. The team did not complete the IEP at that meeting.

JANUARY 21, 2016 ASSESSMENTS

25. District completed a functional behavioral assessment and a special circumstances instructional assistance assessment during the winter of the 2015-2016 school year. The assessments were documented in a report dated January 21, 2016. Student's off-task behavior was a main concern. He played with objects, fidgeted, made noises and disengaged from work. He would ask for a drink or to go to the restroom to avoid tasks. He also walked around the classroom, talking to peers when not appropriate, poking, hitting and touching his peers during classroom instruction, and attempting to engage his peers in group discussions during instruction time. Student was on-task on average 53 percent of the time. However, during his pull-out specialized academic instruction time, which had fewer students, was a more structured and a more adult-supported environment, Student engaged in off-task behavior less frequently than he did in a larger classroom setting.

26. District assessors recommended Student required adult assistance throughout the entire school day, including at recess and lunch. He needed assistance to start and complete academic tasks as well as continual prompting to keep him focused and to maintain his attention during class.

JANUARY 25, 2016 IEP TEAM MEETING

27. On January 25, 2016, the IEP team reconvened to discuss the results of the functional behavior and SCIA assessments. The team reviewed Student's present level of performance and adjusted his goals and services, adding goals in the areas of speech, math and behavior. District team members determined that Student required behavior adult assistance throughout the school day to start and complete academic tasks, and to

focus and to maintain attention on tasks in class, and agreed to provide him with a full-time behavior aide with monthly supervision. Mother again requested that the aide be fluent in French.

28. District IEP team members continued to recommend placement at Balboa Elementary. The IEP team offered additional services including speech therapy consultation, behavior intervention services, and behavior intervention supervision. Mother requested some changes to the IEP, to which the IEP team agreed. The team agreed to reconvene in early April 2016 to review the behavior services.

29. District contracted with Behavior Learning Center, an outside agency, to provide one-to-one behavior aides to assist Student through the school day, beginning January 25, 2016. The Learning Center aides assigned to Student spoke only English, and did not speak or understand French.

30. Behavior aides in the dual immersion program provided assistance to Student by listening to the teacher, writing notes and engaging in the same activities in which the other students were participating, and making certain that Student was participating in the instruction. Student aides sat next to Student during class, and oversaw his behavior needs by making sure that he took a break when he was losing focus, by prompting him and redirecting his attention to keep him on-task, and addressing Student's various sensory needs.

31. The aides followed the French-speaking teacher's instructions by observing the conduct of other students. Some instructions were self-evident (for example, opening a text book to a certain page for a lesson). The aides' role, however, was not to provide any instructional support or direction, nor did Student look to the aide for academic instruction. Upon an instruction from the teacher, the aides would speak quietly to Student so as not to disrupt the other students.

MARCH 4, 2016 RECONVENED IEP TEAM MEETING

32. District team agreed to reconvene on March 4, 2016, because Mother expressed additional concerns about the January 2016 IEP amendment. Among other things, Mother was concerned about Student's behavior, and particularly the level of academic support provided by his behavior aides. District's team members again explained to Mother that the purpose of the aides was to assist with Student's behavior-related issues, not to provide or assist him with academic instruction. District agreed to change the level of Student's special academic instructional services, and discussed his writing and sensory issues, and considered options to deal with those issues.

33. District IEP team members reported that Student's behavior aides had successfully improved his on-task behavior, and his ability to access the curriculum. The IEP team agreed to increase behavior intervention supervision from 240 minutes monthly to 480 minutes monthly. Student's aides communicated his daily behaviors directly to the teacher, who provided the daily behavior sheet to Mother. Mother consented to the IEP Amendment.

STUDENT'S PROGRESS IN FRENCH LANGUAGE FLUENCY – SECOND GRADE FLOSEM RESULTS

34. At the beginning and end of Student's second grade school year, he could comprehend almost everything at a normal rate of speech, and was generally fluent with only occasional minor lapses. He was able to clearly demonstrate his knowledge of synonyms and alternate ways of expressing simple ideas, and while his speech was always intelligible, he demonstrated a definite accent with occasional inappropriate intonation. He was beginning to show an ability to use a few complex constructions, although not always successfully and grammatical errors were present which made meaning ambiguous. His second grade French teacher considered that he had made progress in every category, and also progressed academically.

SEPTEMBER 28, 2016 ANNUAL IEP MEETING

35. On September 28, 2016, the IEP team convened for Student's annual IEP. All requisite IEP team members, including Mother, attended and actively participated in the meeting. The team discussed, reviewed, and documented Student's present levels of academic achievement and functional performance. His eligibility continued to be in the primary category of autism and a secondary category of OHI.

36. The IEP team recorded his progress and updated his goals to include twenty-eight goals in reading English language development, writing, math, behavior, vocational, semantics, vocabulary and pragmatics. District team members reported that Student's off-task behaviors had decreased dramatically, and he had shown a steady growth in his ability to focus and follow directions with immediacy. District team members observed that he needed to continue working on completing behavior goals, and he continued to have a behavior intervention plan to assist with follow instructions and paying attention.

37. Student's dual immersion French teacher informed the team that Student had demonstrated strong participation in class, sharing and commenting when given the opportunity, and able to copy notes and follow along with the class. Student had recently made a very successful presentation to the class, and had shown significant progress in math. The teacher had recently started to have Student sit next to her during math class, and while she continued to be concerned about Student's off-task behaviors and frequent need for redirection, she nevertheless felt that having him next to her had been very successful.

38. Student's English instruction teacher advised the team that Student could follow along with the class during guided practice, including reading and writing. Student could complete activities in his work book, including answering short questions independently, with some verbal prompting.

39. His special education teacher reported Student met four of his five annual academic goals in reading, writing, math and English language development. Student was cooperative and motivated for most tasks, and receptive to praise and support. He was able to read 75 sight words, and 15 consonant blends with long and short vowel sounds. He was able to write grammatically correct sentences with the use of sentence starters. He could identify addition and subtraction key words in word problems and count, read and write numbers from 1 to 100.

40. District occupational therapists reported Student had met all of his goals. Student was able to write legibly, had improved his self-help and fine motor skills, and could button and zip his own pants.

41. District speech-language therapist reported that Student had met two of his four goals, and had demonstrated growth in participation and engagement in the classroom. He continued to struggle with turn-taking, but had improved in his responses to non-preferred topics. He still needed prompting to answer questions.

42. Student's off-task behaviors had decreased dramatically, and his ability to focus and follow directions had shown steady growth. He could listen appropriately and was much more easily redirected than previously. Student continued to be off-task an average of 3.4 times each day.

43. The District offered placement at Balboa elementary; 600 minutes per week of specialized academic instruction in English and math; 60 minutes per week of speech and language services; 60 minutes per month of speech and language consult; a one-to-one behavior aide; 480 minutes per month of behavior intervention supervision; 60 minutes per week of occupational therapy services, 60 minutes per month of occupational therapy push-in; 60 minutes per month of occupational therapy supervision; and extended school year.

44. Mother signed consent to the IEP on November 30, 2016, "for the purposes of implementation only" and only if Mother's concerns were attached to the IEP document. Mother's concerns continued to include failure to provide a French-speaking aide in the classroom.

PROGRESS REPORTS OF BEHAVIOR AIDE AGENCY

45. Following the assignment of behavior aides, the Learning Center began to observe Student in the classroom on a regular basis, typically at least once a month. The observation reports tracked progress in the area of off-task behaviors, beginning with a baseline of twenty off-task occurrences per day, based upon the most recent IEP present levels of performance before the aide was assigned.

46. Board certified behavior analyst Luiza Andakyan initially observed Student and prepared the progress reports through January 2017. Board certified behavior analyst Claudia Iniguez observed Student and prepared the progress reports beginning with the February 13, 2017 report.

47. Ms. Andakyan was a board certified behavior analyst. She had a Bachelor of Science degree in biology, a Master of Arts degree in teaching with a specialization in applied behavior analysis, and a Master of Science degree in applied behavior analysis.

48. Ms. Iniguez had a Bachelor of Science degree in psychology, and a Master of Science degree in clinical psychology. She was a board certified behavior analyst. She had been a program supervisor for two and one-half years and a behavior aide for one year at the Learning Center at the time of hearing. Prior to that, she was employed as a behavior technician/aide for eight years.

49. The operational definition of "off-task behavior" in the Learning Center's observations and reports initially was "playing with objects, fidgeting body for more than five seconds, attempting to or walking around the classroom, talking to peers during instructional time, touching or poking others with hands or feet, and/or asking to

go use a restroom or drink water when he did that less than 30 minutes ago.” That definition as it applied to Student changed in January 2017 to define off-task behavior as “playing with objects, fidgeting body for more than *30 seconds . . .*” The reason for the change in the definition was that as Student progressed and his off-task behaviors decreased, the five-second time interval became too short to be meaningful, and had to be lengthened. After the time interval was changed to 30 seconds in January 2017, Student continued to improve under that data collection criterion, with his off-task behavior decreasing from two off-task behaviors per day in January 2017 to one off-task behavior per day by May 2017.

50. The Learning Center’s reports reflected that from March 2016 through May 2017, Student’s off-task behaviors continued to decrease consistently (with occasional minor regressions following a spring break and a change in a behavior aide), and the frequency of Student’s replacement behaviors (behaviors which superseded and prevented the off-task behaviors) improved, and his listening response (completing one step directives given by teachers or adults without engaging in any problem behaviors) also improved. By April 2017, Student’s off-task behaviors had decreased to one incident per day.

STUDENT’S PROGRESS IN FRENCH LANGUAGE FLUENCY – THIRD GRADE FLOSEM RESULTS

51. At the beginning of Student’s third grade school year, he could comprehend almost everything at a normal rate of speech, and by the end of the year, he had progressed and could understand everything at a normal speed and like a native speaker. He was generally fluent with only occasional minor lapses, and able to clearly demonstrate his knowledge of synonyms and alternate ways of expressing simple ideas. Student’s pronunciation and intonation approached a near-native-like ability at the start of the year, and by the end of the year, his pronunciation and intonation were clearly

native-like. At the start of the school year, he was beginning to show an ability to use a few complex constructions, although not always successfully and grammatical errors were present which made meaning ambiguous, but by the end of the year showed an almost consistent command over a limited range of more complex patterns and rules of grammar.

STUDENT'S EXPERT WITNESS OBSERVATIONS AND OPINIONS

Elizabeth Schwandt – Board Certified Behavior Analyst

52. In May 2017, Student's expert, board certified behavior analyst Elizabeth Schwandt, observed Student in the classroom and his afterschool program. Ms. Schwandt had a Bachelor of Science degree from New York University in 1998 and a Master of Education degree from American Intercontinental University in 2006, with an emphasis in special education. She became certified as a board certified behavior analyst in 2007. Ms. Schwandt worked as a clinical director of other behavior agencies for more than 10 years, supervised in-school behavior support programs, and conducted approximately one hundred functional behavior assessments to assess the in-school behavior support needs for students. She conducted more than one hundred classroom observations to determine whether a behavior program designed for an individual student was appropriately implemented.

53. Ms. Schwandt observed Student on three separate occasions, twice in his French-speaking math class, and once in his afterschool program. During each observation, Ms. Schwandt observed Student engaging in multiple off-task behaviors. In total, she observed Student engage on approximately twenty-five off-task behaviors during her three observations. Ms. Schwandt spent a total of approximately 64 minutes observing Student.

54. Student's off-task behaviors included inappropriate conversing, walking around the classroom, tapping his papers on the desk, and growling. Student's behavior aide engaged in numerous prompts to stop the off-task behavior. During one of the classroom observations, Student and his peers were rehearsing for the end of school year play, and many of his off-task behaviors were observed in that non-instructional context.

55. During her career as a clinical supervisor, Ms. Schwandt placed bilingual aides in dual language immersion programs, and supervised in-home behavior programs where the parent spoke a language other than English. She required that bilingual aides be placed in such settings, because, in her experience, the aide's function was to support the child in quickly and appropriately responding to the teacher's instructions, to support the goal of making the child independent of the aide. Ms. Schwandt opined that anything that caused the child to respond directly to or become dependent on the aide hindered that goal.

56. In Ms. Schwandt's experience, in a classroom setting, an aide's responsibility is to assist the student in responding immediately to the teacher, by providing the student with appropriate prompts, that is, to provide assistance in helping a child respond to directions from the teacher, by immediately identifying what is being asked of a child and what the child must do to do to respond appropriately. Ms. Schwandt opined that when an aide is unable to understand the teacher's instruction, or the teacher is required to repeat the instruction in English to allow the aide to prompt the child, the link between the teacher's communication and the student's response is broken.

57. During her observations of Student, Ms. Schwandt observed repeated delays of 45 seconds to one minute between the teacher's instruction and communication of the instruction to Student, which she attributed to Student's aide's

inability to speak French. She concluded that the delays would have the effect of diminishing the teacher's ability to maintain instructional control over Student, and allowed Student to engage in off-task behavior until the teacher came and told the aide what her request had been.

Student's Experts regarding a French-Speaking Aide

58. Student's expert witnesses, Tara Fortune, Johanne Paradis, and Elizabeth Howard reviewed Student's January 21, 2016 functional behavioral analysis assessment report. None of those experts observed Student in the classroom.

59. Dr. Tara Fortune received her Bachelor of Science degree from the College of St. Benedict in classical languages. She earned her Master of Arts degree from the University of Minnesota in second languages and cultures education. Her master's thesis was titled "The Private Bilingual Schools of Mexico City: An Immersion-Model Approach to Second Language Acquisition." Dr. Fortune was awarded her doctorate in education curriculum and instruction from the University of Minnesota. She was the author of numerous publications and chapters relating to bilingual immersion programs, and trained District in best practices for dual language immersion programs.

60. Dr. Johanne Paradis earned both Bachelor of Arts and Master of Arts degrees in linguistics from the University of British Columbia, and a doctorate degree in psychology from McGill University. She also received a graduate diploma in education from McGill University. She held numerous teaching and academic positions since 1991 in linguistics and communication sciences, and authored or presented numerous articles regarding linguistics, and bilingual education and development for more than 10 years.

61. Dr. Elizabeth Howard received her Bachelor of Arts degree from the University of Maryland in Spanish language and literature. She earned a Master of Arts degree in educational psychology from the University of California at Berkeley, and holds a multiple subject teaching credential with bilingual certification. She received a

doctor of education degree from the Harvard Graduate School of Education in human development and psychology, with an emphasis in bilingualism and biliteracy. She held numerous teaching positions since 1987, including positions in bilingual education. She has co-authored two books regarding second language learners and two-way immersion programs, and has authored or co-authored numerous monographs in those same areas.

62. Each of those experts opined that in dual language immersion programs, all adults should speak only the immersion language. Separation of the languages was a long-established principle of dual-language immersion programs. Each expert opined that speaking to Student in English during his French language instruction would effectively diminish his opportunity to learn French. The optimum effect of the dual language immersion program would be achieved with an aide who spoke the target language. Each of the experts concluded, however, that more academic research is necessary with respect to the mechanics and process of dual immersion language programs.

CONCLUSIONS OF LAW

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA¹

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) et seq.²; Ed. Code, § 56000, et seq.; Cal.

¹ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis below.

² All references to the Code of Federal Regulations are to the 2006 version.

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

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an

interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Supreme Court’s recent decision in *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ___, [137 S.Ct. 988] (*Endrew F.*) reaffirmed and clarified *Rowley*, explaining that to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

4. 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, as the complaining party, bears the burden of proof.

FAPE REQUIREMENTS

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or 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, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

6. The methodology used to implement an IEP is left to the school district's discretion so long as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley, supra*, 458 U.S. at p. 208; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. at p. 208.)

RELATED SERVICES

7. The IDEA requires that special education and related services be provided by qualified personnel. (20 U.S.C. § 1412(a)(14)(A).) The IDEA defines the term "qualified personnel" as personnel who are appropriately and adequately prepared and trained, and who possess the content knowledge and skills to serve children with disabilities. (*Id.*; 34 C.F.R. § 300.156(a).) Paraprofessionals may assist in the provision of special education and related services if they are "appropriately trained and supervised, in accordance with State law, regulation, or written policy. ..." (20 U.S.C. § 1412(a)(14)(B)(iii).) A paraprofessional means an "educational aide, special education aide, special education assistant, teacher associate, teacher assistant, teacher aide, pupil service aide, library aide, child development aide, child development assistant, and physical education aide." (Ed. Code, § 44392, subd. (e).)

8. In California, related services are called "designated instruction and services." (Ed. Code, § 56363, sub. (a).) Designated instruction and services includes developmental, corrective and other supportive services as may be required to assist the

child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664].) Designated instruction and services shall be provided “when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program.” (Ed. Code, § 56363, subd. (a).)

ISSUE: DID DISTRICT’S REFUSAL TO PROVIDE FRENCH-SPEAKING BEHAVIOR AIDE RESULT IN DENIAL OF FAPE?

9. Student contends that District’s refusal to provide a bilingual behavior aide in his dual language immersion program substantively denied him educational opportunity, and impeded his ability to access his academic program and caused him to regress academically. Student contends that because most of Student’s general education curriculum was delivered in French, without a French-speaking aide, he was unable to access the curriculum as well as his peers, that District failed to perform any best practices research for his dual immersion program, and that District failed hire a bilingual aide even though one was available.

10. District contends the purpose of the behavior aide was to address behaviors, and a French-speaking aide was not essential to Student’s ability to access his education and receive educational benefit from his program.

Adequacy of Educational Benefits

11. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student’s failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his

abilities. (*Walczak v. Florida Union Free School Dist.* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *T.B. ex rel. Brenneise v. San Diego Unified School Dist.* (S.D. Cal, March 30, 2011, No. 08CV28–MMA (WMc)) 2011 WL 1212711, * 5; *Perusse v. Poway Unified School Dist.* (S.D. Cal. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

12. Student did not meet his burden of proving that, as part of his voluntary enrollment in a dual-immersion French language educational program, District denied him a FAPE by failing to offer him a bilingual French-speaking behavior aide. The evidence established that Student made consistent academic and behavioral progress in the voluntary FLAG program with his English-only speaking behavior aide and therefore District offered and provided him a FAPE.

13. Here, the evidence showed that Student did not require a bilingual behavior aide to derive a meaningful educational benefit from his academic program. He made adequate progress during the statutory period, and he consistently met many, if not most, of his established academic goals. Moreover, Student's FLOSEM evaluations at the end of each year consistently showed improvement in almost all categories of his acquisition of the French language. After a behavior aide was assigned to Student, his off-task behaviors improved markedly. Although he continued to require redirection and prompting at times, that redirection and prompting was adequately provided by his aides. The Learning Center observed him on a regular basis after the aides were assigned. Those observations showed that, while there was occasional regression, Student demonstrated an overall consistent improvement in his behaviors. While Student contends that a change in the manner of data collection in January 2017 (from 5 second intervals to 30 second intervals) undercut the Learning Center observations entirely, each of the Learning Center observers credibly opined that a change in intervals typically occurs when a student has progressed sufficiently to change the basis of the

data collection, and even after the interval was changed to 30 seconds in January 2017, Student continued to improve in the area of off-task behaviors.

14. Student offered no persuasive legal authority that requires a student eligible for special education and related services to perform at the same level as his peers. Simply, to meet its substantive obligation to Student under the IDEA, District was required to offer an IEP which was reasonably calculated to enable Student to make progress appropriate in light of his circumstances. (*Rowley, supra*, 458 U.S. at p. 200, 203-204; *Endrew F., supra*, 580 U.S. ____ [____ S.Ct. ____, ____ L.Ed.2d ____ (2017 WL 1066260.) The evidence established that Student was making appropriate progress under Student's circumstances, as discussed above. Student failed to prove that he had unique academic needs that could only be met through an IEP modification assigning a French-speaking behavior aide.

15. Student offered expert opinions at hearing in support of his argument that to achieve optimal results in a dual immersion language program it is always preferable, and constitutes the best practice, to provide a behavior aide proficient in the target language. Student argued that when an aide who is fluent in the target language is involved in the process, there are few, if any, delays in prompts, and the issue of triangulation of language (that is, switching back and forth between English and the target language), which slows the process of the bilingual education, does not arise. The student is able to connect directly with the teacher or other adult instructor without having to rely on a behavior aide, and thereby more easily achieves the level of independence which is the goal in such programs.

16. However, Ms. Schwandt observed Student for only a total of 64 minutes, spread over three separate observations, only two of which were in the classroom. Of the two classroom observations, one occurred when Student and his peers were practicing for the end of school-year play, and during that observation, for

approximately 11 minutes, Student and his peers were distracted and not engaged in academic instruction. Although Ms. Schwandt had extensive background, training and experience in bilingual education, her total time in observing student was insufficient to overcome the testimony of Student's teachers and the Learning Center's observers, who testified consistently that Student made adequate progress both in speaking French and in his academic instruction. Ms. Schwandt's limited observations and conclusions carried less weight, and were insufficient to carry the burden of persuasion on the issue.

17. Student's other experts each had credentials equally as impressive as Ms. Schwandt's. However, while each could testify as to the best practices to achieve optimal results in bilingual and dual immersion instruction, none of those experts observed Student personally, in the classroom or otherwise. The functional behavioral analysis assessment report each reviewed was conducted before Student was assigned English-speaking behavior aides, and before his progress with the aides began to appear. Each witness also acknowledged that more research was needed in the area of dual language immersion programs. None of those experts' opinions carried sufficient weight to meet Student's burden of persuasion.

18. District's dual language immersion program was entirely voluntary, was based on a lottery for available spots in the program, and Mother was required to, and did, sign a waiver each year acknowledging that Student was opting out of English-language only instruction. District FAPE offer was placement at Student's home school, Balboa Elementary, where instruction was conducted entirely in English. Student's continued attendance in the FLAG program was dependent on District's ability to provide necessary special education supports and services and on Student's continued progress, in that program. District offered special education services at FLAG, including a one-to-one behavior aide during the statutory period. Mother was present at and was an active participant in all of the IEP team meetings, and while District conditionally

acceded to Mother's wish to have Student enroll in the dual language program, she did not have the right to compel District to employ a particular methodology in providing education or services to Student in the program she agreed to. District made clear to Mother that if Student did not show progress, the District's next FAPE offer would be placement and related services in the English-only program at Balboa Elementary. District's IEP offers during the statutory period were appropriate and constituted a FAPE because Student accessed his educational program and made progress consistent with the standards in *Rowley, supra*, 458 U.S. at p. 200, 203-204 and *Endrew F., supra*, 580 U.S. ____ [__ S.Ct. __, __ L.Ed.2d __ (2017 WL 1066260.).

19. Finally, Student argued for the first time in his closing argument that District procedurally violated the IDEA by: predetermining its offer of behavior support, by limiting the offer to English-speaking aides; failing to conduct research on the appropriateness of aide support; and failing to note in Student's IEP his progress in French language. These new issues were not raised at the prehearing conference, or at hearing. Instead, Student argued in closing, in part, that based on testimony at hearing "it is undeniable" that District predetermined its offer. This Decision does not address procedural violations of the IDEA added in closing argument that were not alleged in the complaint or identified at the prehearing conference, that District was unaware of, had no opportunity to respond to in writing, no opportunity to object to during the prehearing conference or hearing, and did not agree to or litigate during hearing. (See 20 U.S.C. § 1415(c)(2)(E)(i).)

20. In summary, Student failed to prove District denied Student a FAPE by failing to offer or provide a French-speaking one-to-one behavior aide, and consequently, Student failed to meet his burden of proof on the only issue for hearing.

ORDER

All relief sought by Student is denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed as to the only issue that was heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATE: August 4, 2017

_____/s/_____

VERNON BOGY

Administrative Law Judge

Office of Administrative Hearings