

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

DUBLIN UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2016080413

DECISION

Dublin Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on August 8, 2016, naming Student. The matter was continued for good cause on August 26, 2016.

Administrative Law Judge B. Andrea Miles heard this matter in Dublin, California, on December 13, 14, and 15, 2016.

Melanie Larzul, Attorney at Law, represented Dublin Unified School District. Blaine Cowick, Ph.D., Senior Director of Special Education, attended the hearing on behalf of Dublin. Mother represented Student. Student did not attend the hearing.

At the parties' request, a continuance was granted to allow the parties to file written closing arguments, and the record remained open until January 23, 2017. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

On January 24, 2017, a status conference was held before Presiding Administrative Law Judge Margaret Broussard. Ms. Larzul appeared on behalf of Dublin

and Mother appeared on behalf of Student. The purpose of the status conference was to discuss the unavailability of the undersigned due to significant injury. Based on the parties' request, the due date for the decision was continued to February 15, 2017.

ISSUE

May Dublin transition Student from aide and behavior services provided by a nonpublic agency to aide and behavior services provided by Dublin as offered in the individualized education program that resulted from the IEP team meeting of January 25, 2016, continued on March 18, 2016, and May 5, 2016?¹

SUMMARY OF DECISION²

This Decision finds that in order to prove that its offer to transition Student from nonpublic agency provided aide and behavior services to Dublin provided aide and

¹This Decision refers to the IEP at issue as the January 25, 2016 IEP.

²On December 2, 2016, a telephonic prehearing conference with the parties was held. At the PHC, the undersigned discussed with the parties the complexity of the legal issues regarding Dublin's assertion that a portion of an IEP may be found to constitute a free appropriate public education and that OAH may order implementation of a portion of an IEP without parental consent. The parties were informed that they needed to be prepared to address this during hearing and in closing briefings. This same information was memorialized in the Order Following Prehearing Conference that was issued on December 8, 2016.

behavior services, as found in the January 25, 2016 IEP, constituted a free appropriate public education, Dublin was required to prove that the entire January 25, 2016 IEP offer constituted a FAPE. OAH does not have the authority to order that just that portion of the January 25, 2016 IEP be implemented without the consent of Parents.

This Decision finds that Dublin failed to meet its burden of proof that the January 25, 2016 IEP offered Student a FAPE in the least restrictive environment, and therefore denies Dublin's requested remedy.

FACTUAL FINDINGS

JURISDICTION

1. Student is a ten-year-old girl who attends third grade at Dublin's Amador Elementary School. She has lived with Parents within the geographical boundaries of Dublin Unified School District from 2013 until the time of hearing.

2. At the age of three, Student received a clinical diagnosis of autism. Student was found eligible for special education services in 2009, when she was three and a half years old, under the eligibility category of autism. Student also has significant speech and language delays.

EDUCATIONAL HISTORY

3. After Student was diagnosed with autism, the local regional center provided Student with in-home Applied Behavioral Analysis (ABA) therapy,³ and other

³ Applied Behavior Analysis is a particular form of therapy used with children who are diagnosed with autism spectrum disorder.

forms of therapy, such as speech therapy, and occupational therapy. As of the date of the hearing, Student continued to receive services from the local regional center. However, the record is unclear as to the exact services provided and the frequency and duration of those services.

4. When the family resided in Los Angeles, the Los Angeles Unified School District provided Student special education services through an IEP, which included a behavior support plan, an ABA trained behavioral aide, and behavioral services from the non-public agency First Steps for Kids. It also included physical therapy, occupational therapy, speech and language therapy, adaptive physical education services, and inclusion services provided by both Los Angeles and nonpublic agencies. With the support of her aide, Student was fully included in a kindergarten general education class beginning in February 2013.

5. At the beginning of the 2013-2014 school year, Student became a resident within the boundaries of Dublin Unified, after her family moved. Parents requested that Dublin provide Student with the same special education services as those provided by Los Angeles, including an ABA trained aide and behavior services through First Steps. Additionally, Parents requested that Dublin place Student in kindergarten instead of first grade because she had only completed four months of kindergarten in Los Angeles.

6. Dublin placed Student for the first 30 days in a first grade, general education classroom with the assistance of a full-time behavioral aide. On September 25, 2013, Dublin held a 30-day IEP team meeting at which the Dublin members of the IEP team recommended that Dublin assess Student to determine her needs. Dublin made Student an IEP offer, which included continued placement in a general education, first grade class with a full-time behavioral aide from First Steps, speech and language services, physical therapy services, occupational therapy services, and inclusion services to modify Student's curriculum.

7. In early January 2014, Parents consented to the September 25, 2013 IEP with exceptions. They continued to disagree with Student's placement in a first grade classroom and requested again that Student be placed in kindergarten. Parents disagreed with some of the offered services and felt that additional speech and language goals were needed. They also requested that Dublin provide Student with 10 hours of in-home ABA services per week from First Step.

Dublin's 2014 Psycho educational Assessment

8. In late January 2014, Gary Yabrove, Ph.D., a Dublin school psychologist, completed a psycho educational assessment of Student. Dr. Yabrove did not testify at the hearing, but his report was admitted into evidence.⁴ Dr. Yabrove found Student to have cognitive abilities in the first percentile for her chronological age. Although her academic skills, particularly reading decoding and word reading, were a relative strength for Student, Dr. Yabrove found that much of Student's academic curriculum required modification. The findings found in Dr. Yabrove's report regarding Student's academic strengths and needs were supported through the testimony of Kathryn De Martini, an inclusion specialist with Dublin.

9. Dr. Yabrove reported that Student's adaptive behavior skills were low in all areas. Adaptive behavior skills are akin to those skills that a person requires for daily living. The results of the Vineland Adaptive Behavior Scale, Second Edition, which were

⁴Dr. Yabrove's report was admitted as administrative hearsay under the provision of section 3082, subdivision (b), of title 5 of the California Code of Regulations, which provides that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

based on the information, provided by Mother, showed Student's adaptive behavior skills to be at the level of a three and a half year old child. At the time of the assessment, Student was seven years and 10 months old.

10. As part of his assessment, Dr. Yabrove observed Student in class. He reported that Student had "great difficulty with attention and task compliance, in both large group and [one to one settings]." He noted that Student was only able to stay on task for three to four minutes before requiring a break. During the hearing, Dr. Eric Burkholder, a behaviorist with Dublin, testified that Dr. Yabrove's observations of Student in the classroom were consistent with his observations of Student in the classroom, although Dr. Burkholder observed Student at a later date.

11. Dr. Yabrove's report indicated that he found that Student exhibited a number of behaviors secondary to her autism that significantly impacted her educational functioning. He indicated that there was evidence of global developmental delays and that, while he believed Student continued to meet the eligibility criteria for autism, he believed she also met the eligibility criteria for intellectual disability. Dr. Yabrove's findings regarding Student's cognitive deficits were based in part on his testing of Student and his interpretation of those testing results. Since Dr. Yabrove did not testify at the hearing and the accuracy of that testing and interpretation of the testing results were not supported by additional evidence, these findings in his report will not be relied upon for making a finding of Student's cognitive deficits or needs.

January 27, 2014 IEP

12. The IEP team developed an IEP document at a meeting that began on January 27, 2014, and continued on February 13, 2014, April 14, 2014, and May 8, 2014. During the meeting, several assessment reports were reviewed, including Dr. Yabrove's. The parties did not introduce the other assessment reports as evidence.

13. The IEP offered Student placement in Dublin Elementary School in a special day class for students with autism. The class was comprised of no more than 10 students with a teacher and up to five other adults. Mother observed the program and did not think that it met Student's needs, which she believed could be met in general education classes with one-on-one aide support and additional academic assistance.

14. Based in part on Dr. Yabrove's findings, the Dublin members of the IEP team found that Student met the eligibility criteria for intellectual disability. The IEP document stated that Student's primary category of eligibility was autism and her secondary eligibility category was intellectual disability. Parents disagreed with Dublin's finding that Student was eligible under intellectual disability.

15. On May 28, 2014, Parents provided their written consent to the IEP with exceptions. Parents disagreed with several provisions of the IEP, including the offer of placement in a special day class, because they believed that first grade, typical peers were the appropriate peer role models for Student.

June 19, 2014 Settlement Agreement

16. On June 19, 2014, Parents and Dublin reached a settlement agreement outside of the IEP process. The agreement provided Student with direct and individual occupational therapy and speech and language services during the 2014 extended school year. For the 2014-2015 school year, the agreement placed Student in a first grade, general education class at Dublin's Kolb Elementary School, with early release on Wednesday, Thursday, and Friday, and continued support from the First Steps aide throughout Student's school day. Dublin agreed to provide Student with 240 minutes weekly of inclusion services, including academic support and pull-out homework support. Dublin also agreed to fund 100 minutes per week of in-home academic assistance by First Steps.

17. Through the agreement, Student's IEP was changed so that the only eligibility category listed was autism. Per the written agreement, in exchange for the items outlined in the settlement agreement, including those detailed above, Parents waived any claims for injuries, damages, or losses related to Student's education, including special education, up to the first day of the 2015-2016 school year.

2014-2015 SCHOOL YEAR

18. At the beginning of the 2014-2015 school year, according to the settlement agreement, Student was placed in a first grade, general education class at Kolb Elementary School. Student received the support of a one-to-one, First Steps aide throughout her entire school day. In addition, Ms. De Martini was assigned to provide Student with inclusion services. It was Ms. De Martini's responsibility to work with Student's general education teacher to ensure that Student was accessing the curriculum by making recommendations and modifying Student's assignments. In addition, Ms. DeMartini provided Student with direct instructional services. Typically, Ms. DeMartini's role as an inclusion specialist did not include providing students with direct academic instruction outside of the classroom, but she provided this service to Student as part of the settlement agreement.

19. In the classroom, Student exhibited some maladaptive behaviors. To address these behaviors, the aides implemented behavior interventions. First Steps provided Student with two to three different behavioral aides, who took turns supporting Student. Only one aide worked with Student at a time, sitting with Student during class and prompting her to attend to the teacher. The aides used an erasable white board to write down a broken down version of the teacher's instructions. Student required constant prompting from the aides to remain attentive and to follow directions, but she did respond well to the prompts. In addition to providing Student with support,

the aides were required to collect data on Student's behavior and use of behavioral interventions.

20. Student continued to struggle academically throughout the school year, particularly with mathematics. When Student became frustrated with the difficulty of a task, she would engage in maladaptive behaviors, such as leaving her desk, falling to the ground, or ignoring the teacher and her aides. Student engaged in other maladaptive behaviors that did not relate to task avoidance, such as inappropriate touching of her peers or adults. Student engaged in those behaviors to gain attention.

21. Student's maladaptive behaviors at school impeded her ability to access her education. To address the behaviors, the behavior plan, which was designed by a behaviorist with First Steps, was implemented. Among other behavior interventions, the behavior plan instituted a token rewards system. This system allowed Student to work towards a reward upon displaying compliant behaviors. Student responded well to the token rewards system.

January 26, 2015 IEP Team Meeting

22. On January 26, 2015, Dublin held Student's annual IEP team meeting. The June 2014 settlement agreement was still in effect until the beginning the following school year. The IEP team elected not to discuss placement and services as those were addressed by the settlement, although the IEP indicated that it began January 26, 2015 and ended January 25, 2016.

23. The written IEP continued to offer Student placement in a special day class and the same services as the prior IEP. New goals and accommodations were proposed by the IEP. On February 12, 2015, Mother consented to the accommodations and goals offered by the IEP.

April 2015 Functional Behavioral Assessment and Behavior Support Plan

24. On February 27, 2015, Parents consented to allow Dublin to conduct a functional behavioral assessment of Student. The purpose of the assessment was to determine the function of Student's behaviors that interfered with her learning and the learning of the other students so that behavior strategies could be developed to address those behaviors. The assessment measured and assessed several different maladaptive behaviors of Student: touching others, throwing items, falling to the ground, non-compliance, and elopement. Dr. Burkholder testified at the hearing regarding his findings.

25. As part of his assessment, Dr. Burkholder reviewed Student's current behavior plan, which First Steps developed and implemented. First Steps based the behavior plan on the results of 2014 functional behavior assessment conducted by First Steps. The behavior plan addressed Student's behaviors of tan truming, aggression, non-compliance, and self-stimulatory behaviors. Dr. Burkholder found First Steps's prior behavior plan effective since the behaviors targeted by the plan were occurring at a low rate or were no longer occurring. Because of the effective nature of those prior interventions, Dr. Burkholder incorporated many of those intervention strategies into his proposed behavior support plan.

26. As part of his assessment, Dr. Burkholder observed Student and collected data on her behaviors during the school day on seven occasions. His observations occurred during class time, recess time, lunchtime, and pick-up time. Based on his observation and collected data, he hypothesized that the level of educational expectations and work difficulty may have been triggering some of Student's behaviors. At times during a difficult task, Student would become frustrated with her work and engaged in behaviors such as throwing her pencil down and leaving her desk. However, the behavior interventions utilized by the First Steps aide were effective in redirecting

Student and helping her function appropriately in the classroom despite her proclivity for engaging in maladaptive behaviors.

27. Based on his assessment, Dr. Burkholder found that Student's behavioral needs were "not intensive enough" to require a change from placement in general education and that her behavioral needs could be supported in a general education or special education setting. Dr. Burkholder recommended that the IEP team focus the behavior plan on functionally equivalent replacement skills of asking for a break, and asking for attention or interactions from others.

28. Dr. Burkholder's proposed behavior plan expanded or modified the strategies found in First Steps's behavior plan. Additionally, Dr. Burkholder recommended continuing the behavior goals from the January 26, 2015 IEP and did not recommend any additional goals.

April 27, 2015 IEP Team Meeting

29. The IEP team met again on April 27, 2015, to review Dr. Burkholder's Functional Behavioral Assessment and to discuss placement and services for the following school year. During the meeting, Dr. Burkholder reviewed his report and presented a proposed behavior support plan. He also expressed his opinion that Student's behaviors did not prevent her from continuing to be placed in general education classes with the support of a one-to-one aide.

30. At the time of the IEP team meeting, Student's maladaptive behaviors had been reduced, due to implementation of behavior interventions. Despite the reduction of her maladaptive behaviors, Ms. De Martini felt that Student was "not accessing the curriculum as well as she could have been." Her opinion was that the assistance of First Steps aides was a "major interference" to Student accessing the curriculum. While she believed that they were "very appropriately" trained behavioral aides, they were not trained in academic instruction. Her opinion was that the aides focused on increasing

compliance and reducing Student's maladaptive behaviors instead of supporting her access to the curriculum. Additionally, she disagreed with Dr. Burkholder's opinion that Student's behaviors did not warrant a change in placement. Ms. De Martini felt that Student's behaviors were "intensive" and a change in placement was warranted based on her behaviors.

31. Ms. De Martini recommended to the IEP team that Student be placed in a special day class. It was her opinion that Student was not making adequate progress on her academic goals in the general education environment. She believed that Student required the smaller class size and the intensive academic instruction of a special day class to access her education.

32. Ultimately, the amended IEP offered Student placement in a moderate to severe special day class at Amador Elementary School for the following school year. The IEP did not offer Student one-to-one aide support for the following school year, on the theory that the staffing in the special day class was sufficient to meet Student's behavioral needs. The offered special day class was staffed with one adult for every two students in the class. Parents declined the IEP offer.

July 21, 2015 Prior Written Notice

33. Parents requested that Dublin place Student in a general education class and continue to provide her with the support of a full-time aide and behavioral services from First Steps. Parents also requested that Dublin increase the amount of inclusion and home-based ABA services.

34. Dublin responded to Parents' requests in a letter dated July 21, 2015, written by Dr. Blaine Cowick, Senior Director of Special Education. Dublin denied Parents' request and indicated that if the parties were not able to reach a compromise that it was going to file a due process complaint with OAH. Dublin cited as its reason for denying Parents' requests as Student's failure to access the general education

curriculum despite the provision of “intensive” one to one intervention. The letter indicated that Student was disrupting other student’s learning “by slowing down the instruction given to other students.”

35. However, the letter to Parents indicated that Dublin would be continuing to provide Student with all the services outlined in the June 2014 settlement agreement. Dr. Cowick stated that Dublin was “extremely concerned” that Student was not receiving a FAPE designed to meet her individual needs.

2015-2016 SCHOOL YEAR

36. For the 2015-2016 school year, Student was in a second grade, general education class at Amador Elementary School. Student continued to receive support from a First Steps one-to-one aide throughout her entire school day and behavioral services from First Steps.

Student’s Needs

37. The parties agree that Student has autism and has needs in various general areas, including, speech and language, small and large motor skills, academics, and behavior. The parties produced little evidence establishing Student’s actual speech and language needs, small motor skills, and large motor skill needs. Instead, at hearing the parties focused on Student’s behavior and academic needs. The parties strongly disagree about the level of Student’s cognitive abilities and about how to address her cognitive needs.

38. Dublin contends that Student’s cognitive delays place her in the first percentile of peers her age, and that she qualifies for special education services under the category of intellectual disability. To support its position, Dublin provided a copy of the psychological assessment conducted by Dr. Yabrove, however, it chose not to have Dr. Yabrove or any other expert testify to support these findings.

39. Mother contends that Student's cognitive levels are higher than Dr. Yabrove's findings indicate and that Student is not intellectually disabled. To support her position, Mother introduced into evidence a psycho educational assessment conducted by Dr. Carina Grandison, a developmental neuropsychologist. Dr. Grandison's report was admitted into evidence as administrative hearsay. Mother did not call Dr. Grandison as a witness or any other expert to explain and support Dr. Grandison's findings. Per Dr. Grandison's report, her opinion that Student was not intellectually disabled based on the testing she conducted.

40. The determination of the degree of Student's intellectual deficits is important to determining her needs, as it affects her ability to complete academic work in the general education classroom, even with modifications. Ms. De Martini provided anecdotal evidence of Student's cognitive levels. To some extent, this anecdotal evidence supported Dr. Yabrove's findings, but as referenced above it did not support the accuracy or interpretation of his testing. The findings of cognitive levels in Dr. Grandison's report directly contract Dr. Yabrove's findings in his report. Mother's testimony provided support to Dr. Grandison's findings in this area, much as Ms. De Martini's testimony supported Dr. Yabrove's testimony. This lack of certainty about Student's cognitive deficits creates an evidentiary issue, which cannot be resolved due to the lack of evidence presented.

41. The evidence presented by the parties present a different picture of Student's cognitive abilities and her ability to access the curriculum in the general education class. Dublin has taken the position that Student requires a special day class due to cognitive delays and difficulty accessing the curriculum, while Student has taken the position that Dublin is underestimating Student's cognitive abilities and that with additional academic support, Student can access her education in a general education

setting. Without knowing Student's accurate cognitive level, it is impossible to determine that the current placement is appropriate.

BEHAVIORAL NEEDS

42. During the fall of 2015, Student's maladaptive behaviors escalated. However, by January 2016, her maladaptive behaviors had decreased and Student was no longer falling to the floor. The First Step aides tracked student's maladaptive behaviors and response to interventions on a daily basis.

43. The First Steps behavior aide's primary focus was on supporting Student's behaviors, not on providing academic support. However, in the classroom the aide was being required to assist Student with her academic work throughout the school day. The increasing difficulty of the academic work required of Student increased her maladaptive behaviors.

January 25, 2016 IEP Team Meeting

44. On January 25, 2016, Dublin held Student's annual IEP team meeting. The IEP team included: Mother; Katie Stevenson, a special education program specialist with Dublin; Ms. De Martini; Natalie Corona, a school psychologist with Dublin; Holly Scroggins, school principal; Gina Wilburn, occupational therapist; Michelle Lenihan, speech and language therapist; Haris Demidzic, an adaptive physical education instructor; Heather Emmons, a general education teacher with Dublin; Elizabeth O'Brien, a resource program specialist teacher and case manager with Dublin; Tiffany Herron-Lumpkin, advocate for Student; and Katie Buchanan and Elizabeth Monday, case managers with First Steps. The IEP team intended on completing the IEP process in two sessions at Parents' request. Dublin scheduled the first session to review Student's progress on the goals from the prior IEP and document Parents' concerns. All required parties were at the IEP team meeting on this date.

45. At the hearing, the parties did not provide witness testimony to support Student's progress on her goals or her present levels of performance in the areas of occupational therapy, adaptive physical education, and speech and language therapy that were noted in the written IEP.

March 18, 2016 Continuation Meeting

46. A continuation meeting was held on March 18, 2016 to further address Student's IEP. Mother objected to the meeting being held because the two independent experts that she had retained, Dr. Paula Gardner and Dr. Karina Grandison had not completed their assessments. The IEP team consisted of Parents; Ms. Lenihan; Ms. Wilburn; Ms. Emmons; Mr. Demidzic; Dr. Burkholder; Ms. Corona; Ms. O'Brien; Ms. De Martini; Ms. Stevenson; and Jennifer, Chiarelli, Dublin's assistant director of special education. No representative from First Steps attended.

47. A representative from First Steps did not participate in the IEP team meeting. Dublin's intention was to hold a third IEP team meeting to complete Student's IEP, where a representative from First Steps would be present. However, during the IEP team meeting, Ms. De Martini read aloud the proposed goals from First Steps and indicated that any concerns regarding the goals would need to be addressed at the IEP team meeting when First Steps would be present.

48. The goals, other than those proposed by First Steps, were presented by the Dublin IEP team members, and discussed by the IEP team. Parents objected to discussing services and placement during the meeting. Despite the objection, Dublin presented the offer of service and placement. Parents disagreed with the offer of placing Student in a special day class and the offer to provide Student with district provided behavior services and aide support. Parents explained to the IEP team that they believe that the offer of services and placement was not in accord with the recommendations of

the outside experts. The proposed accommodations and modifications were only discussed later during the May 5, 2016 meeting.

49. Prior to the end of the meeting, the general education teacher, Ms. Emmons, was excused from the meeting. According to the written IEP notes, the meeting began at 10:10 a.m. and she was excused at 11:30 a.m. No evidence was presented to indicate that the attendance of Ms. Emmons was not necessary because her area of curriculum or related services was not being modified or discussed during the remainder of the meeting or that the Parents and Dublin had agreed in writing that she could be excused. Dublin did not meet its burden to show that all required team members were at the IEP team meeting when placement and services were discussed.

50. The IEP team meeting was concluded with the understanding that a third IEP team meeting would be held, so that First Steps could be present. Parents did not consent to any portion of the proposed IEP during the meeting.

Dr. Paula Gardner's Assessment

51. Paula M. Gardner, PhD., a well-respected expert in the area of inclusion of special education students in general education programs, conducted an assessment of Student in March and April 2016. Student did not call Dr. Gardner to testify at the hearing, but her report was admitted into evidence as administrative hearsay. Dr. Gardner presented her report and her recommendations at the May 5, 2016 IEP team meeting.

52. The purpose of the assessment was to address whether Student should continue to be placed in a general education classroom with supplementary services and supports, and to determine whether Dublin's offer of placement in a moderate-severed special day class with mainstreaming opportunities was the least restrictive environment in which Student would receive an educational benefit. In order to conduct her assessment, Dr. Gardner observed Student at school and at home, conducted

interviews, and reviewed Student's educational records, including education reports, assessments, IEPs, and other pertinent information.

53. In her 31-page report, Dr. Gardner indicated that there was no evidence that Student displayed academic or behavioral challenges that required an "undue consumption of the teacher's time and/or ability to teach or her typically developing peers' ability to learn." She provided numerous recommendations on the supports and services, Dublin should offer Student so that she could receive an educational benefit in a general education class. She recommended that Student receive more specialized instruction from Amador Elementary's resource specialist program special education teacher. She also recommended that Dublin allot enough time per month for its inclusion specialist to provide Student's "teachers and other personnel with consultation, coaching, classroom support, and information for effective instructional and behavioral strategies." Part of the inclusion specialist's role would be to support the general education teacher by modifying curriculum to accommodate instructional strategies, as well as providing suggestions for the general education teacher.

54. In her report, Dr. Gardner recommended that Student continue to have the support of an ABA trained, one-to-one aide. Her report did not take a position on whether Dublin would be able to provide those services through its own personnel or whether Dublin needed to continue employing the services of First Steps. She did specify in her report that the aide should provide Student with academic support in addition to providing behavioral regulation and facilitating social interactions.

55. Dr. Gardner's report clearly indicated that she did not believe that the offered special day class was appropriate for Student. She observed the special day class as part of her assessment. She noted that the special day class would be comprised of students with significant cognitive, language, physical, and behavioral challenges.

56. Dr. Garner's opinion that Student's maladaptive behaviors did not impede her ability to function in a general education class supplemented and explained Dr. Burkholder's testimony. Dr. Burkholder believed that although Student's behaviors impeded her ability and the ability of other students to learn, that with the support of a one-to-one aide and the implementation of Student's behavior plan, Student could continue to be placed in a general education class.

May 5, 2016 Continuation Meeting

57. On May 5, 2016, Dublin held the third portion of Student's continued annual IEP team meeting. Dr. Gardner attended the meeting, but Dr. Grandison did not attend.⁵ Attached to the IEP document is a copy of the signatures of those who attended the meeting. Mother, Ms. De Martini, Mr. Burkholder, Ms. Buchanan, and Mrs. Emmons attended the IEP team meeting. The document does not clearly identify the other members who attended, and no witness further identified them.

58. During the IEP team meeting, First Steps presented information regarding Student's present levels and proposed behavior goals. The IEP team discussed the proposed goals. Based on comments by Dr. Burkholder and Dr. Gardner, the team decided to modify at least one of the goals.

59. Dr. Gardner presented her findings and recommendations to the team. Despite her recommendation that Student remain in the general education setting with a one-to-one aide, and the additional of the instructional support of Amador Elementary's resource specialist program teacher, and other proper supports, the Dublin members of the IEP team elect not to change the offer of placement and services that was offered at the March 2016 IEP team meeting.

⁵ The IEP team was provided with copies of Dr. Gardner's and Dr. Grandison's reports prior to the IEP team meeting.

IEP Offer

60. The January 26, 2016 IEP offer that emerged from the series of meetings described above addressed the remainder of the 2015-2016 school year, the 2016 extended school year, and the first half of the 2016-2017 school year. Student's next annual IEP team meeting was scheduled for January 2017, at which time Dublin would make a new IEP offer that would cover the remainder of the 2017 school year.

NEEDS, PRESENT LEVELS OF PERFORMANCE AND GOALS

61. The IEP addressed Student's present levels of performance in the areas of academics, communication, gross and fine motor skills, social-emotional skills, behavior, vocational skills, adaptive living skills, and health. However, Dublin and Student presented very little evidence, beyond the written IEP to support the accuracy of the IEP's present levels of performance in the areas of communication and gross and fine motor skills.

62. Some of the IEP's statements of present levels of performance were supported by sufficient evidence at hearing, and some were not. In the area of academics, the IEP accurately reflected Student's strengths and weaknesses in the area of reading, spelling, and math. Academically, Student experienced the most difficulty with math. Ms. De Martini's testimony sufficiently supported the accuracy of this information.

63. The written IEP indicated that Student presented with mild articulation delays that were distorted slightly due to inaccurate tongue placement. Her fast rate of speech and her tendency to run words together negatively impacted her intelligibility. The IEP indicated that Student could produce a complete sentence when prompted; her spontaneous utterance length was generally short. Both Ms. De Martini's and Mother's testimony sufficiently supported the accuracy of the IEP's statement of Student's deficits in this area.

64. The IEP further explained that Student had difficulty with social communication and that she required prompting and a model to engage in social language routines. During the hearing, there was some testimony supporting Student's difficulty with social communication and engaging appropriately with adults and peers. However, that testimony provided more anecdotal information, whereas, the baselines of the communication goals provided data, such as the percentage of the times that Student gained the attention of peers appropriately, without any supporting testimony or an explanation on the data collection process. Without that information, it not possible to determine the accuracy of the levels listed in the communication baselines.

65. In the areas of fine motor skills and gross motor skills, the written IEP provided very little information regarding Student's present levels of performance in the section where present levels of performance were listed. However, the baselines of the fine and gross motor skills goals provided some additional information regarding Student's present levels of performance, as did the notes pages. The written IEP indicates that Student has difficulty with her placement of her letters on the lines of the paper, difficulty moving paper while cutting, spacing between words when writing sentences, and the ability to write capitals for several letters. The accuracy of the present levels of performance for fine motor skills was not sufficiently established through witness testimony or another form of supporting evidence.

66. The baselines of the two goals in the areas of gross motor skills indicate that Student has difficulty with object control. The baseline of one goal indicates that Student fails to step forward when she throws a tennis ball and the other indicates that she is unable to control the ball passed to her by a partner. Dublin presented no evidence to support the accuracy of the present levels of performance in the area of gross motor skills. Previously, Student received adaptive physical education to address her gross motor needs.

67. The written IEP indicated that Student had difficulty attending to task without consistent prompting and that she lacked the ability to complete work independently. The testimony of Ms. De Martini, Dr. Burkholder, and Ms. Buchanan sufficiently supported these assertions.

68. The written IEP offered Student 28 goals in the areas of gross motor skills, fine motor skills, social skills, behavior, reading, written expression, mathematics, speech and language, and "other needs." The "other needs" included Student's need to learn to keep her head up and look towards the direction in which she is walking.

69. Most of the goals were designed to be completed by January 2017, but six of them were designed for completion by March 18, 2017. During the hearing, witness testimony was presented only on the academic goals and the behavior goal. The testimony from Ms. De Martini regarding the academic goals did not focus on whether the goals were appropriate for Student or whether they could reasonably be completed by the end of the time period, but instead on her progress as of November 2016 and whether the First Steps aides had properly supported those goals.

70. The IEP offered Student six speech and language goals. The goals addressed everything from Student's articulation deficits to her ability to voice her opinion in a grammatically correct sentence. Dublin did not present any evidence on the appropriateness or measurability of the speech and language goals.

71. The IEP offered Student three social skills goals that targeted areas of need for Student. Student's needs in those areas were addressed through the testimony of Ms. De Martini and Dr. Burkholder. Student had made progress on her prior social skills goals during the school year. However, Dublin did not present evidence supporting that the goals were measurable and that they appropriately addressed Student's needs.

ACCOMMODATIONS AND MODIFICATIONS

72. The written IEP contained a series of accommodations and modifications that offered everything from assistive technology to modification of Student's assignments. However, there was no specific testimony or evidence supporting the appropriateness of the offered accommodations and modifications.

SERVICES AND PLACEMENT

73. The IEP's meeting notes state that the team offered Student placement in a moderate to severe special day class at Amador Elementary with a portion of her school day in general education. During the remainder of her second grade year, the IEP offered Student 1,085 minutes per week in the moderate to severe special day class. However, the service page indicated that the IEP offered Student 1,185 minutes weekly in the moderate to severe special day class for the remainder of Student's second grade year. The lack of clarity of the placement offer increased through the IEP's description of time Student would spend in general education. The notes indicated that the remaining 465 minutes of the school week would be in a general education setting. However, it also stated that Student would be placed in general education for 90 minutes of physical education per week, 45 minutes of music per week, 30 minutes of library time per week, 45 minutes of grammar per week, 30 minutes of spelling per week, 45 minutes of science/art per week in a general education setting. Although the IEP indicates that this amount of time in general education equals 465 minutes, in actuality the time totals 285 minutes. The IEP does not contain any explanation regarding the remaining 180 minutes of general education time and none was provided at the hearing.

74. The written IEP specified that during the following school year (third grade) the offered minutes in the moderate to severe special day class would increase to 1,390 minutes per week and that the offered minutes in general education would total

255 minutes per week, with 90 of those minutes in physical education, 45 minutes in music, 30 minutes in library time, and 90 minutes in science.

75. The IEP offered Student 1,800 minutes weekly of "Intensive Individual Services." It stated that Dublin would provide Student with a "district individualized aide to support transition to new program and mainstreaming opportunities." The notes specified that the IEP offered district provided aide support throughout the entire school day, including during pull-out service sessions. The notes of the IEP and the testimony of Ms. De Martini, established that the aide would accompany Student during all pull-out services⁶ offered by the IEP.

76. Although Student experienced some difficulties academically and socially in her general education placement, the evidence showed that Student made progress during the 2015-2016 school year on her goals. Student's difficulty with academics required modification of assignments and the assistance of the aides to complete her academic work.

77. Placement in general education allowed Student to improve her social skills and make progress on her social skills goals. Student was well received by her peers in class, who repeatedly initiated social interactions with her. Student still required the assistance and support of her aide to engage properly in social interactions with her peers, but she was making progress in that area.

⁶A pull-out service is one that is provided to a student outside of the classroom in a separate location.

78. To support its offer of placement in a special day class, Dublin relied on Dr. Yarbrove's psycho educational assessment and Ms. De Martini's testimony. Ms De Martini provided Student academic support by providing her with direct instruction, modifying her assignments, and providing Student with modified homework. Ms. De Martini felt that Student required placement in a special day class to address her academic needs. She was concerned that the First Step aides were not providing Student the academic support she needed, because their focus was on Student's behavioral compliance. She was concerned that Student was too prompt dependent and that an effort was not being made to reduce prompt dependency. Dublin did not present Student's general education teacher as a witness or any grade reports to support Ms. De Martini's opinion that Student was not accessing the curriculum.

79. The notes of the written IEP indicated that it offered Student one 30-minute individual, pull-out session of speech and language services, one 30-minute group, pull-out session of speech and language services, one 30-minute push-in session,⁷ and 40 minutes of monthly consultation. The notes did not specify whether the aforementioned 30-minute sessions were to be provided per week or per month; and did not specify whether the offer of services covered the remainder of the current school year, the following school year, or both. This offer was insufficiently clear.

80. Further in the lack of clarity, the services page of the IEP listed different speech and language services for Student. Beginning March 18, 2016, and ending March 18, 2017, the services page stated that the IEP offered Student, one 30-minute individualized speech and language pull-out session, one 30-minute small group pull-

⁷ Push-in services are provided during class time in the classroom where the child is placed.

out session with no more than one other student, and one 30-minute push-in session. Although, the service page included an offer of 40 minutes of collaboration and consultative services per month, those services were only offered through the date of the IEP team meeting. Due to these discrepancies, the offer of speech services was not sufficiently clear. Furthermore, Dublin did not meet its burden to show that either the offer on the notes page or the offer on the services page was appropriate for Student.

81. The IEP offered Student two 30-minute sessions weekly of individualized occupational therapy services in a "Regular class/public day school" and 30 minutes monthly of collaboration and consultation services, beginning January 26, 2016, and ending January 25, 2017. This designation of services implies that the direct occupational therapy services would be provided during Student's time in general education. Due to the nature of individualized services, this designation would further reduce the amount of time Student would participate in general education by 60 minutes per week. Dublin did not meet its burden to show that the offered occupational therapy services were appropriate for Student.

82. The IEP offered Student 30 minutes monthly of collaboration and consultation services from the inclusion specialist to work with the general education staff and special day class teacher regarding "mainstreaming times" beginning January 26, 2016 and ending January 25, 2017. The IEP did not allot any time for the inclusion specialist to work with and train the offered district aide, despite the fact that Ms. De Martini repeatedly testified that one of the benefits of transitioning to a district provided aide was that she would have the opportunity to train and oversee the aide regarding supporting Student's academic instruction. Additionally, the IEP did not provide time for the inclusion specialist to collaborate with the district's board certified behavior analyst, who was responsible for training the aides in behavioral interventions and data

collection. The evidence established that the offer of inclusion specialist services was not appropriate for Student.

TRANSITION PLAN

83. The IEP provided a transition plan to transition Student from the support of the First Steps aide to the support a Dublin provided aide. The behavior intervention services offered in the IEP were explained in the service portion of the IEP and in the transition plan. Dr. Burkholder testified about the details and purpose of the proposed plan.

84. Dr. Burkholder proposed a plan to transition from nonpublic agency aide support to district provided aide support over a four-week period. The plan allowed for consultation time by First Steps's behaviorists to work with Dublin's behaviorist and aide. The evidence supports the conclusion that the proposed transition plan could be utilized whether Student was placed in general education or in a special day class.

85. For the first three months, the transition plan offered 20 hours of behavior services, approximately seven hours per month, to help Student "settle in" and allow for staff training, oversight, program start-up, and collaboration. At the end of those three months, the transition plan offered Student four hours of behavior services per month for oversight and consultation with the district aide. The offer of four hours of behavior services assumed that Student was placed in a special day class, with a portion of the school time in general education settings. However, Dr. Burkholder testified that those four hours would need to be increased to eight hours if Student remained in a general education setting. The fact that the amount of needed behavioral services is dependent on the educational placement is evidence that the placement and services are intertwined and the must be analyzed as a whole. At the time of the hearing, Student was receiving eight hours of behavior services, because she was placed in a general education classroom.

BEHAVIOR INTERVENTION PLAN

86. The IEP included a behavior intervention plan that was created by First Steps. Prior to the May 2016 IEP team meeting, Dr. Burkholder provided input on the plan to Ms. Buchanan, which she incorporated into the behavior plan prior to its presentation to the IEP team meeting. The plan identified Student's problem behaviors; the function of the problem behaviors; strategies to prevent or reduce the behaviors; and interventions to use when the behaviors occur. The evidence supports the finding that the behavior plan appropriately addressed Student's behavioral needs and offered effective interventions.

EXTENDED SCHOOL YEAR

87. The IEP offered Student extended school year services beginning June 24, 2016, and ending July 22, 2016. During the extended school year the IEP offered Student 30 minutes weekly of individualized, pull-out occupational therapy services; 45 minutes weekly of pull-out, speech and language services with more than one additional student; and 1050 minutes of specialized academic instruction in a moderate to severe special day class. The IEP did not offer Student one-to-one support. Dublin did not establish that the offered extended school year services appropriately met Student's needs.

COMPARISON OF FIRST STEPS FOR KIDS AIDES AND DUBLIN AIDES

88. The evidence shows that Student needed the support of an aide trained in ABA to assist her at school. Dr. Burkholder, Ms. De Martini, and Mother all testified in support of that finding. Dr. Burkholder's credible testimony that he could train a district aide to support Student's behavioral needs appropriately on a level at least comparable to those aides provided by First Steps was convincing due to extensive experience training behavioral aides.

89. One of Ms. De Martini's criticisms of the performance of the First Steps aides was that they were not skilled in assisting Student with academic instruction. She indicated that she would have more access and ability to train a district aide in how to support Student with academic instruction than she would have with a First Steps aide. Nevertheless, the IEP only offered Student 30 minutes a month of inclusion specialist services to work with the general education staff and special day class teacher; training the aide was not mentioned. The evidence was clear that Student required aide support to provide her with academic assistance, but the IEP failed to provide any training for the aides to support Student academically. Additionally, the transition plan proposed by Dublin only specified training of the aide by Dr. Burkholder and the First Step behaviorist to focus on behavioral interventions and not on academic support.

90. Even though this issue was never addressed by Dublin, Ms. De Martini expressed her opinion that Student would require less academic assistance from an aide if she was placed in the offered special day class, because the special day class would provide her with more academic support from the greater number of adults. Nonetheless, the discrepancy between the established need for properly trained academic aide support combined with the lack of offered inclusion services designated for training and consultative services of the offered district aide proportion is evidence that the offer of services was not appropriate.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁸

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), 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)⁹et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.)The main purposes of the IDEA are:(1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment, higher education, 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 that special education and related services 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; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school

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

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

personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6)& (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.)

BURDEN OF PROOF

5. Dublin filed the complaint in this case and bears 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 due process hearings is preponderance of the evidence].) Dublin seeks a narrow order that it be permitted to transition Student from nonpublic service agency provided behavior aide and services to district provided behavior aide and services. As the proposed remedy, Dublin requests OAH allow it to make the aforementioned transition without Parents' consent.

6. Dublin argues that to be entitled to its requested remedy, it need only prove that the behavioral services and aide support offered by the January 26, 2017 IEP meet the legal standards of *Rowley*. Student contends that one portion of an IEP cannot constitute a FAPE, and so OAH may not order the requested remedy without parental consent.

7. In essence, Dublin argues in its closing brief that because parents may file for due process to challenge a single component of an IEP, so too may school districts seek due process to validate a single portion of an IEP. Dublin cites California Education Code sections 56501 and 56346(f) in support of this proposition. Although this portion of Dublin's argument is correct in part, it fails to recognize the difference between asserting that a single component of an IEP denies a student a FAPE and asserting that a single component of an IEP offers a student a FAPE. Parents may challenge a single

element of their child's IEP, such as an offered service, because that parent is essentially asserting the student is being denied a complete FAPE due to a fatal defect in one of its elements. However, proof that one element of a program is appropriate does not prove that the entire program is an offer of FAPE.

8. If a parent will not consent to a proposed IEP component that the school district determines is necessary to provide a FAPE, the school district must initiate a due process hearing. (Ed. Code, § 56346, subd. (f).) Under that provision, the school district must file expeditiously once an impasse with the parent is reached, and cannot opt to hold additional IEP team meetings or continue the IEP process in lieu of initiating a due process hearing. (*I.R. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1170 (*I.R.*).) Notably, Education Code section 56346, subdivision (f) does not then authorize a hearing officer to approve that one component. Instead, it provides, "a due process hearing shall be initiated in accordance with Section 1415(f) of Title 20 of the United States Code." That section, in turn, provides that "a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." (20 U.S.C. § 1415(f)(3)(E)(i).)

9. Education Code section 563456, subd. (f) and *I.R.* do not address the evidence that is necessary to prove that the contested component of the IEP is necessary to provide a student a FAPE. Furthermore, in this case, Dublin has not asserted that requested transition of behavior services and aide are "necessary" for Student to receive a FAPE, and if she continued to receive nonpublic agency provided behavior services and aide that she would not be receiving a FAPE. Instead, Dublin has argued, that it can provide the services at least as effectively as those being provided by First Steps and that it should be allowed to determine the methodology of the services offered by the IEP.

10. California Education Code section 56501 allows a school district to file a complaint when “[t]here is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child,” and when “[t]here is a disagreement between a parent or guardian and a local educational agency regarding the availability of a program appropriate for the child . . .” (Ed. Code, § 56501, subds. (a)(1), (4).) California Code of Regulations, title 5, section 3042, subd. (a), describes a child’s educational placement as including “. . . that unique *combination* of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP . . .” (Italics added.) These provisions authorize OAH to determine the validity of entire educational programs. Neither state nor federal law provides for determining the validity of individual portions of an educational program at a due process hearing.

11. A FAPE is not modular; it is a unitary whole. Courts routinely determine whether a district provides a FAPE by looking at the IEP as a whole. Under *Rowley*, an IEP provides a FAPE if it offers a child access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204.) It is the “individualized education program,” not some portion of it, which must be reasonably calculated to confer benefit. (*Ibid.*) Educational benefit includes the student’s mental health needs, social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

12. The IEP has been described by the Supreme Court as the “modus operandi” of the IDEA; and “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” (*School Comm. of Town of Burlington, Mass. v.*

Department of Educ. (1985) (*School Comm. of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].) The IEP is the “centerpiece of the [IDEA’s] education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345.) These cases and their progeny consistently recognize the interrelationship of all of the elements of an IEP in providing FAPE.

13. The court in *Gregory K. v. Longview School District*, (9th Cir. 1987) 811 F.2d 1307, (*Gregory K.*), acknowledged the need to evaluate the full educational program being offered to determine whether the student had been offered a FAPE. 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 educational program, not that preferred by the parent. (*Ibid.*) A student’s educational program consists of all of the components of the offered IEP, not of only one component.

14. Ms. De Martini’s testimony that Student would require less academic assistance from an aide if she was placed in the offered special day class highlights the interrelated roles that placement and services play in Student’s special education program and determining the necessity of analyzing services and placement together to determine whether it meets Student’s needs. So too did Dr. Burkholder’s testimony support the interrelated roles when he acknowledged that in the event that Student continued to be placed in a general education class rather than in the offered special day class, that the amount of time offered by the IEP for behavioral services would need to be increased to adequately meet Student’s needs.

15. There are two parts to the legal analysis of determining whether a school district’s IEP offer complied with the IDEA. First, the tribunal must determine whether the

district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

16. In its closing brief, Dublin cites several OAH decisions to support its argument that a portion of an IEP can be found to constitute a FAPE and that OAH has the ability to order that a portion of an IEP can be implemented without parental consent. OAH cases are not binding on later OAH decisions. (Cal. Code Regs., tit. 5, § 3085.) Even if they were, the decisions cited by Dublin are distinguishable from the case at hand.

17. In *Student v. Yuba City Unified School Dist. et al.* (OAH, April 7, 2013, No. 2013120207) (*Yuba City*), Yuba City filed a complaint on the issue of whether the school district and county *denied* Student a FAPE by offering the services of district provided nurse services as part of the IEP, instead of permitting the parent to choose the provider of the nursing services. Conversely, in the present case, Dublin asks that the district offered behavior and aide services offer a FAPE. Additionally, at the beginning of the hearing in *Yuba City*, the parties agreed to limit the district's issue to whether district's staff was qualified to provide the diabetic services that Student needed, so the originally pled issue was not decided. Even though, Yuba City prevailed on the narrowed issue, its request to be permitted to implement the portion of the IEP that offered that Yuba City provided nursing services without parental consent provision was not granted.

18. In the second case cited by Dublin, *Student v. Exeter Union School District* (OAH, December 7, 2009, No. 2009081099), Exeter asked for the behavioral support plan to be found appropriate. Unlike in the case at hand, Exeter did not request as a proposed remedy that OAH order the implementation of the behavior support plan without parental consent. Additionally, the decision appears to make a ruling that the

IEP offer made constituted a FAPE; it did not specify that the only the offered behavioral support plan constituted a FAPE.

19. A FAPE thus can be analogized to a completed puzzle, which is made up of the various procedural and substantive elements of an IEP that, taken as a whole, is reasonably calculated to enable a child to receive educational benefit. When one of the pieces of the puzzle is removed, FAPE does not exist. For this reason, a parent may challenge an element of their child's IEP, such as an offered service, because that parent is challenging whether the student is being denied a FAPE due to that offered service being inappropriate to meet the child's needs. Such is not the situation in the case at hand, where Dublin seeks a finding of FAPE.

20. Furthermore, Dublin's argument that OAH may authorize a district to implement a portion of an IEP is simply not persuasive. It is particularly inappropriate to this case, where Parents dispute the appropriateness of several portions of the IEP, but Dublin seeks to validate only one of them. The law requires that OAH only order implementation of an IEP without parental consent by determining that the entire IEP, including its procedural and substantive elements, comported with legal requirements and offered Student a FAPE. There is no question, however, that Dublin could show that the IEP offer of January 25, 2016 both procedurally and substantively offered Student a FAPE and therefore the aide services proposed, and the entire IEP, could be implemented without parental consent. In this case, however, as described below, Dublin failed to meet its burden.

ANALYSIS OF THE JANUARY 25, 2016 IEP OFFER

21. Not only did Dublin not prove that the entire IEP offered a FAPE; the evidence affirmatively showed that Dublin did not entirely comply with procedural requirements in making the offer, and that some of the IEP's elements were not reasonably calculated to afford Student educational benefit.

Procedural Compliance

22. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Id.* at 205-206.) However, a procedural error does not automatically result in a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

CLARITY OF PLACEMENT OFFER

23. Clarity is a necessary component of an offer of FAPE. In *Union School Dist. v. Smith* ((1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*)), the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement:

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school District will greatly assist parents in "present[ing] complaints with respect to any

matter relating to the ... educational placement of the child.”

20 U.S.C. § 1415(b)(1)(E).

(*Union*, supra, 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified School Dist.* (E.D. Cal. 2009) 626 F.3d 431, 459-461; *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.)

24. *Union* involved a district’s failure to produce any formal written offer. However, numerous judicial decisions invalidate IEP’s that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *A.K. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine School Dist. v. K.H.* (D.Ore., June 2, 2005, No. 04-1468) 2005 WL 1587241, p. 10; *Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108; *Mill Valley Elem. School Dist. v. Eastin* (N.D.Cal., Oct. 1, 1999, No. 98-03812) 32 IDELR 140, 32 LRP 6047; see also *Marcus I. v. Department of Educ.* (D. Hawaii, May 9, 2011, No. 10–00381) 2011 WL 1833207, pp. 1, 7-8.)

25. One district court described the requirement of a clear offer succinctly: *Union* requires “a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal.” (*Glendale Unified School Dist. v. Almasi*, supra, 122 F.Supp.2d at p. 1108.)

26. The January 25, 2016 IEP’s offer of placement lacked adequate clarity. The IEP was unclear on the amount of time in special education it was offering Student for the remainder of Student’s second grade year. Multiple places of the IEP document listed conflicting amounts of time offered in general education and in special education. For example, although the IEP indicated that the amount of time offered in general education equaled 465 minutes and designated the amount of time for each general

education class, in actuality the time listed for each of the offered classes totaled only 285 minutes. The written IEP did not contain any explanation regarding the remaining or missing 180 minutes of general education time.

27. This lack of clarity of the IEP resulted in a procedural violation and deprived the Parents of the right to participate meaningfully in the IEP development process. The conflict in the amount of time offered in special education and general education along with a failure to delineate clearly what general education classes Student would be attending and the amount of time she would be attending during the remainder of Student's second grade year, created such confusion that it prevented Parents from meaningfully considering the offer. Therefore, on this basis alone, the IEP fails to offer Student a FAPE.

28. Additionally, the IEP lacked clarity regarding the offered speech and language services due to the discrepancy between the offered services listed in the notes section and those listed in the services section. This lack of clarity in the offer of speech and language services created further confusion regarding the IEP and resulted in procedural violation, which deprived Parents of the right to participate meaningfully in the IEP development process.

Substantive Appropriateness of the IEP Offer

29. An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved.(20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).)

30. 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.)

31. Dublin presented little evidence supporting the substantive appropriateness of the IEP in areas other than those involving Student's behavioral needs and the offered district provided aide and behavior services. Since a finding of FAPE is dependent on reviewing all components of the IEP, including Student's needs and whether the IEP appropriately addresses those needs, Dublin failed to meet its burden of proving that the IEP offered Student a FAPE.

NEEDS, PRESENT LEVELS OF PERFORMANCE, AND GOALS

32. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d) (3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has reasonable chance of attaining within a year. (Ed. Code, § 56344.)

33. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).)

34. The burden was on Dublin to establish that the IEP identified Student's needs accurately and that those needs were met appropriately through the IEP. Determination of Student's accurate cognitive level was important to determining the appropriateness of goals, accommodations, modifications, services, and placement, however, Dublin failed to do so.

35. The written IEP offered Student 28 goals in the areas of gross motor skills, fine motor skills, social skills, behavior, reading, written expression, mathematics, speech and language, and "other needs." Dublin provided little evidence of Student's needs beyond her behavioral and academic needs. In the areas of speech and language, fine motor skills, and gross motor skills, Dublin failed to establish that the IEP accurately reflected of Student's needs and present levels of performance; that the offered goals addressed Student's needs; that the goals were measurable; and that Student had a reasonable chance of attaining the goals within a year. Dublin's failure to prove that information by a preponderance of the evidence means that Dublin failed to meet its burden of proof regarding the IEP.

ACCOMMODATIONS

36. The IEP shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

37. Dublin failed to meet its burden of proving that the modifications and accommodations offered in the IEP would have allowed Student to advance appropriately towards attaining her annual goals and to make progress in the general education curriculum.

PLACEMENT AND SERVICES

38. The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

39. Related services must be provided if they are required to assist the child in benefiting from special education. (Ed. Code, 56363, subd. (a).) The term "related services" (designated instruction and services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.)

40. One important example of a substantive failing in the January 26, 2016 IEP offer is its proposal to move Student to a more restrictive environment. Both federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil maybe removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398,1403; *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

41. In *Sacramento City Unified Sch. Dist. v. Rachel H.*, *supra*, 14 F.3d 1398, the Ninth Circuit Court of Appeal set forth four factors that must be evaluated and balanced

in determining whether a placement is in the least restrictive environment: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Id.*, 14 F.3d at p. 1404.)

42. Dublin has requested that OAH limit its decision to the appropriateness of the offered behavioral aide and services. However, the interrelated nature of services and placement, particularly when those offered services are those of one-to-one aide, makes it impossible to analyze the appropriateness of the offered services without analyzing the offered placement.

43. Although Dublin presented some evidence to show that Student's academic needs could be met in the special day class, Dublin failed to provide sufficient evidence that all of the *Rachel H.* factors were weighed and balanced in determining that the special day class was the least restrictive environment for Student. It failed to explain why Student's needs could not be addressed adequately in general education with additional academic support, such as that from a resource specialist program teacher. Dublin made its offer of placement before the IEP team learned of Dr. Gardner's recommendations. Even after hearing her strong recommendations that it was appropriate to place Student in general education, as long as she was provided with proper supports and services, the IEP team meeting continued to offer primary placement in the special day class without discussing the benefits of placing Student in general education.

44. Dublin established through its own witness, Dr. Burkholder, that Student's behaviors did not prevent her from being placed in general education. The evidence showed that although Student's progress was slow, she was making progress while

being placed in general education. Sufficient evidence was not presented to show that with additional supplementary academic services that Student could not receive an educational benefit by continuing to be placed in general education. On the contrary, the weight of evidence suggested that Student could be adequately educated among general education peers.

45. On the whole, Dublin failed to meet its burden of proving that it was appropriate to transition Student from a nonpublic agency behavioral aide and services to a district aide and services because it failed to establish the larger proposition that the January 25, 2016 IEP, which contained that offer of service, met the procedural requirements of the IDEA and substantively offered Student a FAPE.

ORDER

The relief sought by Dublin is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on the sole issue.

RIGHT TO APPEAL

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

DATED: February 15, 2017

/s/

B. ANDREA MILES

Administrative Law Judge

Office of Administrative Hearings