

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN DIEGUITO UNION HIGH SCHOOL  
DISTRICT,

OAH Case No. 2017041163

SAN DIEGUITO UNION HIGH SCHOOL  
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2017010382

DECISION

San Dieguito Union High School District filed a request for due process hearing with the Office of Administrative Hearings on January 13, 2017, naming Parents on behalf of Student. Student filed a request for due process hearing with OAH on April 26,

2017, naming District.<sup>1</sup> On April 27, 2017, OAH consolidated the cases. On May 31, 2017, OAH granted the parties' joint request to continue the consolidated matter.

Administrative Law Judge Paul H. Kamoroff heard the consolidated matter in Encinitas, California, on September 12, 19, 20, and 21, 2017, and in San Diego, California, on September 13 and 14, 2017.

Cindy K. Lane, Attorney at Law, appeared on behalf of Student. Student's grandfather and grandmother, who are Student's adoptive parents, attended the hearing. Student did not attend the hearing.

Ernest L. Bell, Attorney at Law, appeared on behalf of District. Tiffany Hazlewood, District's Program Supervisor, attended the hearing.

At the request of the parties, OAH continued this matter for written closing briefs. The record closed on October 9, 2017, upon receipt of the closing briefs.

## ISSUES<sup>2</sup>

### STUDENT'S ISSUES:

1. Did District deny Student a free appropriate public education during the 2015-2016 and 2016-2017 school years, by:
  - a. Failing to make a clear, concise, and formal, FAPE offer on April 11, 2016;

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<sup>1</sup> District filed its response to Student's complaint on May 8, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189.)

<sup>2</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to renumber and redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- b. Failing to make a clear, concise, and formal, FAPE offer on May 17, 2016;
- c. Failing to make a FAPE offer on May 17, 2016, that was comparable to the FAPE offer from Solano Beach School District, dated March 9, 2016;
- d. Failing to make a FAPE offer on May 17, 2016, that was reflective of Student's unique needs; and
- e. Making changes to Student's individualized education program, outside of an individualized educational program team meeting?

#### DISTRICT'S ISSUE:

2. Did District's April 11, 2016 and May 17, 2016 combined IEP offer of placement and services constitute a FAPE in the least restrictive environment, such that District may implement the IEP without Parents' consent?

#### SUMMARY OF DECISION

Student had learning and attention disorders that impacted his education. Student asserts that District's IEPs denied him a FAPE on various grounds. The heart of Student's complaint is that he demonstrates learning delays, despite having received special education services in public school for several years. Therefore, Student requests placement at a nonpublic school.

District avers that Student made steady progress each year while in public school. District asserts that it carefully reviewed Student's individual needs and crafted an IEP that met those needs, while conforming to all legal requirements. Therefore, District requests an order permitting it to implement the IEP, without Parents' consent.

Student was unable to support his claims. Rather, the evidence showed that District's May 17, 2016 IEP, the primary IEP for this matter, offered Student a FAPE and met all necessary legal requirements. Accordingly, the Decision finds that District may implement the May 2016 IEP, without Parents' consent.

## FACTUAL FINDINGS

1. Student was a 13-year-old boy who resided with his adoptive parents, Grandfather and Grandmother. Grandparents were divorced and shared joint custody of Student. They resided in the same townhouse complex and Student was able to walk between their homes. Beginning in August 2016, Student's seventh grade, Grandparents' residences fell under the jurisdiction of District, a high school district. Previously, those same residences were under the jurisdiction of Solano Beach Unified School District, an elementary school district. Since kindergarten, Student received special education under the eligibility categories specific learning disability and other health impairment.

2. Specific learning disability is a disorder characterized by a severe discrepancy between ability and achievement to a degree that the pupil cannot be adequately served in regular classes without the provision of special education or related services. Student's specific learning disorder correlated to delays in visual processing. As a result of his disability, Student had difficulty in reading, writing, and math.

3. Student was also eligible under other health impairment due to an attention deficit hyperactivity disorder. ADHD is a neurodevelopmental characterized by difficulties with executive functions that cause attention deficits, hyperactivity, or impulsiveness. As a result of his disability, Student had difficulty with planning, organization, and understanding directions.

4. Student also demonstrated emotional difficulty. Student was cognizant of his learning delays, and sometimes became anxious when he was unable to keep up with his peers. Student was not disruptive in class and did not have behavior problems. However, when anxious, he sometimes verbalized self-depreciative remarks or slapped his own head.

5. Notwithstanding his learning delays, Student was social, easily made friends, and was well-liked by peers and teachers. Student was athletic and played various sports, including calf wrestling and rugby. Student was large for his age and naturally protective of his friends.

6. At Solano Beach, Student received special education and related services consisting of classroom accommodations, specialized academic instruction, occupational therapy, and counseling services. The amount of specialized academic instruction varied from year-to-year, and was provided in a small, structured class, called the learning center. The learning center was similar to a mild-to-moderate special day class, where pupils received differentiated instruction in multiple subjects from a special education teacher. Learning center instruction was provided at a slower pace and in smaller groups than regular education classes. Solano Beach also provided Student regular education classes, where he actively participated with typically developing peers. Until the 2016-2017 school year, Solano Beach was solely responsible for providing Student's education. Solano Beach elementary students matriculated to District, a high school district, when pupils entered middle school, beginning in the seventh grade. It was normal for staff from Solano Beach and District to work collaboratively to transition IEP students from the elementary school district to the high school district.

7. Since 2011, Student was represented at IEP team meetings by his grandparents and an educational advocate, Dr. Sara Frampton. Grandfather and Dr. Frampton testified during the hearing on behalf of Student. Dr. Frampton has a bachelor's degree in psychology, master's degrees in education and counseling, and a doctorate in psychology. She has worked as an educational advocate for over 10 years. Grandfather and Dr. Frampton were pleased by Student's progress at Solano Beach and complimentary of Solano Beach's teachers, staff, and assessments. Grandparents and Dr. Frampton believed that Solano Beach provided Student a "staggering amount" of

accommodations and services. Student's witnesses were pleased with those accommodations and services. At Solano Beach, Student was provided accommodations and services in both the learning center and while mainstreamed in regular education classes, including social studies, science, and elective classes. Grandparents and Dr. Frampton had never questioned that delivery model, or felt it was inappropriate for Solano Beach to place Student in regular education for part of the school day. In sum, the IEPs provided by Solano Beach were based upon sound data and individualized to Student's needs. While at Solano Beach, Grandparents consented to each IEP offered to Student. It was not until District offered a similar educational program that Dr. Frampton and Grandparents asserted that Student could not be educated in regular education classes and required a nonpublic school.

8. Solano Beach conducted a triennial assessment of Student in March 2015, the last comprehensive assessment prior to the IEPs in dispute. Student was 11 years old and attending fifth grade at Solano Pacific Elementary School, a school in Solano Beach. The comprehensive assessment was conducted by Kelly Monahan, learning specialist; Joseph Parsons, school psychologist; Francesca Vaccarino, occupational therapist; Megan Orr, speech and language pathologist; and a school nurse. Mr. Parsons and Ms. Monahan testified during the hearing. Mr. Parsons received a bachelor's degree in psychology in 1989, and a master's degree in counseling in 1999. He was a school psychologist for 17 years, and was an experienced assessor and therapist. Ms. Monahan had a dual master's degree in general and special education, and 16 years teaching experience. Mr. Parsons and Ms. Monahan were familiar with Student; each had assessed and observed Student on numerous occasions, and Ms. Monahan had taught Student's learning center class. During hearing, each provided persuasive testimony in support of Solano Beach's IEPs, and the IEP offered by District.

9. For the triennial assessment, Mr. Parsons and Ms. Monahan reviewed

school records; interviewed Student, teachers and Grandparents; observed Student inside and outside of the classroom; reviewed work samples; consulted with team members, informally assessed Student using questionnaires and inventories, and formally assessed Student with a variety of standardized tests.

10. Results of the Woodcock Johnson Tests of Achievement, Fourth Edition, an academic assessment, revealed that Student was delayed in reading, including very low scores in broad reading, letter-word identification, and reading fluency. Student had low average skills in math. In writing, Student had scattered abilities, ranging from average to very low. The Gray Oral Reading Test yielded similar results; Student had below average reading abilities. The Woodcock-Johnson Test of Cognitive Abilities, Fourth Edition, showed that Student had average comprehension abilities, but was delayed in fluid reasoning, short term memory, and perceptual speed. Student had a low-to-below average intellectual ability. Inventories showed that Student had some social-emotional difficulty, although his teachers did not feel that impacted his ability to access his education. Student had functional fine motor and hand use skills. He was not delayed in speech and language.

11. Student had delays in reading, writing, math, attention, anxiety, and planning, which required the intervention of special education and related services. The assessors found that, when compared to prior testing, Student had made slow but steady progress each year across all areas. Given those results, Mr. Parsons and Ms. Monahan persuasively opined that an education program consisting of specialized academic instruction, counseling, and occupational therapy, delivered with accommodations and aide support in small, special education classes for reading, writing, and math, and regular education classes for the remainder of the school day, had been an effective way to meet Student's individual needs.

## THE MARCH 9, 2016 IEP

12. On March 9, 2016, Solano Beach convened an annual IEP team meeting. This was Solano Beach's last IEP for Student, as he was entering District the following year. Student was 12 years-old and completing the sixth grade at Solano Pacific. Grandparents and Dr. Frampton attended the IEP team meeting. Solano Beach's IEP team included the following: Ms. Monahan; Mr. Parsons; Ms. Vaccarino; Cassie Bess, general education teacher; Erin Lain, program specialist, and; Elisa Fregoso, school principal.

13. The IEP team first reviewed Student's present levels of performance. Student received instruction in the learning center and in regular education classes. While in regular education, Student received accommodations and aide support. Student did well in both environments. He met five of seven prior annual goals, in reading, decoding, writing, math, math problem solving, and self-regulation. Student made progress on the remaining goals, in reading comprehension and organization. The team agreed that Student had a positive attitude towards school and was highly motivated to work with his peers. He independently followed classroom routines and school procedures. He independently transferred between all classes, including the learning center and regular education classes. In regular education, he followed directions well in a large group and worked well with his peers. Student benefited from peer modeling in regular education, and was well liked by peers and teachers.

14. Student received reading instruction in the learning center. With small group instruction, he read and understood sixth grade level texts and novels. The student-to-teacher ratio in the learning center ranged from six-to-one to two-to-one. Solano Beach conducted academic testing for Student on February 10, and March 7, 2016, which revealed that Student was progressing in reading, including achieving 100 percent scores on consonant blending, short vowels, long vowels, and variant vowels.



Student struggled in writing, and received accommodations and peer support in both the learning center and regular education. Student received math in the learning center. He was approaching fifth grade math independently, and could work at the sixth grade level with instruction and supports.

15. Student received social studies and science in regular education. He received various accommodations, including class notes from peers, study guides, and had tests read aloud to him. Student performed well in regular education and actively participated in class discussions and projects. He worked well with his typical peers and enjoyed the social interaction he received during regular education. Student raised his hand to speak, regulated the tone of his voice, followed class rules, self-advocated, and requested help when appropriate.

16. Student had appropriate gross motor skills and participated in team sports. He had functional hand-use, yet had a history of visual motor and fine motor difficulty. Student also demonstrated some sensory processing weaknesses. For those reasons, Solano Beach provided him occupational therapy, along with access to a quiet work setting when needed.

17. Student also received school-based counseling. Sometimes anxious, Student had learned coping strategies to successfully self-regulate while at school. He did not demonstrate any emotional or behavioral difficulty that impeded his education or that of others.

18. After thoroughly reviewing Student's present levels of performance, the IEP team crafted nine new, annual goals. Goal one, in reading, called for Student to describe the central idea and summarize a reading text, in three of four trials, with 80 percent accuracy. Goal two, in decoding, required Student to apply word analysis skills in decoding words, 80 percent of the time, in three of four consecutive trials. The third goal, in writing, sought for Student to write multiple paragraph and complex writing

compositions, with correct spelling, punctuation, and grammar, measured by work samples in three of four trials. Goal four, in math, called for Student to use positive and negative numbers to represent quantities in real-world contexts, with 80 percent accuracy in three of four trials. Goal five, also in math, required Student to independently add, subtract, multiply, and divide whole numbers and decimals, using an algorithm, in four of five consecutive trials. The sixth goal, in self-regulation, sought for Student to use phrases and coping strategies to self-regulate when emotionally distressed, 80 percent of the time over 10 school days. Goal seven, in task completion, called for Student to increase his ability to complete home-work and classwork assignments, including complex tasks, 80 percent of the time over 10 consecutive school days. Goal eight, in editing, required Student to complete a first draft of a writing composition, then utilize appropriate spelling rules and edit the work, with 90 percent accuracy in four of five trials. The last goal sought to increase Student's planning and organization skills by requiring him to organize a work binder, prioritize assignments, and independently record daily assignments, in different classroom settings, during four of five recorded opportunities, over 10 consecutive school days.

19. Grandparents, Dr. Frampton, and each IEP team member actively participated in the development of the IEP goals. The goals addressed Student's individual needs and provided a meaningful way of measuring progress towards each area of deficit. During hearing, Dr. Frampton praised Solano Beach's IEP team, assessments, and educational program. She testified that the goals were carefully developed by a competent IEP team, and based upon appropriate testing. In sum, she referred to the goals as "wonderful." Similarly, Mr. Parsons and Ms. Monahan testified that the goals were based upon valid data and addressed Student's individual needs.

20. To meet those goals, the IEP team offered Student various accommodations and services. The accommodations included preferential seating;

access to a quiet work environment for testing and assignments; extended time to complete assignments and tests; access to a multiplication chart, number line, place value chart, and calculator; test directions and questions read aloud; reduced number of problems on homework; visual and verbal reminders; verbal and visual modeling of expectations and directions; frequent breaks and opportunities for movement; access to a quiet setting for down-time; self-regulation strategies; access to a word processor; access to an adult instructional aide in regular education classes, 900 minutes weekly; and access to spell check and word banks for tests.

21. The March 2016 IEP provided the following services: group counseling, 30 minutes each week; group occupational therapy, 30 minutes weekly; and specialized academic instruction, 670 minutes weekly. The specialized academic instruction included 300 minutes weekly for reading, 300 minutes weekly for math, and 70 minutes each week for organization, planning, and task-completion. That instruction was provided in a small group in the learning center classroom. For reading, the small group size was designated as six-to-one, two-to-one, or one-to-one instruction. Student would spend 40 percent of the school day outside of regular education. Student had difficulty with short term memory, and the IEP team offered Student extended school year services to address that delay.

22. Grandparents and Dr. Frampton actively participated in the development of the March 9, 2016 IEP. They trusted Solano Beach's IEP team and were satisfied with the content of the IEP offer. Grandparents consented in writing to the IEP at the conclusion of the team meeting.

#### THE APRIL 11, 2016 MEETING

23. Solano Beach and District worked cooperatively to ensure that Student would successfully transition from elementary school to middle school. Student would

graduate elementary school on June 10, 2016, and begin middle school on August 30, 2016, the start of the 2016-2017 school year. Therefore, District needed to have an IEP offer for Student prior to August 30, 2016. To accomplish this goal, beginning in early April 2016, District took steps to transition Student. District staff reviewed Student's educational records and consulted with their counterparts at Solano Beach. District's program supervisor, Ms. Hazlewood, observed Student at Solano Pacific. Following that observation, District scheduled an amendment IEP team meeting on April 11, 2016.

24. Staff from both Solano Beach and District were present for the April meeting. Solano Beach staff included Ms. Monahan, Mr. Parsons, and Ms. Lain. District staff included Gina Marzo, education specialist; Maureen Yellen, school psychologist; Joy Bischke, occupational therapist; Angela Halpin, general education teacher; Kelly Dunn, assistive technology specialist; Julia Chowdhury, speech and language pathologist; and Ms. Hazlewood. Grandparents and Dr. Frampton were present. However, prior to the commencement of the meeting, a disagreement arose between Grandfather and Grandmother regarding Student's educational placement. Based upon the disagreement, Dr. Frampton believed that Grandparents were unable to participate in the IEP team meeting that day, and requested that it be rescheduled. District agreed to the request, and rescheduled the meeting to May 17, 2016.

25. On April 27, 2016, Ms. Hazlewood took Grandparents on tours of District schools, Carmel Valley Middle School and Earl Warren Middle School. Carmel Valley and Earl Warren were both proximate to Student's residence. However, only Earl Warren had a learning center class that was similar to the Solano Pacific class.

#### THE MAY 17, 2016 IEP

26. District held its first IEP team meeting for Student on May 17, 2016, three months prior to the start of the next academic year. Similar to the April meeting, staff

from Solano Beach and District attended. Solano Beach staff included Ms. Monahan, Mr. Parsons, and Ms. Lain. District staff included Francesca Beccarino and Ms. Bischke, occupational therapists; Cristina Campisano, education specialist; Andrea Clark, general education teacher; Ms. Yellen; Ms. Dunn; Ms. Chowdhury; and Ms. Hazlewood.

27. The purpose of the IEP team meeting was to amend the March 9, 2016 annual IEP, to transition Student to District for the 2016-2017 school year. Student was still 12 years old and attending the sixth grade at Solano Pacific, where he remained until the end of 2015-2016 school year. District staff was familiar with Student's individual needs. District's IEP team had reviewed Student's school records, consulted with Solano Beach staff, interviewed Grandparents, and observed Student at Solano Pacific.

28. District provided Grandparents a copy of procedural safeguards and described the purpose of the meeting. The team discussed Student's present levels of performance, including his strengths and weaknesses. Student had not been assessed since the March meeting, and there were no changes to Student's educational, social, or emotional needs since that meeting. Student had learning delays in reading, writing and math that required special education interventions. He remained a highly motivated student and enjoyed being in regular education classes with typical peers. Accommodations, including audio text, instructions read aloud, and the word processor, had allowed Student to successfully access regular education. Student successfully utilized self-regulating strategies and had shown a decrease in anxiety and emotional dysregulation. He was comfortable and worked well with the regular education teachers, aides, service providers and other school staff. Student was generally positive, had friends, and got along well with others. The IEP had been successful. Student had progressed across all areas.

29. The IEP team next considered a continuum of services and programs,

which included regular education, special day classes, learning center classes, fundamental classes, and non-public schools. The District team favored regular education, learning center, and fundamental classes for Student. Solano Beach staff, including Mr. Parsons, Ms. Monahan, and Ms. Lain, supported those same classes for Student. Fundamental classes were small, structured classes taught by special education certified teachers, using small group and individual instruction. Each class had one teacher and an adult aide, with a maximum of 15 students. Unlike the learning center, which addressed multiple subject areas, each fundamental class targeted one specific subject; e.g. fundamental math, fundamental English.

30. In significant part, the May 17, 2016 amendment IEP mirrored the March 9, 2016 annual IEP. District adopted the March IEP goals as written. District offered identical accommodations, with the addition of audio books and access to the learning center throughout the school day.

31. For services, District offered the same level of counseling and occupational therapy offered in the March 2016 IEP. The team initially proposed 670 minutes weekly of specialized academic instruction, consistent with the March IEP. However, in response to Grandparent's request for additional reading support, District added a reading support class. The reading support class was a small, structured class that provided intensive reading instruction using multiple instructional methodologies. The addition of this class increased the specialized academic instruction to 940 minutes weekly. Overall, the specialized academic instruction would be provided in a fundamental English class, fundamental math class, reading support class, and a learning center class. Each class was 235 minutes per week, totaling 940 minutes weekly. The learning center class was provided at a set time each week and was in addition to the learning center accommodation, which permitted Student to access the learning center fluidly throughout the school day, when he felt that he needed extra support. Similar to the

March IEP, District offered an academic aide, as an accommodation, 900 minutes weekly. The aide support was provided through the learning center, and pushed into regular education. With the aide, Student received an additional 900 minutes of weekly specialized academic instruction. District also offered transportation and extended school year services.

32. District offered placement at Earl Warren, because that school had the learning center, fundamental classes, reading support, and regular education that Student required. It was normal for pupils to attend six class periods daily at Earl Warren. However, a seventh period was available during the regular school day, when an additional class was needed. With the addition of the reading support class, Student would need seven periods daily. As an alternative to a seventh period, Ms. Hazlewood proposed that Student receive independent study physical education. Independent study physical education allowed pupils to obtain school physical education credit for his or her participation in an after-school sport, and was commonly used by students who participated in after-school athletics, including those with IEPs. Student's participation on the rugby team met that requirement. To reflect this discussion, Ms. Hazlewood wrote on the IEP document that the team "proposed...waive PE as [Student] is very active and involved in outside supports [*sic*]."

33. During hearing, Student alleged that statement meant that District had unlawfully required Student to waive physical education, to receive the full amount of specialized academic instruction offered in the IEP. The evidence presented during hearing did not substantiate that claim. For example, Ms. Hazelwood persuasively testified that she had merely proposed independent study physical education, not a waiver of physical education, as an option to accommodate Student's school schedule. The term "waive" referred to independent study physical education, a lawful option for all students; and not a total waiver of physical education, which she understood was

unlawful for seventh graders. That testimony was corroborated by Dr. Frampton, who testified that she understood the proposed waiver was for independent study physical education. During hearing, Grandfather could not recall the discussion regarding the physical education waiver, but clarified that the present matter did not arise from Student's participation in a physical education class. Additionally, Ms. Hazlewood was familiar with District's classes and scheduling at Earl Warren. She persuasively described that Student could receive the full amount of specialized academic instruction, along with a physical education class, at Earl Warren during the regular school day.

34. District placed the IEP offer in a written document. The IEP document clearly described the accommodations and services offered to Student. A concise delineation of instructional minutes and modalities was included for each service, along with a start and end date for each service. Additionally, the IEP described that Student would be outside of general education 48 percent of the school day. The IEP offer was based upon recent testing from Solano Beach, which was not disputed by Student. The offer included input from Grandparents, Student's advocate, Student's then-present services providers from Solano Beach, and qualified educators from District. The May 2016 IEP was similar to Solano Beach's March 9, 2016 annual IEP, and amended it only by transitioning Student to District, adding accommodations, and increasing the specialized academic instruction.

35. However, Grandparents did not consent to the May 17, 2016 IEP. On their behalf, Dr. Frampton wrote her dissent on the IEP document. Dr. Frampton did not believe that District was capable of meeting Student's individual needs. Grandparents trusted Dr. Frampton and deferred to her advice. On that basis, Grandparents disagreed with the IEP offer and requested that District place Student at a nonpublic school.



## CONDUCT FOLLOWING THE MAY 2016 IEP TEAM MEETING

36. On May 18, 2016, Dr. Frampton sent Grandparents a letter which described the May 17, 2016 FAPE offer. Dr. Frampton recommended that Grandparents not consent to the IEP, because she believed the IEP was significantly different than Student's program at Solano Beach. She summarized that the fundamental and reading support classes offered at Earl Warren were not individualized for Student's needs.

37. Dr. Frampton repeated this opinion when she testified during the hearing. She complained that the instruction offered by District was not individualized for Student; specifically, that the fundamental and reading support classes at Earl Warren were "generic." Rather, Dr. Frampton recommended that Student be placed at the NewBridge School, a nonpublic school, or similar nonpublic school. However, Dr. Frampton provided little support for her opinion. She had not formally assessed Student or observed the fundamental or reading support classes at Earl Warren. She was not directly familiar with those classes and could not describe why she believed the classes were generic. Additionally, Dr. Frampton mistakenly referred to the reading support class as a "Read 180" class.<sup>3</sup> Yet, evidence showed that Read 180 was one of several instructional methodologies used in the reading support class. Overall, Dr. Frampton revealed that she was not familiar with District's classes or instructional methodologies. Moreover, Dr. Frampton's testimony was inconsistent. She praised the educational program, staff, and assessments provided by Solano Beach. She attested that the goals, accommodations, services, and placement provided by Solano Beach, including the March 2016 IEP, were appropriate and individualized for Student's needs. Yet, she was critical of District when it offered identical goals and accommodations, and similar

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<sup>3</sup> Read 180 was a reading intervention program used by students in grades four through 12, developed by Scholastic Corporation.

services, as those offered by Solano Beach. Dr. Frampton overlooked that District's May 2016 IEP was formulated collaboratively with Solano Beach educators and therapists, who actively participated in the development of that IEP. Overall, Dr. Frampton struggled to explain why the praiseworthy program offered by Solano Beach was no longer individualized, and generic, when offered by District. Finally, Dr. Frampton testified that District failed to make a FAPE offer during the May 17, 2016 IEP. That testimony was inconsistent with overwhelming evidence, including the IEP document, which coherently described the FAPE offer. It was also inconsistent with Dr. Frampton's May 18, 2016 letter, in which she described the FAPE offer, thereby evidencing her understanding of the offer. For those reasons, Dr. Frampton's testimony regarding Student's educational program and related claims was not persuasive.

38. On July 26, 2016, Ms. Hazlewood sent Grandfather and Grandmother each a prior written notice letter. The letter described the May 17, 2016 IEP offer, including the services, classes, placement, and instructional minutes for each service. Ms. Hazlewood included a copy of procedural safeguards, and copies of the March 9, 2016, April 11, 2016, and May 17, 2016 IEPs, with the letter.

39. On July 27, 2016, Dr. Frampton replied to Ms. Hazlewood's letter. Dr. Frampton disputed that the May 17, 2016 IEP was individualized to Student's needs, and informed District that Student would be seeking reimbursement for private school placement. On August 8, 2016, Ms. Hazlewood responded to Dr. Frampton's concerns and re-summarized District's FAPE offer.

40. In August 2016, Grandparents enrolled Student at NewBridge, a nonpublic school located in Poway, California. NewBridge was a special day school that served 88 pupils, ranging from kindergarten to eighth grade. Classes were small and structured, with an eight-to-one ratio for instruction; eight students to one teacher. NewBridge provided instruction that targeted language-based disabilities, such as dyslexia. Student

attended NewBridge during the 2016-2017 school year. During hearing, Grandfather presented documents that showed Student's attendance, and costs, related to NewBridge.

41. Steve Mayo was the director and founder of NewBridge. He testified on behalf of Student during the hearing. Mr. Mayo was an experienced educator and administrator. Moreover, NewBridge was certified by the California Department of Education as a nonpublic school, and specialized in serving pupils who, like Student, had reading disorders. In sum, NewBridge was capable of providing some level of instruction to Student. However, the adequacy of NewBridge was not in dispute for this matter. Rather, the appropriateness District's FAPE offer was the subject matter. To that end, Mr. Mayo was not a helpful witness. Mr. Mayo had not formally assessed Student and was not his teacher at NewBridge. Mr. Mayo was not familiar with Student's school records or IEPs. He was not familiar with Solano Beach's educational program, or the educational program offered by District. He had not observed District's classes and was unable to form an opinion regarding the May 17, 2016 IEP offer; other than to opine that the extent of Student's delays required that he be placed at NewBridge. Although Mr. Mayo was a competent educator, his lack of familiarity with District's IEP offer diminished the weight of his testimony.

42. Moreover, Mr. Mayo's testimony was inconsistent. For example, he testified that Student was at a second grade reading level when he arrived at NewBridge, based upon the San Diego Quick Sight Word Assessment, a reading inventory that NewBridge used as an in-take assessment. Mr. Mayo opined that Student was similarly delayed in writing and math, at second-to-third grade levels, based upon similar in-take assessments. Yet, he intermittently testified that Student was at fifth, sixth, seventh, and even eighth grade reading levels. In fact, NewBridge did not differentiate instruction, meaning that Student was taught at a seventh grade level

there, and was able to access that curriculum. Nonetheless, Mr. Mayo purported that the March 2016 goals were defective because the baselines erroneously placed student at a higher grade level than he was capable of working at. Mr. Mayo was the sole witness to question the appropriateness of the March 2016 goals; although Dr. Frampton agreed with Mr. Mayo's opinion that the goals were too lofty, she incongruently praised the goals and the manner in which they were developed. However, NewBridge did not implement the March 2016 goals. Instead, NewBridge formulated 12 new goals for Student in the areas of reading, spelling, writing, math, social language, self-regulation, and planning. NewBridge had the opportunity to develop the goals at any grade level it felt was appropriate, yet developed goals that required the same level of capability as the March 2016 goals. For example, the reading goals ranged from a fifth grade to seven-and-a-half-year grade level. The spelling and writing goals were developed at a seventh grade curriculum. The math goals were written at a sixth grade level.

43 Given Mr. Mayo's testimony, NewBridge should have formulated goals at much lower grade levels. Yet, NewBridge educators elected to devise goals that were similar to those formulated by Solano Beach and adopted by District. Moreover, NewBridge progress reports showed that Student met eight of those goals, and made progress towards the remaining four goals, by the end of the 2016-2017 school year. Student's ability to meet grade level goals was inconsistent with Mr. Mayo and Dr. Frampton's testimony that Student was too delayed academically to benefit from a comprehensive campus like Earl Warren.

44. Student disliked NewBridge. He disliked the school's structure and missed interacting with typical peers. He had difficulty getting along with students and teachers at NewBridge. By the end of the school year, Student refused to participate in academic testing, a problem that had not manifested while in public school. Grandparents removed Student from NewBridge at the end of the 2016-2017 school year.

45. For the 2017-2018 school year, Grandparents enrolled Student at Earl Warren, which he attended through the hearing. While there, District implemented the March 2016 IEP, as Student's stay put placement. As of the hearing, Student was participating in each class, following instructions, completing assignments and tests, receiving passing grades, and positively socializing with peers and teachers.

46. Following the May 17, 2016 IEP, District held two IEP team meetings for Student, on March 20, 2017, and June 14, 2017. However, District was unable to complete either meeting or make a FAPE offer. Consequently, the May 17, 2016 IEP contained District's most recent FAPE offer for Student, as of the hearing.

47. In May 2017, District prepared a multidisciplinary psychological report for Student. Student was 13 years old and attending NewBridge. District selected school psychologist Jennifer Emberger, and education specialist Diane Dekker, to conduct the assessments. Student failed to present an independent educational evaluation in support of his claims. Therefore, District's May 2017 report was the last assessment of Student prior to the hearing.

48. Ms. Emberger and Ms. Dekker were qualified assessors. Ms. Emberger received a bachelor of arts and master of science in 2000, and a master of arts in education and school psychology, and personnel pupil service credential, in 2014. She had been a school psychologist since 2014. Ms. Dekker obtained a bachelor of science in 1997, a master of education in 2003, and was a credentialed mild/moderate special education teacher. She had 22 years of teaching experience. Ms. Emberger and Ms. Dekker were familiar with Student and his educational history. Each had reviewed Student's education records, observed him at NewBridge and at Earl Warren, and formally assessed him. Ms. Dekker was Student's case manager at Earl Warren, and had taught Student during the 2017-2018 school year. Ms. Emberger and Ms. Dekker were knowledgeable of Student's unique needs and persuasively testified in regard to those

needs during the hearing. Each persuasively testified that the May 17, 2016 IEP was appropriate when offered, and remained appropriate to meet Student's individual needs as of the hearing.

49. For the May 2017 assessment, Ms. Emberger and Ms. Dekker reviewed Student's educational and health records; interviewed Student, Grandparents, and NewBridge teachers; observed Student; and formally assessed Student using various standardized tests and inventories.

50. The Wechsler Intelligence Scale for Children, Fifth Edition, assessed Student's intellectual abilities. A score of 100 is an exact average score, with a 15 point deviation representing average intelligence. Student's scores ranged from average to low average, with a full scale intelligence quotient of 81, a below average score. The Test of Auditory Processing yielded an average score, 95, in phonological processing, and an overall average score, 90, in auditory processing. The Comprehensive Test of Phonological Processing, Second Edition, yielded similar, average, scores in phonological processing. The Test of Visual Perceptual Skills, Third Edition, showed that Student had visual processing delays, with a very low overall score of 78. The Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition, revealed delays in Student's visual and motor functioning. Academic testing, the Woodcock Johnson-IV Test of Achievement and Oral Language, showed that Student had dropped somewhat in reading and math skills while at NewBridge. Overall, Student had average to low average writing skills, and below average to very low abilities in reading and math. Emotionally, Student continued to demonstrate at-risk to clinically significant behaviors, including hyperactivity and anxiety. In sum, the District assessors identified that Student continued to qualify for special education and related services as a pupil with a specific learning disorder and other health impairment. Student continued to demonstrate weaknesses in reading, writing, math, and anxiety, which required special education

intervention.

51. Ms. Emberger and Ms. Dekker were familiar with the March 2016 goals, and the May 2016 FAPE offer. Similar to Mr. Parsons and Ms. Monahan, Ms. Emberger and Ms. Dekker testified that the nine goals addressed Student's needs in reading, writing, math, self-regulation, attention, and organization. The accommodations permitted Student to access his education during small structured classes, and while in regular education. Access to an academic aide and the learning center throughout the school day furthered Student's ability to access his education. Nine hundred forty minutes weekly of specialized academic instruction in small, structured, fundamental and support classes, and the learning center, effectively addressed Student's weaknesses in reading, writing, and math. Weekly counseling was appropriate to address to Student's emotional delays. Weekly occupational therapy remediated Student's fine motor and sensory processing concerns. Ms. Emberger and Ms. Dekker were knowledgeable witnesses who persuasively described that the May 17, 2016 IEP remained an appropriate plan to educate Student, in light of prior testing and the May 2017 testing. Student failed to present any evidence that impeached Ms. Emberger and Ms. Dekker's testing or testimony, or that of any school witness.

52. District called seven witnesses in support of its FAPE offer. Each witness, including Ms. Emberger, Ms. Dekker, Mr. Parsons, Ms. Monahan, Ms. Lain, Ms. Hazlewood, and Ms. Bischke, was a qualified and experienced educator. Each witness was directly familiar with Student and his individual needs. Each had observed Student and reviewed his educational records. Several witnesses, like Mr. Parsons, Ms. Monahan, Ms. Emberger, and Ms. Dekker, had formally assessed Student. Three witnesses, including Mr. Parsons, Ms. Lain, and Ms. Monahan, had taught or assessed Student at Solano Beach, and were not a party to this matter. Yet, their testimony was consistent with District's educators. Each witness, regardless of school district, was unshakeable in

his or her description of Student's needs, and how the March 2016 goals, and the May 2016 IEP, including the accommodations, services, and placement, appropriately met those needs.

53. A summation of testimony illustrated that Student was motivated and likable, but had delays in reading, writing, and math, which required specialized academic instruction. Student also demonstrated some emotional, fine motor, and sensory processing delays, which required counseling and occupational therapy. Testimony overwhelmingly showed that the school districts carefully considered all of Student's individual needs, based upon data collected from testing, teachers, observations, and Grandparents. After thorough and careful consideration of all available data, District offered Student specialized academic instruction for reading, writing and math in special day classes. The special day classes included the learning center, fundamental classes, and a reading support class. Those classes provided Student a learning environment where he could receive instruction at a slower pace and in smaller groups than regular education. The witnesses agreed that Student would also benefit from regular education, including social studies, science, and electives, where Student could model his typical peers. Counseling services adequately addressed Student's emotional difficulty. Each year, Student had grown in his ability to self-advocate and self-regulate his anxiety. Similarly, occupational therapy effectively curbed Student's fine motor and sensory processing delays. The IEP offered appropriate accommodations and aide support throughout the school day. Finally, the IEP offered extended school year services because Student had a delay in short term memory. Student had benefited from special education and regular education classes, and had made steady progress each academic year when provided a similar program. District's witnesses persuasively concluded that Student could continue to receive a FAPE in public school, and there was no reason for the IEP team to believe that Student required



placement at a nonpublic school.

54. In contrast, Student presented scant evidence during hearing. Student failed to submit an independent educational evaluation or independent expert that had assessed Student. In total, Student called three witnesses, Grandfather, Dr. Frampton, and Mr. Mayo.

55. Grandfather is a loving and diligent parent. He was concerned with Student's academic delays and social well-being. Grandfather was frustrated that Student continued to demonstrate delays in reading, writing, and math, despite years of varying levels of special education services. An example of Grandfather's concerns was the Northwest Evaluation Association Map Testing, an academic test given to Student each year at Solano Beach. That test showed Student was delayed in reading in kindergarten, and remained delayed in reading in sixth grade. However, that example was not as persuasive as the first hand observations from Ms. Lain, Ms. Monahan, and Mr. Parsons, which showed that Student had accessed grade level instruction, and progressed, each year in public school.

56. Overall, Grandfather's testimony failed to describe what was lacking in the May 2016 IEP. In significant part, Grandfather deferred to Dr. Frampton's opinion that the May IEP was not individualized to Student's needs. This testimony was contradicted by overwhelming evidence that District had based its IEP offer on a careful review of Student's past and present educational needs. Similar to Dr. Frampton, Grandfather was unable to reconcile his support for Solano Beach's educational program, while disagreeing with the similar program offered by District. Consequently, Grandfather's testimony was not as persuasive as District's witnesses, who unanimously supported the May 2016 IEP.

57. Dr. Frampton and Mr. Mayo were experienced educators. However neither had formally assessed Student. As described herein, Mr. Mayo was not familiar with

Student's educational records or the educational program offered by District. His testimony that Student required placement at a nonpublic school was therefore given little weight. Similarly, as described herein, Dr. Frampton was not familiar with District's classes or instructional methodologies. Moreover, she inconsistently commended the educational program provided by Solano Beach, while criticizing the similar program offered by District. Dr. Frampton was not persuasive in her attempt to explain why the March 2016 IEP goals, accommodations, services, and placement at a comprehensive public school was appropriate when offered by Solano Beach, but not appropriate when offered by District just two months later. In sum, Dr. Frampton's testimony that Student required a nonpublic school was not as persuasive as District's witnesses, who credibly described that Student had progressed, and would continue to progress, in a comprehensive program like the one offered by District.

## LEGAL CONCLUSIONS<sup>4</sup>

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA

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 et seq. (2006)<sup>5</sup>; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them

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<sup>4</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>5</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

for further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County School District*, the court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. (*Endrew F. v. Douglas County School District* (March 22, 2017, No. 15-827) 580 U.S.\_\_\_\_[137 S.Ct. 988, 996, 197 L.Ed.2d 335] (*Endrew F.*).

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) By this standard, Student had the burden of proof for his issues, and District had the burden of proof for its issue.

6. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947 (*Mercer Island*).) “First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (*Rowley, supra*, 458 U.S. at pp. 206-207.) “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” (*Id.* at p. 207.)

7. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*)).

#### DETERMINATION OF ISSUES: ISSUE 1, THE 2015-2016 SCHOOL YEAR

8. Student asserts that District denied him a FAPE during the 2015-2016 school year, based upon various grounds.

#### RESPONSIBLE AGENCIES

9. Under the IDEA, the State Educational Agency has the responsibility for the general supervision and implementation of the Act. (20 U.S.C. § 1412(a)(11)(A); 34 C.F.R. § 300.149(a).) This responsibility includes ensuring that a FAPE is available to all children with disabilities in the mandated age ranges within the state. (20 U.S.C. § 1412(a)(1)(A); 34 C.F.R. § 300.101(a)(2006).) Generally, a FAPE is made available through a local educational agency within the state. (20 U.S.C. § 1412(a)(12)(A); *Letter to Covall*, 48 IDELR 106 (OSEP Dec. 2006).)

10. In California, for the most part, identification of the local educational agency that has the responsibility for providing a disabled child with a FAPE is determined through residency. (Ed. Code, § 48200; *Katz v. Los Gatos-Saratoga Joint Union High School District* (2004) 117 Cal.App.4th 47, 54.) A local educational agency is responsible for "providing for the education of children with disabilities within its jurisdiction." (20 U.S.C. § 1413(a)(1).) California law generally requires students to attend the public school "in which the residency of either the parent or legal guardian is located." (Ed. Code, § 48200.) Here, Student did not attend District during the 2015-2016

school year. Rather, Student attended Solano Beach, the elementary school district he was assigned due to his residency. District's obligations to Student did not commence until the 2016-2017 school year, when Student matriculated to the high school district. Consequently, Student was not a resident within District's jurisdiction during the 2015-2016 school year.

11. A school district shall have an IEP in effect for each eligible pupil within its jurisdiction at the beginning of each school year. (Ed. Code § 56344(c).) Therefore, District's responsibility to offer Student a FAPE began at the commencement of the 2016-2017 school year. District met that obligation by offering Student an IEP on May 17, 2016. Student failed to allege any claims against Solano Beach, which was solely responsible for Student's education during the 2015-2016 school year. Student also failed to offer any legal authority which extended District's obligations to Student for the school year prior to his residency in District, and no such authority appears to exist. Consequently, Student's claims against District, as they relate to the 2015-2016 school year, are denied.

#### ISSUE 1(A): THE APRIL 11, 2016 MEETING

12. Student asserts that District denied him a FAPE by failing to make a clear, concise, and formal, FAPE offer on April 11, 2016. Student bases this claim on District's failure to complete an IEP team meeting and to offer him a FAPE on April 11, 2016.

13. A school district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union School Dist. v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527 (*Union*).) Here, District does not dispute that it did not make Student a formal, written FAPE offer on April 11, 2016.

14. However, Student's claim is misguided. District was not required to offer Student a FAPE on April 11, 2016. As described herein, District did not have a duty to

offer Student a FAPE during the 2015-2016 school year, other than to have an IEP offered by the beginning of the 2016-2017 school year. District met that obligation when it offered Student a FAPE on May 17, 2016, several months prior to the start of the next academic year. Student was still a resident of Solano Beach, and received an IEP at Solano Pacific, a Solano Beach school, through June 10, 2016. Student failed to provide any legal authority, and none could be found, that required District to offer Student a FAPE on April 11, 2016.

15. Moreover, any failure by District to offer Student a FAPE on April 11, 2016, was attributable to Student. On that date, District attempted to convene an IEP team meeting. The purpose of the meeting was not to offer Student a FAPE for the 2015-2016 school year, but to transition Student from Solano Beach to District the following academic year. District was prepared to meet that day, but the IEP team meeting did not commence because Grandparents had a dispute amongst themselves. On that basis, Student's advocate requested that the meeting be postponed, and District obliged that request. It was therefore not possible for District to convene an IEP team meeting, or to offer Student a FAPE, on April 11, 2016. Nor was District required to do so.

16. Consequently, Student failed to show by a preponderance of the evidence that District denied him a FAPE, by failing to make a clear, concise, and formal, FAPE offer on April 11, 2016. Therefore, Student's issue is denied.

#### ISSUE 1(C): FAILING TO MAKE A COMPARABLE FAPE OFFER

17. Student next alleges that District denied him a FAPE by failing to make an offer in its May 17, 2016 IEP, which was comparable to Solano Beach's March 9, 2016 IEP. Student asserts that District was bound to offer a comparable program to the one provided by Solano Beach, because he transferred between the school districts.

18. In the case of a child with a disability who transfers school districts within

the same academic year, enrolls in a new school, and who had an IEP that was in effect in the same state, the school district shall provide that student services comparable to those described in the previously held IEP, until such time as the school district develops a new IEP that is consistent with Federal and State law. (34 C.F.R. § 300.323(e).) Here, the foregoing authority is not applicable and District did not have a duty to offer a comparable IEP to the one provided by Solano Beach.

19. The above authority is not applicable to this matter because Student did not transfer during an academic year. There is no question that Student completed the 2015-2016 academic year at Solano Pacific, within the jurisdiction of Solano Beach. Student was not in District's jurisdiction until the following academic year. Thus, District was not required, and would not have been able, to provide Student a comparable educational program during the 2015-2016 school year. Although District attempted to convene an IEP team meeting in April 2016, and offered an IEP in May 2016, that does not mean that Student transferred to District at that time. Student attended, and received an IEP, at Solano Pacific, a Solano Beach school, through June 10, 2016. Rather, District's FAPE offer was for the following academic year, 2016-2017. Moreover, a school district is only required to provide a comparable educational program for a transfer student until the school district develops a new IEP. Here, District developed a new IEP for Student on May 17, 2016, prior to Student's transition to District. Hence, District was not required to offer a comparable IEP to the March 9, 2016 IEP, outside of its duty to offer a FAPE, which will be discussed herein.

20. For the foregoing reasons, Student failed to show by a preponderance of the evidence that District denied him a FAPE, by failing to offer a comparable IEP to the one provided by Solano Beach. Consequently, Student's claim is denied.



## ISSUE 1(E): MAKING IEP CHANGES OUTSIDE OF AN IEP TEAM MEETING

21. Student complains that, during the 2015-2016 and 2016-2017 school years, District modified his educational program without Grandparents' consent, and outside of an IEP team meeting.

22. Generally, parents must consent to an IEP before it can be implemented. (20 U.S.C. § 1414(a)(1)(D)(i)(II); 34 C.F.R. § 300.300(b); Ed. Code, § 56346, subd. (a).) Parents may consent to changes in an IEP either by agreeing to a new IEP or by executing an addendum to the existing IEP. (20 U.S.C. § 1414(d)(3)(D), (F); 34 C.F.R. § 300.324(a)(4)(i), (a)(6); Ed. Code, § 56380.1, subds. (a), (b).) The only way an IEP can be imposed on a student without parental consent, or changed without parental consent, is by the order of a judge or hearing officer after a due process hearing sought by the district for the purpose of overriding the lack of parental consent. (Ed. Code, § 56346, subds. (e), (f).) "Among the central procedural safeguards in the IDEA and related California statutes is the right of parents to be involved in the development of their child's educational plan." (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882. (*Amanda J.*))

23. During hearing, Student abandoned this claim as to the 2015-2016 and 2016-2017 school years. He provided no documentary evidence, or witness testimony, to support that District made any changes to his educational program outside of an IEP team meeting. Neither Grandfather nor Dr. Frampton testified that District had changed any services during that time. Moreover, the claim does not make sense because Student did not attend District during the 2015-2016 or 2016-2017 school years. Student attended Solano Beach during the 2015-2016 school year. District was therefore unable to make any changes to Student's educational program during that time. For the 2016-2017 school year, Student was privately placed at NewBridge School; Student did not consent to District's services, and District did not provide him services, during that

school year.

24. In his closing brief, Student points out that District was not providing Student 940 minutes of specialized academic instruction when he attended Earl Warren, during the 2017-2018 school year. On this basis, Student asserts that District changed his IEP. However, although the May 2016 IEP offered Student 940 minutes of weekly specialized academic instruction, Grandparents did not consent to that IEP. Rather, District was providing Student stay put placement and services, based upon the last agreed upon IEP, March 9, 2016; which called for 670 minutes of weekly specialized academic instruction. The additional specialized academic instruction, including a reading support class, was only included in the May 2016 IEP, which had not been consented to by Grandparents. Therefore, District was not able to provide that service.

25. Next, Student asserts that District would be unable to provide Student 940 minutes of weekly specialized academic instruction during the 2017-2018 school year, without modifying his schedule to eliminate his physical education class. Because Grandparents had not consented to that modification, District would have to change his IEP, without Grandparents' consent. Student's argument fails on many levels. First, Student's claim is not ripe, as it is only speculative and has not yet materialized. Next, the claim does not relate to the 2015-2016 or 2016-2017 school years, the years identified in Student's issue. Finally, the claim is contrary to a preponderance of evidence submitted in this matter. Although Dr. Frampton opined that District would be unable to implement the entire May 17, 2016 IEP without a physical education waiver, she was not familiar with District's classes or schedule. Ms. Hazlewood more persuasively testified that District was able to implement the entire May 17, 2016 IEP, with physical education and during the regular school day. Ms. Hazlewood was familiar with District's placement, classes and schedule, and credibly described that Student could receive the full 940 minutes of weekly specialized academic instruction, without

eliminating physical education, at Earl Warren. Consequently, Student's claim fails.

26. For the foregoing reasons, Student failed to prove by a preponderance of the evidence that District denied him a FAPE, by changing his IEP without Grandparents' consent.

#### ISSUES 1(B) AND (D), AND ISSUE 2: THE MAY 17, 2016 IEP

27. Student alleges that the May 17, 2016 IEP was not appropriate. Student complains that District failed to make a clear, concise, and formal, offer of FAPE. Student also complains that the IEP was not individualized to his needs. Instead, Student asserts that he requires placement at a nonpublic school to receive a FAPE.

28. District's sole issue asserts that it offered Student a FAPE in the least restrictive environment, pursuant to the combined IEPs of April 11, 2016, and May 17, 2016 IEP. As found herein, District did not make a FAPE offer on April 11, 2016, nor was it required to do so. Therefore, District's issue will be limited to the May 17, 2016 IEP.

29. District requests an order that it may implement the May IEP, without Grandparents' consent. When a school district seeks to demonstrate that it offered a FAPE, the legal analysis consists of two parts. 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 reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

#### Required IEP Team Members

30. An IEP is developed by an IEP team. The IEP team must include: (1) one or both of a student's parents; (2) no less than one general education teacher; (3) no less than one special education teacher or, if appropriate, a special education provider of the student; (4) a representative of the district who is qualified to provide or supervise

specially designed instruction, and is knowledgeable about the general education curriculum and the availability of district resources; (5) an individual who can interpret the instructional implication of assessment results; (6) at the discretion of the parent(s) or district, any other individual who knowledge or special expertise regarding the student, including related services personnel, as appropriate; and (7) whenever appropriate, the student with exceptional needs. (20 U.S.C. § 1414(d)(1)(B); 34 C.C.R. § 300.321(a); Ed. Code, § 56341, subd. (b).) Required team members may be excused from an IEP meeting if the parent and school district consent in writing, and the excused member provides written input to the IEP team prior to the meeting. (20 U.S.C. § 1414(d)(1)(C); 34 C.F.R. § 300.321(e)(2); Ed. Code § 56341, subd. (f).)

31. The May 17, 2016, IEP team included Student's parents, Grandfather and Grandmother, and their education advocate Dr. Frampton. District invited colleagues from Solano Beach who were familiar with Student's individual needs to attend the meeting. Solano Beach staff included education specialist Ms. Monahan, school psychologist Mr. Parsons, and program specialist Ms. Lain. District staff included school psychologist Ms. Yellen; assistive technology specialist Ms. Dunn; speech and language pathologist Ms. Chowdhury; Ms. Beccarino and Ms. Bischke, occupational therapists; Ms. Campisano, education specialist; Ms. Clark, general education teacher; and Ms. Hazlewood, program supervisor. Each team member was qualified to discuss the area of service he or she provided. For example, Mr. Parsons was a school psychologist with years of experience assessing and treating students with attention disorders and specific learning disorders. Ms. Monahan was an education specialist who taught Student's learning center class at the time of the IEP team meeting. Mr. Parsons and Ms. Monahan had each formally assessed Student. Ms. Lain was an experienced educator who had taught both general education and learning center classes. Ms. Hazlewood was an experienced educator and administrator, who had recently observed Student at school

and toured District schools with Grandparents. Along with other District team members, Ms. Hazlewood was familiar with the services and placements offered in District, including those provided at Earl Warren. A school psychologist, general education teacher, and occupational therapist from District were also present during the meeting. During hearing, there was no question raised as to the qualifications or make up of the IEP team. By the foregoing authority, District met its obligation to include necessary IEP team members.

### Procedural Safeguards

32. State and federal law require districts to provide the parent of a child eligible for special education with a copy of a notice of procedural safeguards upon initial referral, and thereafter at least once a year, as part of any assessment plan, and at other designated times. (20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.504(a); Ed. Code, § 56321, subd. (a).) The notice must include a full explanation of all procedural safeguards and be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent. (20 U.S.C. § 1415(d)(2); 34 C.F.R. §§ 300.503(c)(1) & 300.504.) Furthermore, at each IEP team meeting, the district must inform a parent of state and federal procedural safeguards. (Ed. Code, § 56500.1, subd. (b).) District provided Grandparents a copy of the procedural safeguards at the beginning of the May 17, 2016 IEP team meeting. The notice included a complete description of all procedural safeguards, was easy to understand, and was in English, Grandparents' native language. Consequently, District met the requirements prescribed by the foregoing authority.

### Parental Participation and Prohibition Against Predetermination

33. Special education law places a premium on parental participation in the IEP process. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a).)

Parents must have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a); *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043 [“Parental participation ... is critical to the organization of the IDEA.”].) Parental participation in the IEP process is considered “[A]mong the most important procedural safeguards.” (*Amanda J.*, *supra*, 267 F.3d at p. 882.)

34. Predetermination of an IEP offer violates the above requirement. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-858 (*Deal*); *H.B. v. Las Virgenes Unified School Dist.* (9th Cir. July 3, 2007, No. 05-56485) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) A school district cannot independently develop an IEP, without meaningful parental participation, and then present the IEP to the parent for ratification. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, superseded on other grounds by statute (*Vashon Island*); *Target Range*, *supra*, 960 F.2d 1479, 1484.)

35. Evidence established that Grandparents actively participated during the May 2016 IEP team meeting. Grandmother, Grandfather, and Student’s educational advocate Dr. Frampton, each attended the IEP team meeting. Along with qualified staff from both Solano Beach and District, Grandparents and their advocate were vocal participants in the meeting. They asked questions and shared data regarding Student. District solicited, considered, and incorporated input from Grandfather, Grandmother and Student’s advocate. District amended the IEP to reflect Grandparents’ and Dr.

Frampton's concerns. For example, District increased Student's specialized academic instruction to address Grandparents' concerns that Student needed additional reading support. On that basis, District added a reading support class to his weekly schedule. Grandfather and Dr. Frampton, along with District witnesses who were present at the May 2016 IEP team meeting, testified that Grandparents actively participated during the IEP team meeting. There was no evidence submitted that refuted that testimony. Overall, Grandparents shared their perspectives on Student's needs, asked questions, proposed changes, and discussed various elements of the IEP. District considered and incorporated Grandparents' input into the IEP offer. Therefore, a preponderance of evidence shows that District did not predetermine the May 17, 2016 IEP, and permitted Grandparents to participate in the development of Student's educational program.

#### Necessary Considerations

36. In developing the IEP, the IEP team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A)(ii); 34 C.F.R. § 300.324(a), (b)(1)(ii); Ed. Code, § 56341.1, subds. (a), (d).)

37. School districts, as part of a special education local plan area, must have available a continuum of program options to meet the instructional and service needs of special education students. (34 C.F.R. § 300.115(a); Ed. Code, §56360.) This continuum of program options must include, but is not limited to, regular education; resource specialist programs; designated instruction and services; special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and

instruction using telecommunication in the home, hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.) In determining placement, a school district must consider a continuum of alternative placements. (34 C.F.R. § 300.115(b); Ed. Code, § 56342, subd. (b).) A school district is only required to consider those placements in the continuum that may be appropriate for a particular child. There is no requirement that the IEP team members discuss all options, so long as alternative options are available. (*L.S. v. Newark Unified School Dist.*, (N.D.Cal, May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, p. 6.)

38. Here, District considered all necessary information during the May 2016 IEP team meeting, including Grandparents' input; the concerns and proposals of Grandparents and Student's advocate; input from Student's present educator at Solano Beach; and input from qualified District staff. Student's strengths, needs, and behaviors; the results of recent assessments; and progress towards goals, were all considered. Student had received special education in the learning center and regular education classes. He required small group instruction for reading, writing and math. For other classes, including social studies, science, and electives, Student was able to access his curriculum in the general education environment with the provision of accommodations and related services.

39. The IEP team considered a continuum of educational placements, including regular education, special day classes, learning center classes, fundamental classes, and non-public schools. While Grandfather and Dr. Frampton wanted a nonpublic school for Student, District staff carefully reviewed different placement options and determined that Student would benefit from regular education, learning center, reading support, and fundamental classes for English and math. During hearing, District witness, including Ms. Emberger, Ms. Dekker, Ms. Bischke, and Ms. Hazlewood, persuasively described that a placement that included those classes, at a comprehensive



campus, met Student's individual needs. Solano Beach educators, including Mr. Parsons, Ms. Monahan, and Ms. Lain, testified in support of those same classes for Student. The fundamental English and math classes, and the reading support class, were small, structured classes taught by special education certified teachers, using small group and individual instruction. Each class used multi-modality and differentiated instruction, individualized to Student's needs. The learning center offered additional support for Student in writing, reading, math, and organization. The regular education classes provided Student an opportunity to model typical peers, a benefit that could not be offered in a nonpublic school like NewBridge. Student's emotional challenges were successfully addressed through counseling and accommodations, and he did not demonstrate behavior problems that required a more restrictive environment. In sum, District appropriately reviewed all available data and a continuum of placement options for Student.

#### Required IEP Contents

40. Federal and State law specify in detail what an IEP must contain. Among other things, it must include a statement of the student's present levels of academic achievement and functional performance, including the manner in which the student's disability affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general curriculum; and (2) meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP team develops measurable annual goals that address the student's areas of need and which the student has a

reasonable chance of attaining within a year. (Ed. Code § 56344; *Letter to Butler* (OSERS Mar. 25, 1988) 213 IDELR 118; U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,471 (1999 regulations).) The purpose of goals is to assist the IEP team in determining whether the student is making progress in an area of need. As such, the IEP must also contain a statement of how the student's goals will be measured and when the parent will receive periodic reports on the student's progress towards his goals. (20 U.S.C. §1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the offered educational services. (Cal. Code Regs., tit. 5, § 3040, subd. (b).) Here, the May 17, 2016 amendment IEP, incorporated the March 9, 2016 annual IEP goals.

41. The March 2016 goals were formulated after a thorough review of Student's individual needs by qualified staff. Student had delays in reading, writing, math, anxiety, editing, planning and organization, which required intervention. To meet those areas of need, the Solano Beach IEP team carefully crafted nine annual goals. Goals one and two addressed reading delays. The third goal addressed writing. Goals four and five sought to remediate math delays. The sixth goal, in self-regulation, sought for Student to use coping strategies to self-regulate when emotionally distressed. Goal seven, in task completion, called for Student to increase his ability to complete homework and classwork assignments. Goal eight, in editing, addressed reading, spelling and writing delays. The last goal was to increase Student's planning and organization skills. Each goal had measurable baselines and objectives, and was designed to be met after one year. The goals addressed Student's individual needs and provided a meaningful way of measuring progress towards each area of deficit. During hearing, each witness that was familiar with the March and May 2016 IEPs testified in support of the goals. In fact, Grandfather and Student's advocate, Dr. Frampton, praised the goals and the

manner in which they were developed. Scant evidence was provided that impugned the goals in any manner. Student's needs had not changed in the intervening two months between the annual IEP and the May 2016 amendment IEP. It was therefore appropriate for District to adopt the March 2016 goals.

42. An IEP must also include a statement of the special education and related services which will be provided to the student, with a projected start date as well as the anticipated frequency, location, and duration of services. (20 U.S.C. § 1414(d)(1)(A)(i)(IV) &(VII); 34 C.F.R. § 300.320(a)(4) and (7); Ed. Code, § 56345, subd. (a)(4)& (7).)

Additionally, the IEP must explain the extent to which the student will not participate with non-disabled children in a regular class or other activities; a statement of required program modifications or supports that will be provided to the student to allow him 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; and a statement of individual accommodations necessary to measure the student's performance on State and district-wide assessments. (20 U.S.C. § 1414(d)(1)(A)(i)(IV)-(VII); 34 C.F.R. § 300.320(a)(4)(5)(6) & (7); Ed. Code, § 56345, subds. (a)(4)-(7).) Here, the May 17, 2016 IEP document described specific accommodations and services. For example, the IEP offered Student 30 minutes weekly of group counseling services; 30 minutes weekly of group occupational therapy, and 940 minutes weekly of specialized academic instruction. Specialized academic instruction would be provided in fundamental English, fundamental math, reading support, and learning center classes. Those services were offered for the 2016-2017 school year, during which Student would be removed from regular education 48 percent of the school day. By the foregoing authority, the IEP sufficiently described the special education that was offered.

43. By the foregoing authority, the May 2016 IEP included all of the statutorily

required items. For instance, it included: Student's present levels of academic achievement and functional performance; an analysis of how Student's disability affected his involvement and progress in the general education curriculum; a statement of nine measurable, annual goals designed to meet Student's unique needs and allow him to make educational progress; a statement of how Student's goal performance would be measured and reported to Grandparents; a description of accommodations and related services; along with projected start dates and duration, frequency, and location of services, supports, and accommodations; and the percentage of time Student would not be participating in the general education setting with typical peers.

#### CLEAR IEP OFFER

44. Student alleges that Grandparents were not provided a clear, concise, and formal, FAPE offer.

45. An IEP offer must be sufficiently clear that a parent can understand it and make an intelligent decision based on it. (*Union, supra* at p. 1527.) In *Union*, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. (*Ibid.*) The IEP is to be read as a whole. There is no requirement that necessary information be included in a particular section of the IEP if that information is contained elsewhere. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d)(2); Ed. Code, § 56345, subd. (h).)

46. District held an IEP team meeting for Student on May 17, 2016. The IEP was an amendment of the March 9, 2016 annual IEP offered by Solano Beach. The May 2016 IEP team meeting was incorporated into a complete, written IEP document. The document incorporated the March 9, 2016 goals, and described in detail the IEP accommodations; duration, frequency and type of related services; and the educational

placement. The IEP document delineated that Student would be removed from regular education for 48 percent of the school day.

47. Grandparents and Dr. Frampton attended both the March 2016 annual IEP, and the May 2016 amendment IEP team meeting. District provided Grandparents a copy of procedural safeguards and invited Grandparents and Student's advocate to participate during the meeting. Grandparents and Student's advocate shared concerns regarding Student's educational progress, anxiety, and reading deficits. District modified the IEP offer based on those concerns, including adding a reading support class. Grandparents understood the accommodations, goals, services, and placement, offered by District. Grandparents, through their advocate, indicated their dissent, in writing, on the IEP document. During hearing, it was clear that Grandfather and Dr. Frampton fully understood the FAPE offer, and were able to form an opinion on that basis to disagree with the offer at the time of the IEP team meeting.

48. At the conclusion of the May 2016 IEP team meeting, District provided Grandparents and Dr. Frampton a copy of the IEP. The next day, on May 18, 2016, Dr. Frampton wrote Grandparents a letter that described the IEP FAPE offer, and her opinion why Grandparents' should continue to dissent to the offer.

49. On July 26, 2016, prior to the commencement of the 2016-2017 school year, Ms. Hazlewood sent Grandparents and Dr. Frampton a prior written notice letter, which detailed the FAPE offer, and included another copy of the IEP, and the procedural safeguards. On July 27, 2016, Dr. Frampton wrote Ms. Hazlewood a letter which, again, described the FAPE offer, and rejected the offer.

50. Consequently, overwhelming evidence supports that Grandparents had a copy of the May 17, 2016 IEP, and fully understood the FAPE offer, to be able to make an informed decision to accept or reject the offer.

51. Nonetheless, Student claims that District did not provide Grandparents a

clear, concise, and formal, offer of FAPE. In support of that claim, Dr. Frampton and Grandfather testified that District did not make a FAPE offer for the 2016-2017 school year. However, that testimony was incongruent with the IEP document, Dr. Frampton's May 18, 2016, and July 27, 2016 letters, and Ms. Hazlewood's July 26, 2016 letter. Dr. Frampton's letters described the FAPE offer, and are clear evidence that she, and Grandparents, understood the FAPE offer. Moreover, although Grandfather and Dr. Frampton could not recall if they received a copy of the IEP at the conclusion of the May 2016 meeting, Ms. Hazlewood persuasively recalled that District staff made copies of the IEP, and provided Grandparents a copy, at the end of the meeting. Finally, there is no question that Grandparents and Dr. Frampton received a copy of the IEP on July 26, 2016, included with District's prior written notice letter. Consequently, Grandparents received a clear, concise, and formal, FAPE offer for Student prior to the commencement of the 2016-2017 school year.

52. In sum, the May 17, 2016 IEP provided a clear, written offer of FAPE. The IEP document provided sufficiently clear details as to the proposed placement and services such that Grandparents could reasonably be expected to understand it and decide whether to accept the offer. Grandparents and their advocate understood the offer and, on that basis, were able to formulate a dissent to the offer.

53. Based upon the foregoing, Student failed to meet his burden to prove by a preponderance of the evidence that District denied him a FAPE, by failing to make a clear, concise, and formal, FAPE offer on May 17, 2016.

54. Overall, District complied with the procedures set forth in the IDEA in developing Student's May 17, 2016 IEP. District provided Grandparents all of the procedural protections to which they were entitled, and involved Grandparents in the process of developing Student's program. The proposed IEP included all the content required by law, and the IEP team members took into account necessary considerations.

In summary, the IEP was procedurally valid.

## SUBSTANTIVE VALIDITY OF IEP OFFER

### Unique Needs

A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, behavior, communicative, physical, and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501, abrogated in part on other grounds by *Schaffer v. Weast, supra*, 546 U.S. 49, 56-58, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) In addition, educational needs include functional performance. (Ed. Code § 56345, subd. (a)(1).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also 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 (*San Diego*).)

55. The IEP must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) A school district is required to provide educational instruction, specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from the instruction. (*Rowley, supra*, 458 U.S. 176, 188-189; *San Diego, supra*, 93 F.3d at p. 1468.)

### Evaluating the IEP Offer

56. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.*) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) However, "after-acquired evidence may shed light on the objective reasonableness of a

school district's actions at the time the school district rendered its decision." (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1004 [citing *Adams, supra*, 195 F.3d at p. 1149].)

57. 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, not that preferred by the parent. (*Gregory K., supra*, 811 F.2d at p. 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 child. (*Ibid.*) For a school district's offer of special education services to constitute a FAPE under the IDEA, the offer must be designed to meet the student's unique needs, comport with the his IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Id.* at 1314-1315; *Rowley, supra*, 458 U.S. 176, 203.)

59. An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education designed according to the parent's desires."].) A school district has the right to select the service provider so long as the provider is able to meet the student's needs. The IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*Slama v. Independent School Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885 [refusal to assign service providers of parent's choice does not result in a denial of a FAPE.]; *N.R. v. San Ramon Valley Unified School Dist.* (N.D.Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323, at p.7; parents are not entitled to their preferred provider.].) 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. 176, 208.) Consequently, the present analysis is not whether Grandparents' preferred placement at NewBridge was appropriate, but whether District



offered Student a FAPE.

60. Evidence overwhelmingly showed that District's offer was substantively appropriate. For example, District developed Student's May 17, 2016 IEP, based upon current assessments and information from Grandparents, qualified educators from Solano Beach, and qualified District staff. Data included information regarding Student's cognitive abilities; academics; social-emotional; occupational therapy; and assistive technology, which represented all areas of suspected need stemming from his disability and related to his education. Qualified District staff observed Student at school; consulted with his teachers at Solano Pacific; interviewed Grandparents; and reviewed his school records, including psychological and academic testing. The May 2016 IEP team meeting was attended by a school psychologist, Mr. Parsons, and teachers, Ms. Monahan and Ms. Lain, who had directly assessed and taught Student. A qualified school psychologist, and qualified teachers, from District were also present. Qualified staff from Solano Beach and District, with Grandparents and Student's advocate, collaborated in developing an educational plan.

61. The IEP properly took into account all of Student's individual needs. The IEP team reviewed Student's present levels of academic, social, and emotional performance. Student was motivated but had delays in reading, writing, and math. He had difficulty in organization and planning, and following instructions. To meet those needs, District adopted the nine goals offered in the March 9, 2016 annual IEP. Student's advocate, Dr. Frampton, testified that those goals were based on valid testing and appropriate to meet Student's individual needs. Mr. Parsons, Ms. Monahan, Ms. Lain, Ms. Dekker, Ms. Emberger, Ms. Hazlewood, and Ms. Bischke, similarly testified that the goals were appropriate to meet Student's unique needs. Student's needs had not changed since the annual IEP, and there was no reason for District to change the goals in May 2016. In sum, the goals were a meaningful and measurable way to address Student's

individual needs.

62. To meet those goals, the IEP offered Student the following services: specialized academic instruction in a separate classroom, in a small group, 940 minutes weekly; counseling services, 30 minutes weekly; and occupational therapy, 30 minutes weekly. In addition, to support Student throughout the school day, the IEP included the following accommodations: preferential seating; access to a quiet work environment for testing and assignments; extended time to complete assignments and tests; access to a multiplication chart, number line, place value chart, and calculator; test directions and questions read aloud; reduced number of problems on homework; visual and verbal reminders; verbal and visual modeling of expectations and directions; frequent breaks and opportunities for movement; access to a quiet setting for down-time; self-regulation strategies; access to a word processor; access to an adult instructional aide in regular education classes, 900 minutes weekly; access to spell check and word banks for tests; audio books; and access to the learning center throughout the school day.

63. The specialized academic instruction would be provided in a fundamental English class, fundamental math class, reading support class, and a learning center class. Each class was 235 minutes per week, totaling 940 minutes weekly. The learning center class was provided at a set time each week and was in addition to the learning center accommodation, which permitted Student to access the learning center fluidly throughout the school day, when he felt that he needed extra support. An aide provided Student an additional 900 minutes of specialized academic instruction each week in the general education classes. District also offered transportation and extended school year services. District offered placement at Earl Warren, because that school had the learning center, fundamental classes, reading support, and regular education that Student required.

64. Ms. Emberger, Ms. Dekker, Mr. Parsons, Ms. Monahan, Ms. Lain, Ms.

Hazlewood, and Ms. Bischke persuasively testified in support of the accommodations, services, and placement. Each witness supported the duration and frequency of the specialized academic instruction. Ms. Bischke's testimony that the level of occupational therapy services was appropriate went unchallenged by Student. The school psychologists, Mr. Parsons and Ms. Emberger, persuasively supported the appropriateness of the counseling services.

65. Student's experts, Dr. Frampton and Mr. Mayo, objected to Student receiving any part of the school day outside of a small, structured, special day class at a nonpublic school. However, they provided little insight regarding District's FAPE offer. Student's experts failed to coherently describe additional or alternative goals or services, which should have been offered in place of District's offer. Inconsistent testimony also diminished the persuasiveness of their testimony. For example, Dr. Frampton alternately praised the March 2016 goals, while agreeing with Mr. Mayo that the goals were defective. Mr. Mayo criticized the goals for placing Student at fifth, sixth and seventh grade levels, yet he supported the NewBridge goals, which used similar grade levels. Nonetheless, it was Dr. Frampton and Mr. Mayo's lack of familiarity with District's placement and services that cemented their inability to provide persuasive testimony.

66. Similarly, Grandfather's testimony failed to describe why the May 17, 2016 IEP was not appropriate. In significant part, Grandfather deferred to Dr. Frampton's opinion that the May IEP was not individualized to Student's needs. That testimony was contradicted by overwhelming evidence that District had based its IEP offer on a careful review of Student's past and present educational needs. Like Dr. Frampton, Grandfather was unable to reconcile his praise for Solano Beach's educational program, while disagreeing with the similar program offered by District. Consequently, Grandfather's testimony was not as persuasive as District's witnesses, who unanimously supported the May 2016 IEP.

67. Based upon the foregoing, a preponderance of evidence showed that the goals, accommodations, and services offered in the May 17, 2016 IEP, were appropriate to meet Student's unique needs.

#### Placement in the Least Restrictive Environment

68. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (a)(2); Ed. Code, §§ 56031, 56033.5, 56040.1, subd. (b) 56342, subd. (b).) The IDEA also requires, to the maximum extent appropriate, that a child with a disability must be educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1, subd. (a).)

69. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: the educational benefits of full-time placement in a regular classroom; the non-academic benefits of full-time placement in a regular classroom; the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and the cost of placing the child with a disability full-time in a regular classroom. (*Vashon Island, supra*, 337 F.3d at pp. 1136-1137; *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.

70. Here, Student seeks to place Student in a more restrictive placement, a nonpublic school. Placement at NewBridge, or a similar nonpublic school, would remove Student completely from regular education and prohibit him from interacting with

typical peers at school. Overwhelming evidence shows that Student benefited from placement at a comprehensive school. The March 2016 annual IEP team first reviewed Student's performance in the learning center and regular education classes. Student did well in both environments. He met five of seven annual goals, in reading, decoding, writing, math, math problem solving, and self-regulation, and made progress towards the remaining goals. Student had a positive attitude towards school and was highly motivated to work with his peers. He independently followed classroom routines and school procedures. He independently transferred between all classes, including the learning center and regular education classes. In regular education, he followed directions well in a large group and worked well with his peers. Student benefited from peer modeling in regular education, and was well liked by peers and teachers. Student received social studies and science in regular education. With accommodations, Student performed well in regular education and actively participated in class discussions and projects. He worked well with his typical peers and enjoyed the social interaction he received during regular education. Student raised his hand to speak, regulated the tone of his voice, followed class rules, self-advocated, and requested help when appropriate. Student was highly motivated and enjoyed being in regular education classes with typical peers. Accommodations had allowed Student to successfully access regular education. Emotionally, Student successfully utilized self-regulating strategies and had shown a decrease in anxiety and emotional dysregulation. Student was comfortable and worked well with the regular education teachers, aides, service providers and other school staff.

71. For reading, writing and math, Student required the structure of a mild-to-moderate special day class. The learning center, fundamental English, fundamental math, and reading support classes met those needs. With small group instruction, Student read and understood grade level texts, and was approaching grade level in

writing and math. The learning center, fundamental English, fundamental math, and reading support classes provided small group and individual instruction at a slower pace than regular education. With a cap of 15 students, one teacher and an adult aide, the student-to-adult ratio was less than the eight-to-one student-to-adult ratio at NewBridge. Moreover, with aide support, Student was able to receive one-to-one instruction at District's school, a benefit not offered at NewBridge.

72. Student made steady progress across all areas of deficit, each year he attended a comprehensive campus. As of the hearing, Student attended a combination of special education and regular education classes at Earl Warren. Student was participating in each class, completing assignments and tests, receiving passing grades, and positively socializing with peers and teachers.

73. Given those facts, Mr. Parsons, Ms. Monahan, Ms. Lain, Ms. Emberger, Ms. Dekker, Ms. Bischke, and Ms. Hazlewood persuasively testified that an education program consisting of specialized academic instruction, counseling, and occupational therapy, delivered with accommodations and aide support in small, special education classes, along with regular education classes, was appropriate and the least restrictive environment to meet Student's individual needs. Student benefited academically and non-academically in regular education and the small group classes offered by District. He was not overly disruptive and it was not cost-prohibitive to maintain his placement at a comprehensive campus.

74. In contrast, Student provided negligible evidence that he required a more restrictive placement. Mr. Mayo and Dr. Frampton's testimony that Student was too delayed to benefit from a comprehensive campus was contradicted by a preponderance of evidence submitted during hearing. For example, the March 2015 assessments and March 2016 IEP showed the he made steady progress and was able to, with accommodations, access grade level instruction at Solano Pacific. Progress reports

showed Student was able to meet grade level goals at NewBridge. The May 2017 assessments showed that Student's individual needs could still be met at Earl Warren, a comprehensive campus.

75. Similarly, Grandfather's concern that Student demonstrated learning delays despite years of varying degrees of special education services, failed to substantiate that Student required a more restrictive placement at a nonpublic school. Grandfather's testimony was outweighed by substantial evidence, including the March 2016 IEP, testing leading up to that IEP, and testimony from Mr. Parsons, Ms. Monahan, and Ms. Lain, which showed that Student had received a meaningful educational benefit at public school.

76. In his closing brief, Student argues, for the first time, that he was not provided a FAPE at Solano Beach because he continued to have learning delays. Student extrapolates from that theory and asserts that District's May 2016 IEP denied him a FAPE because it was similar to Solano Beach's IEP. In sum, Student argues that both Solano Beach and District denied him a FAPE because he had not achieved grade level standards, despite having received a staggering amount of special education services over the years. Student misinterprets District's role. District did not fail to offer Student a FAPE because the program offered would not cure him of his disabilities. Rather, District's obligation was to provide an education program that was reasonably calculated to enable Student to make progress appropriate in light of his circumstances. (*Endrew F. supra*, at 197.) District properly identified Student's learning disorders and offered him a solid educational plan that was appropriately ambitious in light of his capabilities. The plan began with measurable, annual goals in reading; decoding; writing; math; self-regulation; task completion; editing; planning; and organization. To meet those goals, District offered various accommodations; an aide; weekly counseling; weekly occupational therapy; and 940 minutes each week of specialized academic

instruction. Additionally, District offered transportation and extended school year services, because Student's individual needs required instruction during the summer. No area of academic concern was left unaddressed. The team considered Student's non-academic needs as well. Weekly counseling had steadily reduced Student's anxiety, and taught him how to successfully self-regulate when he felt frustrated or anxious. Student was not overly disruptive and did not have behaviors that impacted his education or that of others. To the contrary, Student followed directions, interacted appropriately with peers and teachers, and benefited from modeling his typical peers. In sum, the education program offered by District took into account all of Student academic, social, and emotional needs, and appropriately addressed those needs.

77. The May 17, 2016 IEP was District's last FAPE offer for Student at the time of the hearing. After that IEP, District attempted, but was unable to complete, a subsequent IEP offer. However, in May 2017, District assessed Student and completed a multidisciplinary psychological report. This was the last assessment of Student prior to the hearing. Qualified assessors, Ms. Emberger and Ms. Dekker, reviewed Student's educational and health records; interviewed Student, Grandparents, and NewBridge teachers; observed Student; and formally assessed Student using various standardized tests and inventories. As of the hearing, each assessor had observed Student NewBridge and at Earl Warren. Ms. Dekker was Student's case manager at Earl Warren, and had taught Student during the 2017-2018 school year. Ms. Emberger and Ms. Dekker were knowledgeable of Student's unique needs and persuasively testified that his present needs were consistent with the areas addressed in the May 2016 IEP. Each witness persuasively described that the May 17, 2016 IEP was appropriate to meet Student's present educational needs.

78. Based upon the foregoing, District proved by a preponderance of evidence that the May 17, 2016 IEP offered Student a FAPE in the least restrictive



environment. District established that it complied with all necessary legal requirements in developing the IEP, such that it may implement the IEP in its entirety without Grandparents' consent.

79. In contrast, Student failed show by a preponderance of evidence that he was denied a FAPE because District's FAPE offer was not clear or formal, or because the May 17, 2016 IEP failed to meet his unique needs. Therefore, Student's claims are denied.

## ORDER

1. Student's claims for relief are denied.
2. District's IEP offer of May 17, 2016, was appropriate. That IEP offer shall constitute Student's educational program, until another IEP is mutually agreed upon or ordered. Should Student attend a District school, District may implement the IEP without Grandparents' consent.

## PREVAILING PARTY

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

## 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).)

DATE: November 9, 2017

/s/

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PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearings