

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

FAIRFIELD-SUISUN UNIFIED SCHOOL  
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2017051304

DECISION

The Fairfield-Suisun Unified School District filed a request for due process hearing with the Office of Administrative Hearings on May 26, 2017, naming Student. Administrative Law Judge Charles Marson heard this matter in Fairfield, California, on August 15 and 16, and October 3, 2017.

Jan E. Tomskey, Attorney at Law, represented Fairfield-Suisun. Tom Anderson, Fairfield-Suisun's Director of Special Education, represented the District throughout the hearing.

Mother represented Student, with the assistance of advocate David Lewis only on the first day of hearing. Student attended portions of the hearing on the second and third days.

OAH granted Fairfield-Suisun's request for continuance on June 14, 2017. On the last day of hearing, the matter was continued at the parties' request until October 23, 2017, for the filing of written closing arguments. Mother filed a closing argument on October 11, 2017, and Fairfield-Suisun filed a closing argument on October 23, 2017. On

the latter date the record was closed and the matter was submitted.

## ISSUE

Does Fairfield-Suisun's April 10, 2017, individualized education program offer to place Student in the Functional Academics program at Armijo High School constitute the offer of a free appropriate public education, so that Fairfield-Suisun may implement it without Mother's consent?

## SUMMARY OF DECISION

Fairfield-Suisun proved that the program it offered Student in the April 10, 2017 proposed IEP would provide him a FAPE. It proved that Student cannot be satisfactorily educated in his current deaf and hard-of-hearing (DHH) special day class because he cannot adequately understand American Sign Language (ASL), and the pace and curriculum of the class are beyond his abilities. Fairfield-Suisun's proposed placement in the functional academics class offers Student instruction by the multimodal communication he needs and a curriculum suited to his academic and functional performance levels.

Fairfield-Suisun also proved that the proposed IEP contained everything required by law; that its annual goals are measurable and meet all of Student's needs; and that the accommodations, modifications, supports and related services it offers are sufficient for his needs. Fairfield-Suisun may implement the April 10, 2017 IEP without Mother's consent.

## FACTUAL FINDINGS

### JURISDICTION

1. Student was a 14-year-old boy who resided with Mother within the boundaries of Fairfield-Suisun at all relevant times. He was eligible for and receiving

special education and related services in the primary category of intellectual disability and the secondary category of hard of hearing. Student has Down syndrome and moderate to severe hearing impairment in both ears. His intellectual disability greatly restrains his progress.

2. Student was placed for the sixth grade (the 2014-2015 school year) in a special day class emphasizing functional academics at Fairfield-Suisun's David Weir Preparatory Academy. Pursuant to a mediated agreement that settled a due process dispute, Student was transferred two weeks before the end of the school year to a special day class for DHH students, which was taught almost exclusively in ASL.

3. At the start of the 2015-2016 school year, Student began middle school as a seventh grader at the district's Green Valley Middle School, in a special day class for DHH students with mild impairments that was operated by the Solano County Office of Education and taught using ASL. He attended the same class for eighth grade. During seventh and eighth grades, Fairfield-Suisun repeatedly offered to move Student to a County special day class emphasizing functional academics and taught using multimodal communication, and in which other students with cognitive delays were instructed at a slower pace. Mother declined those offers.

4. At a triennial IEP team meeting on April 10, 2017, Fairfield-Suisun offered to place Student, for ninth grade, in a slower-paced County special day class taught with multimodal communication rather than just ASL. Mother again declined the offer, and Fairfield-Suisun then filed this action to obtain an order that it may implement the April 10, 2017 IEP offer without Mother's consent.

5. After the complaint was filed, Student began the ninth grade (the 2017-2018 school year) in a DHH special day class similar to the one he attended in seventh and eighth grades. There Student has a full-time one-to-one aide fluent in ASL; receives instruction in Math, English, Science and History from a DHH teacher whose native

language is ASL; and is mainstreamed for Robotics and Physical Education.

#### PROCEDURAL COMPLIANCE AT THE APRIL 10, 2017 IEP TEAM MEETING

6. Fairfield-Suisun proposed the April 10, 2017 IEP at a meeting attended by all required personnel, after giving Mother ample notice of the meeting. The meeting was lengthy and sometimes acrimonious, but Mother was able to state her views and her objections to the proposed IEP at length. She participated fully in the discussion, received answers to her questions, and obtained two changes in the draft IEP. As shown more fully in the Legal Conclusions, Fairfield-Suisun complied with all procedural requirements in offering the IEP.

7. Mother contends that Fairfield-Suisun violated the procedural requirements of special education laws in four ways. None of her contentions has merit.

#### Choice of Assessor

8. Shortly before Student's triennial assessments were conducted in 2017, Mother notified Fairfield-Suisun that she did not approve of its choice of DHH teacher Katherine Reyes to do an academic assessment, and proposed that the district use Student's classroom teacher Tracy Husted instead. Katherine Reyes is a DHH teacher in Fairfield-Suisun's Green Valley Middle School,<sup>1</sup> where she is a case manager and a

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<sup>1</sup> Ms. Reyes has been employed for five years by the Solano County Office of Education. She has a bachelor's degree in English, with a minor in disability studies, from the University of California at Berkeley, and a master's degree in special education, with an emphasis in deaf education, from National University. She has a clear credential in DHH education. Before Ms. Reyes was employed by the County, she taught through Teach for America in underperforming schools, and in 2008 was employed by West Contra Costa Unified School District, supporting both staff and students in general and

mentor of new teachers. Fairfield-Suisun declined to change the assessors. As shown in the Legal Conclusions, it was not required to do so.

#### Notice of the Meeting

9. At hearing. Mother testified that she did not receive adequate notice of the April 10, 2017 IEP team meeting, though she does not address the issue in her closing brief. Mother testified either she did not receive the original notice or forgot about it, but attended the meeting because Fairfield-Suisun team members texted and called her the morning of the meeting to remind her or ask why she was late.

10. Marianne Duncan is the Assistant Director of Special Education for the Solano County Office of Education,<sup>2</sup> and was responsible for notifying Mother of the April 10, 2017 IEP team meeting. Ms. Duncan supervises DHH programs for the County, which supports the DHH programs in the five school districts the County contains,

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special education classes. She also taught English to fourth through sixth graders. She has taught for almost 10 years. Ms. Reyes is deaf, and testified with the assistance of two ASL interpreters in understanding questions. Her answers were verbal.

<sup>2</sup> Ms. Duncan has bachelor's and master's degrees in communicative science and was a speech and language therapist early in her career. She has clear rehabilitative services and administrative credentials. She also has a certificate of clinical competence from the American Speech-Language Association. Ms. Duncan has been a principal, a dispute resolution facilitator, a program specialist, and a program manager, and has been employed by the County or its Special Education Local Plan Area in those and similar roles for 34 years. She also has taken all the course work required to be certified as an audiologist. She has received many honors and awards for her work with the deaf and hard of hearing.

including Fairfield-Suisun. At hearing, Ms. Duncan authenticated a copy of a meeting notice dated March 29, 2017, and testified with some certainty that she sent the meeting notice well in advance of the meeting, and was careful to mail it personally to Mother's correct address. She also sent it by email and left copies for Mother in the classroom and at the school site. Because Mother was not sure she had received the notice, Ms. Duncan's specific and detailed testimony was more persuasive. The weight of evidence showed that Mother received notice of the meeting well in advance. The District provided a procedurally compliant meeting notice.

#### Composition of the IEP Team

11. The IEP team meeting on April 10, 2017, was attended by Mother; a Fairfield-Suisun administrator; Ms. Duncan for the Solano County Office of Education; Student's special day class and general education teachers; functional academics teachers Christopher Romo and Lisa Linehan; school psychologist Meg Freifeld; specialists in speech and language, occupational therapy, assistive technology, and behavior intervention; an itinerant DHH teacher; and, for part of the meeting, a school nurse. Sarah Spring, Student's contact at the North Bay Regional Center, also attended at Fairfield-Suisun's request. Mother testified that she thought it was improper for Fairfield-Suisun to invite Ms. Spring and that the decision to do so should have been left to her. She also stated that she was unaware that Ms. Spring would attend, and the meeting notice confirms that; it does not announce that any one from the regional center would participate. However, there was no apparent consequence of this oversight; the extensive meeting notes show that the conversation did not touch on matters relating to the regional center, and do not mention any participation by Ms. Spring. Fairfield-Suisun was procedurally compliant in ensuring the attendance of all necessary personnel at the April 10, 2017 meeting.

## Predetermination and parental participation

12. Mother testified she thought the meeting was “staged” and the offer already determined before the meeting, although she appears to abandon this contention in her closing brief. It is not persuasive in any event.

13. Fairfield-Suisun presented a draft IEP at the April 10, 2017 IEP team meeting, based on recent assessment results. Ms. Duncan wrote the notes of the meeting and confirmed their content at hearing. Mother does not challenge the accuracy of the notes except by making the general charge that all the notes in Student’s IEP’s were incomplete. Ms. Duncan wrote in the meeting notes that they were not verbatim, and testified at hearing that in taking the notes she did not intend to address everything that was said. The notes are therefore substantial, though not exhaustive, evidence of what occurred at the meeting. Mother later told administrators that she might write and submit an addendum to the April 10, 2017 meeting notes, but there was no evidence she ever did.

14. Mother began the meeting with a series of complaints. She stated that she had been given inadequate notice of the meeting; she did not receive assessment reports ahead of time; Student’s current placement had been “tampered with”; the DHH staff was biased; and she would only sign in and make a statement, which she did.

15. Fairfield-Suisun nonetheless attempted to present its assessments, proposed goals and placement recommendation. Ms. Reyes’s report was summarized. Mother then asked questions about the proposed functional academics placement, and stated that Student’s experience with functional academics classes in the fourth through sixth grades had not been good. One of the functional academics teachers described the proposed placement.

16. Ms. Freifeld read sections of her psychoeducational assessment report, noting that information on Student’s adaptive skills was incomplete because Mother

had not returned survey forms she had sent. Mother was incensed when Ms. Freifeld presented her finding that Student's cognitive capacity was the equivalent of a nondisabled student aged three-and-a-half. Mother asked several questions and stated, in essence, she did not believe that result.

17. As the meeting continued, Fairfield-Suisun offered to have the speech language pathologist, the occupational therapist, and the assistive technology specialist summarize their reports, but Mother declined. She asked for copies of their reports. At hearing, Mother stated that she never received the report from Ms. Reyes until a week before the hearing. The preponderance of evidence showed, however, that Mother did timely receive that report as well as the other assessment reports. Ms. Duncan testified specifically that "all" the reports were put in a packet and left at the school office for Mother to pick up the day before the meeting. When she did not, the packet was given to her at the start of the meeting. The meeting notes confirm that "all" the assessments were in the packet. Given the other evidence that Ms. Duncan had been especially scrupulous, and frequently repetitious, in delivering to Mother documents relating to the meeting, it is more likely than not that Mother received all the assessment reports, including Ms. Reyes's report, in a timely manner. In addition, any delay in delivering Ms. Reyes's report would have been without apparent consequence, as at the meeting Mother refused to listen to Ms. Reyes and other assessors deliver their reports, and asked that the reports be mailed. Ms. Duncan established that the packet was mailed to Mother after the meeting.

18. At the April 10, 2017 IEP team meeting, the behavioral specialist began a summary of her findings, but Mother stopped her report. Mother stated that she disagreed with the proposed IEP, for many of the same reasons summarized in this Decision. After Mother complained that previous one-to-one support had not been satisfactory, Fairfield-Suisun added to the proposed IEP provisions that the aide would



have sign language skills, and that a DHH itinerant teacher would instruct staff in Student's use of sign language. The draft IEP already proposed that functional academics staff be trained in Student's hearing aids, FM system, visual cues, alternative communication device, and one-to-one support. Fairfield-Suisun was eager to obtain Mother's agreement to the IEP, and in subsequent days offered to make other changes to the IEP if Mother would agree, but she refused to discuss such further changes.

19. Fairfield-Suisun proposed discussing the 19 goals in the offered IEP, but Mother was unwilling to participate. Since the IEP document had not been finalized by the end of the meeting, Mother was informed that it would be mailed. When she left the meeting, Mother declined to sign her agreement with the offer or even acknowledge that she attended the meeting. Mother received the IEP document in the mail a few days later.

20. In sum, Mother received adequate notice of the meeting, participated in it fully, asked questions and got answers, and had ample opportunity to state her views, which she did at some length. There was no evidence supporting Mother's claim that the meeting was "staged," and the discussion showed that Fairfield-Suisun team members considered Mother's views with an open mind and made some changes in the proposal as a result of hearing her opinions.

#### SUBSTANTIVE COMPLIANCE OF THE APRIL 10, 2017 IEP OFFER

##### Student's Disabilities

21. Student is generally cheerful and outgoing, usually cordial with adults, and enjoys basketball, music, wrestling, physical education, and his two pet dogs. He has friends and excels at Special Olympics. The parties dispute the extent of his cognitive delay; this Decision finds it quite serious.

22. Hearing loss is common among those with Down syndrome because the

syndrome usually alters the shape of the head and constricts the ear canals, making them prone to infection and causing variations in hearing ability. Student is not deaf; he can hear to some extent, but according to an audiology report from Children's Hospital in Oakland which is not disputed by either party, he has moderate to moderately severe hearing loss in his right ear and mild to severe loss in his left ear. His hearing varies according to his health on any particular day. He wears a hearing aid in each ear and has difficulty keeping them clean and functional because he does not always tell an adult that they are not working. His speech is difficult to understand.

23. At school, Student communicates in a mixture of verbal statements, sign language, body language, facial expressions and gestures, supplemented by an augmentative alternative communications device (an iPad with a TouchChat application) that produces both synthesized speech and text. At home, he and Mother have developed an idiosyncratic but effective method of signing that is not ASL, but it serves the same function and is their primary mode of communication.

#### The Triennial Assessments

24. The offer was preceded by, and based on, a wide variety of triennial assessments and reports produced in early 2017. These included a psychoeducational assessment by a school psychologist; an academic assessment by a DHH teacher; another academic assessment by two functional academics teachers; a speech and language assessment; and reports on Student's occupational therapy and assistive communications needs.<sup>3</sup> The specific findings of some of these assessments are set forth below. In general, independent examination shows that the assessments appear to comply with all the legal requirements for such assessments, and Mother does not claim otherwise.

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<sup>3</sup> The occupational therapy and assistive communications information was contained in reports because Mother declined to authorize assessments in those areas.

## Student's Cognitive Capacity

25. Because Student is African-American, Fairfield-Suisun has not given him a standardized intelligence test.<sup>4</sup> However, as part of a triennial review in 2013, he was tested with the Differential Abilities Scales, a standardized measure of verbal, spatial and nonverbal reasoning abilities highly correlated with school achievement, on which scores of 90 to 110 are in the average range. His score was 51, placing him in the 0.1 percentile among same-age peers. That meant when he was 10 years old, he had approximately the cognitive ability of a nondisabled three-year-old. Student was tested again as part of the 2017 triennial review, using the Developmental Assessment for Individuals with Severe Disabilities, Third Edition (DASH-3). Although he did not cooperate with some of the subtests, the assessor was able to obtain sufficient other information to determine that his academic ability score on the DASH-3 put him at the developmental age of three-and-a-half years. This score was consistent with Student's score on the Differential Abilities Scales in 2013.

26. Mother testified that Student's cognitive capacity is much higher than is reflected by his assessment scores. She produced no other evidence at hearing in support of her opinion. She did introduce several letters from professionals such as medical doctors, a pediatrician, and a pediatric neurologist, which variously described Student's hearing impairments, Down syndrome, and related challenges, and urged that he be exposed to ASL and given assistive technology. None of the letters addressed his cognitive capacity, and the authors did not testify. Mother argues that if Student's cognitive capacity were as low as Fairfield-Suisun believes, one or more of these

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<sup>4</sup> See *Larry P. v. Riles (I)* (9th Cir. 1974) 502 F.2d 963; *Larry P. v. Riles (II)* (9th Cir. 1984) 793 F.2d 969.

professionals would have so informed her, and none did. However, there was no evidence that any of these medical professionals was asked, or qualified, to measure Student's cognitive capacity.

27. Fairfield-Suisun introduced extensive evidence of Student's performance in school that was consistent with his scores on the Differential Abilities Scales and the DASH-3. Functional academics teacher Christopher Romo conducted an academic assessment of Student for his 2017 triennial review.<sup>5</sup> He and fellow functional academics teacher Lisa Linehan observed Student for two class periods; administered components of the Student Annual Needs Determination Inventory, the Criterion Test of Basic Skills – Second Edition, and some informal assessments; examined Student's work samples; and interviewed his teachers. Based on that information, they concluded that his academic skill levels were as follows:

Math – 3 years (pre K)

Reading – 4 years (pre K)

Writing – 4 to 5 years (pre K)

Reasoning and Concept Development – 3 to 4 years (pre K)

Based on those measurements, they recommended that Student's curriculum should focus on functional reading, writing, math, daily living skills, and social and communication development.

28. Fairfield-Suisun used the results of its triennial assessments as the basis for

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<sup>5</sup> Mr. Romo has a bachelor's degree in social science from Sacramento State University and a moderate/severe special education teaching credential. He started work for Fairfield-Suisun in 2003 as a resource teacher but in a year moved to teaching functional academics at Fairfield High School, which he has done for more than nine years. He was also a program specialist for two years and a consulting teacher.

drafting the proposed April 10, 2017 IEP, and in particular in the statements of his present levels of performance, as set forth primarily in the baselines of his annual goals. In math, he recognizes the numbers 1 through 13 but not 14 through 31. He cannot independently identify the value of coins or bills, or add them up to complete a purchase. In reading, he can identify safety signs while using classroom curriculum software, but he cannot generalize that skill to the world outside the classroom; he does not recognize the same safety signs out on the campus. His vocabulary is quite limited; with support, he is able to identify about half of a selection of words at a pre-kindergarten level. He does not understand stories, including character, plot, sequence or structure. In writing, he can produce only two to three word sentences. His speech is difficult to understand and limited to utterances of two to three words. He is unable reliably to approach adults for help, including on the many occasions when his hearing aids are not functioning because the batteries are dead or for other reasons, or when his FM system is not functioning.<sup>6</sup>

29. Fairfield-Suisun's view of Student's cognitive capacity was also confirmed by the testimony of his teachers, providers, and other observers. Those witnesses were without exception well informed, experienced with Student, and familiar with his records. Their testimony was specific and well-reasoned, and cross-examination did not reveal any significant shortcomings in that testimony. They were credible witnesses, and their testimony is given substantial weight here.

30. Ms. Reyes's duties included supervising Tracy Husted, Student's teacher at Green Valley for seventh and eighth grades. Ms. Reyes observed Ms. Husted in class for

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<sup>6</sup> Mother has told district staff not to touch Student's hearing aids for the purposes of checking, cleaning or maintenance, notwithstanding their duty to do so. (See 34 C.F.R. § 300.113(a); Ed. Code, § 56345, subd.. (d)(5).)

several hours a week for two years, acted as her mentor, and taught the history portion of the class herself when Ms. Husted was overworked. Ms. Reyes was very familiar with Student, as she has observed and worked him throughout his two years in the middle school DHH class. In addition, Ms. Reyes is now one of Student's two, ninth grade DHH teachers; she teaches him in the afternoon.

31. Ms. Reyes is additionally familiar with Student because she conducted a review of his academics in preparation for his 2017 triennial review. She reviewed his records, observed him in general and special education classes, and evaluated his work samples. She did not use standardized testing because Mother had not yet consented to it. Ms. Reyes reported that in the beginning of the 2016-2017 school year, and again in December, Student had taken the Measurement of Academic Performance, a district test used to track a student's progress in reading and math. His scores showed that he was reading at a level less than second grade and qualified as a "beginning reader," and showed that his math skills were at the same level.

32. Ms. Reyes established, in her report and at hearing, that Student was the only intellectually disabled child in his middle school class, and his curriculum had to be extensively modified so it could be presented at a pre-school level. He could not understand the Common Core grade-level material being taught to the other students in the class. When she taught history to the class, he was not engaged and put his head down. He did not understand the lessons, even with substantial help from his aide. Ms. Reyes stopped asking him questions to avoid embarrassing him.

33. Ms. Reyes also reported that, over time, Student's positive attitude and enjoyment of school had diminished. In his functional academics classes in the fourth, fifth and sixth grades, he was generally happy and engaged. A 2013 psychoeducational evaluation described Student as "cheerful, funny, energetic, active and creative." Ms. Reyes noticed, however, that as Student progressed through seventh and eighth grades

into ninth, he became moody and upset, and sought isolation. She attributed this decline to his required presence in an environment in which he cannot learn.

34. Student's other ninth grade DHH teacher is Tara Pieriscalzi, who teaches him in the morning and is his case manager.<sup>7</sup> Ms. Pieriscalzi was subpoenaed and called to testify by Student, but her testimony supported Fairfield-Suisun's position. She established that Student's ninth grade curriculum must be substantially modified in her class because he cannot understand the Common Core curriculum taught to the other students, who have no more than mild academic delays occasioned by hearing loss, who are all on diploma track, and who spend substantial time in general education classes. Ms. Pieriscalzi spends more than an hour a day modifying Student's curriculum to his pre-school level, taking time away from her other students.

35. Student's performance levels and abilities were also confirmed by Ms. Duncan. As she supervised the teachers, interpreters, and paraeducators in Student's classes, she observed Student many times. She has attended his IEP team meetings, and at hearing was thoroughly familiar with his records.

36. Ms. Duncan opined at hearing that Student was not receiving academic benefit in his DHH class and could not keep up with it. His lessons had to be modified considerably, usually by his one-to-one aide. She observed that, unlike his classmates, he needed extensive repetition of lesson material. He was not communicating with the other students and not receiving the curriculum they were. The other students could read a word and know it, but Student needed examples and manipulatives to try to learn it. Student tried to follow the class but was frequently confused, and spent lengthy periods of instruction "shut down," with his head down on his arms. His academic skills were pre-kindergarten across the board.

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<sup>7</sup> Ms. Pieriscalzi has taught for 21 years, 12 of them as a DHH teacher.

37. The preponderance of evidence showed that Student cannot keep up with the academic pace or curriculum of his DHH class, is learning little in it, and is frequently confused and frustrated as a result.

#### Student's Facility with American Sign Language

##### MOTHER'S TESTIMONY

38. The parties also dispute the extent of Student's ability to understand and communicate in ASL. Mother testified that she and Student communicate very well at home in sign language. She testified further that Student's ASL vocabulary is between 100 and 200 words; that he knew ASL even before he entered the DHH class in middle school; that he chooses to use his ASL to reiterate what a teacher or a communications device may have communicated; that he can sign anything you ask him; that he can use ASL in an emergency; and that he could be a teacher of both sign and vocal communication. No other witness supported these views, and no professional assessment or evaluation confirmed them. Because Fairfield-Suisun introduced a great deal of evidence demonstrating that Mother's view of Student's ASL skills is overly optimistic, her estimation of Student's ASL skills was unpersuasive.

##### THE ASSESSMENT CENTER FOR THE DEAF AND HARD OF HEARING

39. The most definitive evidence about Student's ASL capabilities was obtained from the Assessment Center for the Deaf and Hard of Hearing, which the California Department of Education operates in conjunction with its California School for the Deaf in Fremont. The parties jointly referred Student there in 2015 to answer referral questions that included: "What is the student's primary mode of expressive and receptive communication?" and "Does the student require a multi-modality program for expressive communication and in order to access the curriculum?"



40. The Assessment Center's 2015 evaluation of Student was exhaustive. Its assessment team included a psychologist who was also a board-certified behavior analyst, a speech and language pathologist, and an audiologist. The team reviewed Student's records, including an extensive audiological report from Children's Hospital in 2014. It also reviewed a 2012 assessment by a team from the Diagnostic Center of Northern California, which addressed the question: "To what degree does this student require sign language instruction to benefit from his instruction?" That team concluded that sign language was not Student's primary mode of communication and recommended using a multimodal communication system. The Assessment Center team also interviewed Student's teachers in 2015 and received information from Mother on a questionnaire and in an interview. The team then observed Student at school for an entire day and for another day in his home. One team member watched videos Mother had taken of Student using signs at home.

41. During a testing period, the Assessment Center provided an apartment for Student and Mother at its Fremont facility. There, a team proficient in ASL and experienced in evaluating DHH children with intellectual disabilities administered a wide variety of standardized and other assessment measures to Student, using both English and sign.

42. The Assessment Center's report, delivered on March 17, 2015, supported Fairfield-Suisun's position in every respect. It found that Student had chronic middle ear infections, fluctuating hearing loss, narrow ear canals, ear discharge, and speech and language delays. His spontaneous expressive communication was minimal and consisted of a few short phrases such as "what's up," "stop it," and "I got it." The assessors administered, among many other measures, the Carolina Picture Vocabulary Test for Deaf and Hearing Impaired Children to measure Student's receptive sign language vocabulary. He performed in the second percentile compared to the norm group of

DHH children, with an age-equivalence estimate of less than four years old, which was the lowest age-equivalency bracket the test provided. In testing, after developing some rapport with his examiners, he used speech to communicate, supplemented by gestures and pointing. He did not spontaneously use sign with the assessment team, even when they signed to him.

43. The Assessment Center's full day of observation of Student at his school produced the finding that Student "does not express himself in sign at school." He used spoken English in class, usually in single-word utterances. He responded to only one sign as a prompt, and usually responded to signing with speech.

44. The Assessment Center's observation of Student's communication with Mother, both at home and in Fremont, showed more fluency in signs. Student responded to Mother in signs when she signed to him, and could accurately describe photo cards in signs. Some of these signs were "home signs" developed between Mother and Student, and not part of standard ASL.

45. The Assessment Center's audiologist tested Student's hearing and learned that, when he wore functioning aids, he could receive most but not all auditory information. He learned that Student was no better at remembering names with sign added to spoken language than without it. All his responses were spoken.

46. On the Assessment Center's formal measures of receptive and expressive language, Student's skills fell in the range of the average two-and-a-half to three-year-old non-disabled child. His articulation was below the first percentile. Overall the Assessment Center found him "very dependent on auditory input," which could be usefully supplemented by visual supports such as objects, pictures, and signs.

47. In their summary, the assessors at the Assessment Center answered the referral questions by concluding as follows:

1) Student's primary mode of expressive and receptive communication is

listening and speaking. Signs can usefully supplement those methods. Student signs with his Mother but does not spontaneously sign with others. He does not communicate more effectively when signing than when speaking.

2) Student requires a multi-modality communication program in order to access the curriculum; having more than one way to express himself helps him communicate effectively. The Assessment Center recommended that he primarily use speech and listening to communicate, paired with static visuals and signs. It recommended that Student's signing vocabulary be increased, but cautioned: "[s]igning to [Student] in ASL (voice off) is not recommended at school or at home. [Student] is not fluent in ASL and primarily relies on hearing English to understand what is being said to him. If we sign to [Student] without speaking, he misses information."

48. The Assessment Center's report also noted that a multi-modal communications approach will not guarantee that Student can access the curriculum; he "needs instruction matched to his comprehension and learning level, regardless of the mode or modes in which it is presented."

#### THE OBSERVATIONS OF STUDENT'S TEACHERS, PROVIDERS AND OTHER OBSERVERS

49. Student's teachers uniformly observed that because Student does not usually understand the ASL instruction in his current class, he often turns away from staff and misses content. One assessor in the science portion of his class saw the teacher deliver the lesson in ASL, but Student's aide had to explain it to him using voice. He responds very rarely in class, and when he does he uses voice.

50. In observing Student in class for more than two years, Ms. Reyes noticed that he does not understand ASL, frequently turns away from the teacher using it, and usually does not respond. When he does respond, it is in voice. Ms. Reyes explained that Student's knowledge of ASL is limited to individual words; he does not understand a string of words that convey a concept. She likened his skill level to the ability to

recognize a few words in Spanish while lacking the ability to understand a sentence. She also established that, over time, Student's ASL abilities have not significantly improved.

51. Ms. Pieriscalzi concurred with Ms. Reyes's view of Student's ASL abilities. She uses ASL without voice when addressing the rest of her students, but Student does not understand her unless she adds voice. In a small group session with two other students, Student may be addressed in ASL with voice, but the other two students do not understand as well because they do not benefit from voice. In Ms. Pieriscalzi's opinion, her need to use voice with Student degrades her ability to communicate with her other students.

52. Student's speech and language therapist agreed with his teachers. Karyn Driscoll-Teague has worked as a language specialist for almost 30 years.<sup>8</sup> She provided direct speech and language services to Student in seventh and eighth grades, and often observed him in class. In her experience, Student communicated primarily by voice, which was how she communicated with him. He had an FM system integrated into his hearing aids, and in their sessions she wore a microphone to speak into that system. Student sometimes also used his communications device, which was an iPad with software that displayed icons. Student knew how to use 42 of the 108 icons in the program. Ms. Driscoll-Teague only used some basic signs if he did not otherwise understand something.

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<sup>8</sup> Ms. Driscoll-Teague is an employee of Speech Pathology Group, which contracts with Fairfield-Suisun to provide speech therapy at Green Valley. She has worked as a speech pathologist for the Mt. Diablo and Berkeley school districts. She has been a state-licensed speech pathologist for nine years, and has a certificate of clinical competence from the American Speech-Language Association. She has had extensive experience with intellectually disabled students.

53. When Ms. Driscoll-Teague assessed Student for his 2017 triennial review, an ASL interpreter was present. Student frequently turned away from the interpreter and focused on Ms. Driscoll-Teague, who was using her voice. Student primarily used his voice in the assessment. On a vocabulary test he correctly expressed 37 words, using only verbalization on 86 percent of his responses; using sign and verbalization together on 11 percent; and using only sign on 3 percent. His signing was basic, and was accompanied by universal gestures and the unique home signs he had developed with Mother.

54. The preponderance of evidence showed that while Student knows some individual ASL signs, he is far from fluent in the language and does not understand concepts when signs are used in a string or group. Nor can he readily acquire those skills; the April 10, 2017 IEP reports that, notwithstanding significant time spent on teaching him ASL, he retains only 15 percent of ASL single words. That percentage had not changed from the previous year. Student does not have sufficient skill in ASL to understand the teaching in a ninth grade DHH class in which the other students are learning grade level curriculum and are expected to graduate with diplomas.

#### Overall Content of the April 10, 2017 IEP

55. In its written content, the proposed IEP of April 10, 2017, addresses all the subjects that the Individuals With Disabilities Education Act and related laws require it to address. It contains an identification of Student's disability; a statement of how it affects his involvement in the general education curriculum; his present levels of academic achievement and functional performance, including strengths, weaknesses and assessment data; descriptions of his progress on previous goals; a statement that he will participate in alternate statewide assessments and curriculum; 19 annual goals that include baselines and short-term objectives; a variety of supplementary aids, accommodations, modifications and supports; and related services including a one-to-

one aide, extended school year, and transportation. The proposed IEP contains everything the law required it to contain, and Student does not argue otherwise.

#### The Goals in the April 10, 2017 Proposed IEP

56. The April 10, 2017 IEP contains 19 goals for Student in the areas of communication, expressive and receptive vocabulary, sound production (intelligibility), social pragmatic skills, writing, math, reading, independent life skills, and behavioral skills. A behavioral plan accompanies the behavioral goals and addresses Student's occasional noncompliance.<sup>9</sup> The goals bear a close and specific correlation to the 2017 triennial assessments and address all his areas of need, and Mother does not argue that any additional goal is needed.

57. The goals are derived from specific baselines which reflect Student's present levels of performance. They use an adequate level of specificity and sufficient numerical standards, and are supplemented by short-term objectives. For example, the baseline of Student's number recognition goal is:

[Student] recognizes numbers from 1 to 13, but struggles with any digit above that, which poses as a barrier in helping him identify the date on any given day. Currently, he can independently identify 1-31 with 58% accuracy (recognizes 1-13, but not 14-31).

The baseline accurately reflects the findings of the 2017 academic assessments.

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<sup>9</sup> The proposed behavior plan is modeled on a behavior plan to which Mother agreed in June 2015. Since 2016, Fairfield-Suisun has unsuccessfully sought Mother's permission to conduct a functional behavior analysis in order to update and improve the plan.

The related goal is: By 04/10/2018, with the support of a monthly calendar, [Student] will be able to produce the numbers 1-31 with 80% [accuracy] in 4/5 trials as evidenced by the completion of a fillable calendar.

Three short-term objectives follow, which set benchmarks for three, six, and nine months into the school year that gradually approach the annual goal. For example, three months after implementation begins, Student would be expected to produce the digits 1-18 with 80 percent accuracy. The other 18 goals and their accompanying objectives are similarly quantified and specific. All of them are capable of numerical measurement throughout the year. All of them state how progress will be measured and who is responsible for measuring it.

58. Mr. Romo addressed each of Student's academic goals at hearing, and opined that each is appropriate for him. He established that each of them could be implemented in the proposed functional academics classroom.

59. Ms. Duncan addressed each of the goals at hearing, and opined that each of them is appropriate and measurable.

60. Ms. Driscoll-Teague drafted the speech and language goals in the proposed IEP, and explained each one at hearing. They emphasize multimodal communication with speech, sign, and augmentative communication device. She established that all the offered speech and language goals are appropriate for him.

The accommodations, Modifications, Supports and Services in the April 10, 2017 IEP

61. The proposed IEP contains an extensive variety of accommodations, modifications, supports, and supplementary aids and services. Among the most important are that Student would retain the support of his one-to-one signing instructional aide, his augmentative communications device, and his FM system. He would have preferential seating at the front of the class; shortened assignments;

available breaks; extended time for assignments; repetition of instructions; checks for understanding; verbal rather than written testing; multiple choice tests; visual supports; visual, physical, and modeling prompts; use of open book and notes for testing; enlarged print; use of a calculator; and a quiet place for tests if needed. His assignments in math and language arts would be directed at his skill levels. Weekly reports would be sent home.

62. The proposed IEP would provide Student the services of a speech and language therapist for one 30-minute individual session each week, one 30-minute small group session each week devoted to social language, and consultation with staff. It would provide consultation with an occupational therapist,<sup>10</sup> and the services of an itinerant DHH specialist to support access to his hearing aids and FM system in and out of class and to train staff. It would provide 120 minutes of consultation by an assistive technology specialist immediately after the change of classes to ensure that staff understands his augmentative device, and later consultation for that purpose if needed. It would also provide a signing one-to-one paraprofessional aide in the general education setting, who would be available to Student in the special day class if needed to supplement the assistance of the two paraprofessionals in the class. In addition, the proposed IEP would provide door-to-door transportation.

63. The accommodations, modifications, services and supports in the April 10, 2017 IEP appear adequately to address Student's needs related to his disabilities, and Mother does not make any specific criticism of them. She does argue that they should have included an interpretive team, closed captioning, and note taking support, but

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<sup>10</sup> A qualified occupational therapist assessed Student for his 2017 triennial review and concluded that he did not need direct occupational therapy services. Mother does not challenge this conclusion.



there was no evidence these additional accommodations were needed, or had been previously requested.

#### Fairfield-Suisun's IEP Placement Offer and Proposed Change in Classrooms

64. Fairfield-Suisun's April 10, 2017 IEP would place Student for the ninth grade in the Functional Academics special day class at Armijo High School (Student's home school) for 72 percent of his school day to study core academics, and in general education for physical education and an elective for 28 percent of his day. The teacher of the special day class instructs in a combination of speech, sign, gestures, and assistive communications devices. The students – nine last year -- are cognitively delayed and are on a certificate of completion track; their studies focus primarily on functional skills. Student would continue to have a signing one-to-one aide available throughout the school day in addition to support from the aides assigned to the class.

65. The heart of the parties' dispute is their disagreement about the wisdom of moving Student from his current DHH class, where Mother prefers him to be, to the Functional Academics class, which Fairfield-Suisun proposed. That disagreement centers on two related issues: whether Student has the cognitive capacity to benefit from his current classroom, and whether Student has or can acquire sufficient ASL to benefit there. As shown above, Student does not have the cognitive capacity to benefit from his current classroom, nor does he have sufficient ASL to benefit there.

#### THE OFFERED SPECIAL DAY CLASS

66. The functional academics class to which Fairfield-Suisun proposes to move Student is taught by Nicole Moulton,<sup>11</sup> who described the class in detail at hearing.

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<sup>11</sup> Ms. Moulton has a bachelor's degree in English and a master's degree in education with an emphasis on autism. She has a moderate/severe special education

There are 10 students this year, taught by two paraprofessionals as well as Ms. Moulton. The students variously have intellectual disabilities, autism, Down syndrome, and other health impairments. All have some cognitive delays. Ms. Moulton has experience with students who are hard of hearing, and whose hearing fluctuates as a result of Down syndrome. Ms. Moulton's hearing impaired students have generally communicated in her class with verbalization, and sometimes also with augmentative communication devices and sign.

67. There are two functional academics classes at Armijo High, roughly divided between ninth and tenth graders (whom Ms. Moulton teaches) and eleventh and twelfth graders. The division is the result of curriculum difference; the older students are working more on work readiness skills, whereas Ms. Moulton's students are working more on the foundational daily living and social skills that will get them ready for work.

68. Ms. Moulton teaches academics to her students "the way they will use them in their lives." This includes, for example, teaching math by addressing money, cooking, measuring, telling time and reading schedules. Reading is taught by reading job applications, researching information on the Internet, reading signs, reading labels and understanding recipes.

69. A day in Ms. Moulton's class starts with a routine in which the students wash, put away material, do a warmup exercise on their own and share their answers with the whole group. They are then divided into smaller groups to study a particular topic, such as a weekly weather report. In second period, students typically read a chapter in a book, and then work on the life skills that go along with that chapter. Fourth period, after lunch, involves math exercises such as working on money, time,

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teaching credential and has been teaching the functional academics class for eight years.

measurements, or data analysis, perhaps from charts. Fifth period addresses life skills such as emotional regulation, organization skills, kitchen skills or language arts.

70. Sixth period essentially repeats fifth period because some students go out to mainstream classes in fifth period and miss the lesson. Ms. Moulton's students are frequently mainstreamed in one or two general education classes such as art, theater, and physical education. Students also socialize with general education students in the hallway at every break. Ms. Moulton organizes joint activities with general education classes, such as the Science class across the hall, in which her students work in groups together with typical peers.

71. Ms. Moulton uses a curriculum called Unique Learning Systems, which relates academic subjects to living skills. It has routines, so students know what to expect each month. The curriculum is "self-differentiating": when a student begins to use it, the program measures the student's skill levels through assessments and rubrics and assigns the student to one of three skill levels. After that, when a student logs in, the software presents the lessons at the student's level. Ms. Moulton customizes this delivery for each student, for example by changing text to speech or using symbols, depending on a particular student's needs. Each student has a Chromebook and access to iPads and desktop computers. Ms. Moulton is familiar with working with augmentative communications devices such as Student's.

72. The functional academics class goes out into the community at least two or three times a month. Ms. Moulton's students have, for example, participated in a Rotary Club contest, visited a thrift store, toured the police station and gone to the library to learn how to check out a book. Her classroom (a former home economics classroom) has three kitchens where she first teaches safely turning ovens and stoves on and off, and using hot pots and pans, and then teaches students to plan a menu, price the needed groceries, go to the grocery store to purchase them, and then return to the

class to cook them. The functional academics class at Fairfield High School is operated on the same model, and the two classes have joint activities such as picnics and Chinese New Year celebrations.

73. Fairfield-Suisun introduced substantial evidence that the functional academics class at Armijo High would be an appropriate placement for Student. Ms. Moulton reviewed Student's goals at hearing and was confident that each could be implemented in her class. She commented that his goals were essentially already embedded in her curriculum.

74. Ms. Reyes taught Student in summer school in 2017, and at one point took her class next door to a functional academics class having the same design as Ms. Moulton's. The class was "hands on" and emphasized such activities as money, cooking and shopping, clothes washing, and the like. Student participated in the class and "loved it"; he did not have to stay in one place all day. Ms. Reyes concluded that such a class would be "perfect" for Student.

75. Mr. Romo, the designer of the curriculum in the functional academics classes, opined that he was "100 percent confident" the placement was appropriate for Student. In that class, Student would benefit from working with all the other students rather than alone as he does now. For example, when students divide into three groups, one group would be reading something, the next discussing it, and the third incorporating technology into studying it. Since modified curriculum is built into the class, it would not have to be modified individually for Student. Student would also be able to observe models of students with higher skill levels than his own working on the same projects.

76. Ms. Duncan opined that the functional academics class would be an appropriate placement for Student because of the slower pace and repetition, and because it would allow him to use multimodal communication and study the same curriculum as the other students.

77. Ms. Driscoll-Teague opined that the placement would be appropriate because of its slower pace; the entire class would be working at roughly the same pace as Student. The class's emphasis on manipulatives, visual aids, and auditory and verbal communication, and its practice of repetition, would also benefit him.

#### MOTHER'S SUBSTANTIVE OBJECTIONS TO THE OFFERED CLASS

78. Mother was the only witness at hearing who disagreed with the appropriateness of the proposed placement. No other witness testified in support of her views. Mother introduced several letters from physicians and audiologists recommending that Student be educated in small groups and obtain the benefit of ASL, but none of those professionals appeared as a witness, addressed the proposed placement, or appeared to know anything about it. The one professional witness Mother called, Ms. Pieriscalzi, testified in support of the proposed placement.

79. It was not clear at hearing whether Mother contends that Student could not receive a FAPE in the proposed placement, or whether she only expresses a preference for his current placement. Early in the hearing, in comparing the two placements, she testified: "I have nothing bad to say about an FA placement"; Student "can thrive in both environments"; and "He can benefit from both placements." However, in additional testimony later in the hearing and in her closing brief, she made several criticisms of the proposed placement.

80. Mother believes that moving Student is unnecessary. She thinks Student is "thriving" in his current placement using ASL, has received "many, many, many accolades in part because he uses ASL," and has reached "too many milestones" using ASL to change now. She is confident that he accesses the curriculum. Mother also thinks that Student is more advanced in his life skills than Fairfield-Suisun believes. As an example, she asserted that he shops and pays for his own purchases and has been

doing so since age seven. These claims lacked supporting evidence. The contrary testimony of many other witnesses, supported by test results and contemporary documentation, refuted the claims. These factual assertions by Mother were not persuasive without supporting evidence, and none was presented.

81. Mother asserted at hearing that Student can communicate so well in ASL that “[h]e could be a teacher in both sign and vocal in a functional academics setting.” Mother stated that Student even chooses to use his ASL to reiterate what a teacher says or the words his augmentative communications device was producing. She claimed that Student enrolled shortly before the end of the hearing in an after-school class, “assisted” first-time ASL users in accessing ASL, and was praised for it. She stated that Student attended college at age 12 in an ASL placement. These claims, too, contradicted all the other evidence in the record and were unpersuasive because there was no evidence corroborating them.

82. Mother testified that she knows Student can use ASL because the Assessment Center for the Deaf and Hard of Hearing in Fremont asked for and received her permission to put a picture of Student on the front of one of its brochures. She reasoned that they would not have done that if he were not competent in ASL. But that conclusion does not follow from the premise, and the Assessment Center’s report on Student contradicts it specifically and at length.

83. Mother testified that Student has to lip-read to understand “any English whatsoever.” However, Ms. Reyes testified that although Student’s hearing fluctuates, he can sometimes understand people who speak to him from behind, out of his sight. Student’s teachers and speech and language provider all testified that he understands them better, and responds better, when they use their voices rather than signs. Ms. Pieriscalzi testified that she must supplement sign with voice for him to understand it. The weight of evidence showed that Student prefers to communicate verbally, and to

the extent he understands spoken English, generally understands it without lip-reading.

84. Mother acknowledged at hearing that the school's data on Student's use of signs (including the Assessment Center's report) do not support her claim that Student can communicate well in ASL. She testified that: "The data showed something different, so we don't believe the data," and asserted that testimony of district witnesses about the data is "questionable." However, there were no contrary data introduced in evidence, nor any explanation why such extensive information from so many sources would be "questionable."

85. Mother is sincerely convinced that Student needs to be educated in ASL to succeed in school and life. Mother, who does not claim any training or expertise in ASL, believes that Student needs to learn ASL for clear communication because, unlike the use of voice in which tones change, ASL signs always mean the same thing and never change. She stated Student taught her that. She believes Student must learn ASL because "the signs never change; a sign is a sign is a sign; there is no misunderstanding." This view was persuasively contradicted by Ms. Reyes, whose primary language is ASL and who teaches in ASL. She explained that the same sign can have several different meanings, and different signs can refer to the same word in English, depending on the context in which they are used. Ms. Reyes demonstrated at hearing, for example, that the sign for "blue" as a color is different from the one for "blue" as an expression of sadness.

86. Mother objected at hearing to the fact that there are students with multiple complex disabilities in the proposed placement and the staff is not "specialized in [Student's] complex disability." However, she offered no reasons or proof why Student could not benefit by being taught among students with other disabilities, or that he could not receive an adequate education from anyone other than someone who specialized in his disability. Ms. Moulton is very experienced with students having

intellectual disability, which is Student's primary disabling condition.

87. Mother testified that the functional academics placement would take Student backwards and cause confusion. This statement was unexplained, but probably rests on her incorrect perception that he is fluent in ASL. It is unpersuasive for the reasons mentioned above.

## LEGAL CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>12</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);<sup>13</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 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; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed

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<sup>12</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>13</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.



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 Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that, despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-951.) Although sometimes described in

Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

4. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. \_\_\_, 137 S.Ct. 988 [197 L.Ed.2d 335]. It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit a child to achieve passing marks and advance from grade to grade. (*Id.*, 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student’s IEP must be reasonably calculated to enable the student to make progress appropriate in light of his circumstances. (*Endrew F.*, *supra*, 137 S.Ct. at p. 1001.) The high court noted that “[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.” (*Id.* at p. 999 [italics in original].)

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 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) By this standard, Fairfield-Suisun, as the filing party, had the burden of proof on all issues here.

6. In California, if a parent will not consent to a proposed IEP, or a component of a proposed IEP, that the school district determines is necessary to provide a FAPE, the district must initiate a due process hearing. (Ed. Code, § 56346, subd.

(f.) Notably, however, that statute does not then authorize a hearing officer to approve a single component of a proposed IEP. Instead, it provides "a due process hearing shall be initiated in accordance with Section 1415(f) of Title 20 of the United States Code." (Ed. Code, § 56346, subd. (f).) Section 1415(f), in turn, provides that "a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." (20 U.S.C. § 1415(f)(3)(E)(i); see also Cal. Code Regs., tit. 5, § 3042, subd. (a) [placement is "unique combination" of facilities, personnel, location or equipment necessary to provide a FAPE].) Thus, in an action brought by a district under subdivision (f) of section 56346 of the Education Code, the ALJ must consider the adequacy of the proposed IEP as a whole. (See *Dublin Unified Sch. Dist. v. Student* (OAH, Feb. 15, 2017, No. 2016080413, pp. 21-23).)

7. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

ISSUE: DOES THE APRIL 10, 2017 IEP OFFER STUDENT A FAPE, SO THAT  
FAIRFIELD-SUISUN MAY IMPLEMENT IT WITHOUT MOTHER'S CONSENT?

Compliance with Procedural Requirements

USE OF DISTRICT ASSESSOR

8. In her closing brief, Mother faults Fairfield-Suisun for using Katherine Reyes rather than her preferred assessor, Tracy Husted, to assess Student's academic

needs. However, the IDEA does not give a parent the power to determine the personnel used in a district assessment. (*G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299, 1309, *affd.* (11th Cir. 2012) 668 F.3d 1258, 1263-1264; see also *Student R.A. v. West Contra Costa Unified Sch. Dist.* (N.D. Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795, p. 13 [nonpub. opn.]; *Haowen Z. v. Poway Unified Sch. Dist.* (S.D.Cal., Aug. 14, 2013, Case No. 13-CV-1589-JM (BLM))(Order Denying Motion for Preliminary Injunction), 2013 WL 4401673, p. 5; Letter to Anonymous (OSEP 1993) 20 IDELR 542.) Fairfield-Suisun did not deny Student a FAPE or Mother her participatory rights by using the assessor it selected.

#### NOTICE OF IEP TEAM MEETING

9. A school district must notify parents of the time, place, and purpose of an IEP team meeting, the identities of those who will be in attendance, and the right of parents to bring to the meeting persons who have knowledge or special expertise about their child. (34 C.F.R. §§ 300.322(b)(1); see 34 C.F.R. § 321(a)(6), (c); Ed. Code, §56341.5, subd. (c).) As set forth in the Factual Findings, the preponderance of evidence showed that Mother received notice of the April 10, 2017 IEP team meeting well in advance of the meeting.

10. The notice of meeting was legally compliant except that it did not mention that Ms. Spring, the regional center caseworker, would attend. A district is required to notify parents before an IEP team meeting of those “who will be in attendance . . .” (34 C.F.R. § 300.322(b)(1)(i).) This technical violation was harmless; Ms. Spring did not participate in the discussion at the meeting. Student does not identify any consequence of the lack of notice of her attendance, and none appears in the record.

#### TIMING OF DELIVERY OF ASSESSMENT REPORTS

11. An assessment report must be given to the parent of the child assessed.

(20 U.S.C. § 1414(b)(4)(B); 34 C.F.R. § 300.306(a)(2); Ed. Code, § 56329, subd. (a)(3).) The statutes and regulation do not specify a time by which the report must be provided. The evidence showed that Fairfield-Suisun made available a packet of all the assessment reports the day before the April 10, 2017, IEP team meeting; delivered the packet to Mother at the beginning of the meeting; and mailed another packet to her shortly after the meeting. The preponderance of evidence showed that the packet included Ms. Reyes's report. Fairfield-Suisun complied with legal requirements in delivering copies of the assessment reports to Mother.

#### PARTICIPANTS IN IEP TEAM MEETING

12. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).) The evidence showed that all required team members attended the triennial IEP team meeting on April 10, 2017, at which the April 10, 2017 IEP was finalized and offered.

13. A school district or a parent may invite to an IEP team meeting others who have knowledge or special expertise regarding the student. (20 U.S.C. sec. 1414(d)(1)(B)(vi); 34 C.F.R. § 300.321(a)(6); Ed. Code, § 56341, subd. (b)(6).) California law adds that that the determination whether to invite such a person "shall be made by the party who invites the individual . . ." (Ed. Code, § 56341, subd. (b)(6).) Those provisions authorized Fairfield-Suisun to invite Susan Spring, Student's caseworker at the regional center, to the April 10, 2017 IEP team meeting, and Fairfield-Suisun violated no law in doing so.

#### ALLEGED PREDETERMINATION OF IEP BEFORE TEAM MEETING

14. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right 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.) Accordingly, at the meeting parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1.)

15. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement with the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

16. At hearing Mother testified that the April 10, 2017 IEP had been decided on in advance by district members of the IEP team, and that the April 10, 2017 meeting was "staged." The evidence did not support that claim. It showed that Mother participated in the meeting fully, asked questions and got answers, and aired her views at some length. The notes of the discussion showed that Fairfield-Suisun team members considered Mother's views with an open mind and made some changes in the proposal

as a result of hearing her opinions. Fairfield-Suisun proved by a preponderance of evidence that it did not predetermine the April 10, 2017 IEP offer.

17. The evidence showed that in formulating and making the April 10, 2017 IEP offer, Fairfield-Suisun gave the required notice, assembled all the required personnel, and involved Mother thoroughly in the decision-making process. Fairfield-Suisun proved that it fully complied with the procedural requirements of special education law in formulating and offering the April 10, 2017 IEP.

#### Compliance with Substantive Requirements

18. In determining the validity of an IEP, a tribunal must focus on the placement offered by the school district, not on the alternative preferred by the parent. "Even if [parents' preferred placement was] better for [Student] than the District's proposed placement, that would not necessarily mean that the placement was inappropriate. We must uphold the appropriateness of the District's placement if it was reasonably calculated to provide [Student] with educational benefits." (*Gregory K. v. Longview Sch. Dist.* (9th Cir.1987) 811 F.2d 1307, 1314.) Although Mother prefers Student's current placement to Fairfield-Suisun's proposal, the relative merits of the two placements are not formally at issue here.

#### THE CONTENTS OF THE APRIL 10, 2017 IEP MEET LEGAL REQUIREMENTS

19. Federal and State law specify in detail what an IEP must contain. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320; Ed. Code, § 56345.) An annual IEP must contain, inter alia, a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual 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 statement of present levels creates a baseline for designing educational programming

and measuring a student's future progress toward annual goals.

20. An annual IEP must also contain a statement of measurable annual goals, short-term objectives for a student taking alternative assessments, and appropriate criteria for evaluating progress. Those requirements are set forth in more detail below.

21. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals, and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

22. The evidence showed that the April 10, 2017 IEP includes all the content required by law. Mother does not disagree.

#### IDENTIFICATION OF ALL OF STUDENT'S UNIQUE NEEDS

23. The proposed IEP identifies Student's needs in the areas of communication, expressive and receptive vocabulary, sound production (intelligibility), social pragmatic skills, writing, math, reading, independent life skills, and behavioral skills. The evidence showed that Fairfield-Suisun addressed all of his unique needs.

24. Mother argues that the proposed IEP does not address Student's social and emotional needs "related to his deaf and hard of hearing disability." But there was no evidence that Student has social and emotional needs related to his hearing loss that are separate and different from his social and emotional needs in general. Student excels at physical education and the Special Olympics among students with a variety of disabilities. He is frequently passive and unresponsive when approached by other students, but this is not because he cannot hear them, especially with the support of his aide. His social difficulties more likely stem from his inability to understand the vocabulary of other students and to respond with utterances of more than two or three



words, which are apparent consequences of his intellectual disability. Small group speech and language therapy will assist him in interactions with peers more like him than his classmates now.

25. Mother argues that the IEP was “never designed to go over Communication Needs, Academic Levels, [and] the child and family’s preferred mode of communication.” On the contrary, the IEP addresses Student’s communication needs and academic levels at length, as well as his limitations in using ASL.

26. Mother argues that the IEP “never covered the severity of hearing loss.” What this claim means is not clear. The IEP describes the severity of Student’s hearing loss by incorporating the undisputed finding of Children’s Hospital that he has moderate to moderately severe hearing loss in his right ear and mild to severe loss in his left ear, and by describing the fluctuations in his hearing. It addresses his hearing needs with a variety of accommodations, modifications, supports, and services.

27. Mother argues that, under the April 10, 2017 IEP, Fairfield-Suisun cannot “make adjustment to [Student’s] current educational plan in respect to the Student’s unique DHH needs while he remains in the program.” No evidence supports this claim. The IEP provides for the support of a signing aide and an itinerant DHH teacher to consult with staff, and it remains open to either party to request an amendment to the IEP or an IEP team meeting to discuss possible adjustments in light of Student’s needs.

#### VALIDITY OF ANNUAL GOALS

28. An annual IEP must contain a statement of the individual’s present levels of academic achievement and functional performance, including the manner in which the disability of the individual 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 present levels of performance create baselines for designing educational programming and measuring a student’s future progress toward annual goals.

29. An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg., pp. 12,406, 12,471 (1999 regulations).)

30. For a student taking alternative assessments aligned to alternative achievement standards (like Student), annual goals must be broken down into short-term objectives. (20 USC § 1414 (d)(1)(A)(i)(I)(cc).) Short-term objectives are measurable, intermediate steps between the present levels of educational performance and the annual goals that are established for the child. The objectives are developed based on a logical breakdown of the major components of the annual goals, and can serve as milestones for measuring progress toward meeting the goals. (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).)

31. In addition, the IEP must include a description of the manner in which the progress of the pupil toward meeting the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).)

32. Independent examination of the 19 goals in the April 10, 2017 IEP shows that they comply with all the above requirements. The IEP states that Student's intellectual disability affects his participation in the general education curriculum, due to his cognitive deficits, to such a degree that he requires an alternative curriculum. The

goals meet each of the educational needs the evidence showed Student has, and Student does not identify any need a goal does not address. The IEP extensively describes his present levels of academic and functional performance in general, and then uses those levels to establish benchmarks for each of the 19 goals. The goals extrapolated from those baselines describe advances that Student could reasonably expect to reach in a year, in light of his deficits. Each goal also contains a set of three short-term objectives, providing measurable intermediate steps toward the annual goals. Each goal describes in detail how progress will be measured, who will measure it, and how it will be reported to Mother. The goals do all of this with adequate specificity and precision, as illustrated in the Factual Findings.

33. Mother criticizes the offered goals in only two respects. She argues that the goals are insufficiently ambitious because they are geared to a functional academics class, not a DHH class. As shown in the Factual Findings and below, that choice is appropriate. Mother also argues that Student's DHH goals in the 2015-2016 and 2016-2017 school years were inadequate, but those goals are not the goals at issue here.

34. Fairfield-Suisun proved that the goals in the April 10, 2017 IEP were appropriate and measurable. Together the testimony of Mr. Romo, Ms. Duncan and Ms. Driscoll-Teague established in detail how the goals could be measured, and that they were appropriate for Student. They were credible and persuasive witnesses, for the reasons set forth in the Factual Findings.

35. For the reasons above, the 19 goals in the April 10, 2017 IEP, and their related baselines and objectives, are measurable, adequately address his unique needs, and comply with legal requirements.

#### ADEQUACY OF ACCOMMODATIONS, MODIFICATIONS, SERVICES AND SUPPORTS

36. The evidence showed that the accommodations, modifications, supports

and related services offered in the April 10, 2017 IEP – which Mother does not challenge – adequately address Student’s needs. The most important of these, the signing one-to-one aide, the FM system, and the augmentative communications device, already substantially improve his ability to communicate. The many other accommodations, modifications, services, and supports described in the Factual Findings include the services of a speech and language therapist, an itinerant DHH specialist, and an assistive technology specialist, as well as a wide range of lesser supports designed to assist him in hearing, in expressive and receptive communications, and in getting to and from school.

PLACEMENT IN THE OFFERED CLASSROOM IS REASONABLE IN LIGHT OF  
STUDENT’S CIRCUMSTANCES

37. Fairfield-Suisun discharged its burden of proving that the April 10, 2017 IEP, in changing Student’s placement to the functional academics class at Armijo High, is reasonable in light of his circumstances. Ms. Moulton is a dedicated teacher. The other students in the class, like Student, achieve academically at pre-kindergarten to second grade levels and need significant functional skills training. Student will receive academic training there, including in subjects like history and science, but Ms. Moulton will be much more able than Student’s general education teachers to adapt her curriculum to Student’s precise instructional levels. Importantly, he will spend 28 percent of the school day among general education students, and additional time when participating in the other mainstreaming opportunities Ms. Moulton organizes. As a result, he will have ample access to typical peers and opportunities to model their speech and behavior.<sup>14</sup>

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<sup>14</sup> Neither party addresses the IDEA’s requirement for placement in the least restrictive environment in which a student can be satisfactorily educated. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398,1403; *Ms. S. v. Vashon Island Sch. Dist.*

38. The evidence convincingly demonstrated that Student's current ninth grade placement among diploma-track students in the DHH class is unsuccessful, and that he is not receiving substantial educational benefit there. It is too fast-paced for him; it is taught in ASL at a level he does not understand; the class studies a curriculum that is unattainable for him at present; and it deprives him of needed supports such as multimodal communication, structure, repetition, visual support and manipulatives.

39. The evidence also convincingly demonstrated that the classroom placement offered to Student in the April 10, 2017 IEP would allow him to obtain substantial educational benefit. In that class he could study the same curriculum at the same pace as the rest of the students, and participate with them in learning. He would have additional structure, adult support, visual aids, and manipulatives, and the assistance of three adults in addition to his one-to-one aide. The teacher would encourage multimodal communication with him and approach academic subjects with a methodology that would teach him a wide variety of essential life skills he will need in later years.

40. Mother's primary substantive criticism of the proposed change in classes is that it fails to place Student among peers who are all deaf or hard of hearing. However, there was no evidence, beyond Mother's bare assertion, that such a placement is required to provide Student a FAPE. The functional academics class has had DHH

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(9th Cir. 2003) 337 F.3d 1115, 1136-1137.) Each of the special day classes discussed here serves only disabled students. The outcome is thus neutral in terms of the least restrictive environment requirement, which is not intended to affect placement decisions between two classrooms each of which contains only disabled students. (*McLaughlin v. Holt Public Schools Bd. of Educ.* (6th Cir. 2003) 320 F.3d 663, 669-672; *Lebron v North Penn School Dist.* (E.D.Pa. 2011) 769 F.Supp.2d 788, 800.)

students in the past, and Ms. Moulton is familiar with dealing with them. Student will have access to his one-to-one signing aide, and an itinerant DHH teacher will attend to his equipment and to staff training. The April 10, 2017 IEP contains many modifications and accommodations addressed to his hearing impairment, such as an FM system, preferential seating, and his alternative augmentative communication device. The classroom placement and the related services, accommodations, and supports offered by Fairfield-Suisun thoroughly address Student's needs related to his hearing deficit, and Mother's contention to the contrary is not supported by the evidence.

41. Mother's argument that Student must be exclusively among DHH students to receive a FAPE is fundamentally flawed because it does not consider the effect of Student's primary disabling condition -intellectual disability - on his program needs. Mother's closing argument does not mention that disability; it is written as if Student's only disability is being hard of hearing. But the effect of Student's primary disability is critical to the proper crafting of his IEP. His intellectual disability renders him unable to benefit from a class taught in ASL, and unable to keep up with a class taught at or near the level of a general education ninth grade class. Mother's argument that he must have such a placement does not recognize the existence or extent of Student's cognitive challenges. The evidence showed that Student cannot receive a FAPE in the ninth grade DHH class Mother favors.

42. For the reasons above, Fairfield-Suisun proved by a preponderance of evidence that the April 10, 2017 IEP substantively offers Student a FAPE. The offer is reasonably calculated to provide educational benefit to Student in light of his circumstances.

## ORDER

The April 10, 2017 IEP offers Student a FAPE. Fairfield-Suisun may implement it without Parent's consent, and may do so as soon as reasonably practicable in its sole judgment.

## 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. Fairfield-Suisun prevailed on the only issue 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).)

Dated: November 16, 2017

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/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings