

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ONTARIO-MONTCLAIR SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2017050981

DECISION

Ontario-Montclair School District filed a due process hearing request with the Office of Administrative Hearings on May 22, 2017, naming Parent on behalf of Student. OAH continued the matter for good cause on June 15, 2017.

Administrative Law Judge Linda Johnson heard this matter in Ontario, California, on August 22, 23, and 24, 2017.

Cynthia Vargas, Attorney at Law, represented District. Alana Hughes-Hunter, Ontario-Montclair School District Special Education Local Plan Area's Executive Director, and Dr. Anthony Ortiz, District's Director of Special Education, attended throughout the hearing, except for a brief period of time during the first day.

Student's Mother represented him and attended all days of the hearing. Student's Father attended most of day two and all of day three of the hearing.¹ Student did not

¹ A Spanish language interpreter assisted Father during days two and three of the hearing.

attend the hearing.

On August 24, 2017, OAH granted the parties' request for a continuance to allow the parties to file written closing briefs. The record closed on September 5, 2017, upon receipt of written closing briefs.

ISSUE

Did District offer Student a free appropriate public education in its October 3, 2016 individualized education program such that it may implement the IEP without parent consent?

SUMMARY OF DECISION

District contends that the October 3, 2016 IEP offers Student a FAPE in the least restrictive environment. Student contends District's offer of FAPE is not in the least restrictive environment, and he should be educated in the general education class with specialized academic instruction from the resource specialist program. Student also contends that some of the annual goals are not challenging enough.

District proved that Student cannot be satisfactorily educated in general education academic classes with specialized academic instruction in the resource specialist program. District's October 3, 2016 IEP appropriately offered Student specialized academic instruction in a special day class setting for core academic classes while still providing Student 44 percent of his day in general education. Therefore, the October 3, 2016 IEP offers Student a FAPE in the least restrictive environment such that District may implement it without parent consent.

FACTUAL FINDINGS

BACKGROUND AND JURISDICTIONAL MATTERS

1. At the time of the hearing Student was a 9-year-old boy who resided with

Mother within District's boundaries.

2. Student has attended the same school within the District since beginning school in kindergarten, and qualified for special education services under the disability categories of autism and speech or language impairment.

THE OCTOBER 3, 2016 TRIENNIAL IEP

3. Student's triennial IEP team meeting was held over three days, October 3, 2016, October 18, 2016, and February 2, 2017, while Student was in the third grade. Present at the meetings were: Mother; Christopher Russell, Student's advocate; Anne Perry, center director for Lindamood-Bell Learning Processes; Sheralyn Jones, District's speech and language pathologist; Nelson Favela, District's program specialist; Henrietta Udensi, District's director of special education; Sandra Luther, Student's third grade general education teacher; Paul Valerio, District's program specialist; Christine Weatherill, Student's resource specialist program teacher; Kristen Garcia, District's school psychologist; Amanda Colon, District's principal; Rikeshia Lane and Cynthia Vargas, counsel for District; Nimisha Pradhan, District's occupational therapist; Alison Apodaca, District's adaptive physical education teacher; and Debbie Mackenzie, District's physical therapist. Dr. Susanne Smith Roley, who completed an occupational therapy independent educational evaluation, participated via telephone for part one and two of the IEP team meeting.

4. District provided Mother with a copy of the procedural safeguards at the beginning of all three meetings.

Assessments

5. In preparation for the triennial IEP team meeting District conducted several assessments. Mr. Valerio completed a special education teacher report, Ms. Jones completed a speech and language report, Ms. Garcia completed a psychoeducational

assessment, and there was an adaptive physical education report.² Additionally, Dr. Smith Roley completed an occupational therapy independent educational evaluation.³

6. Mr. Valerio has a bachelor's degree in business from City University of New York, a master's degree from Concordia University, a mild moderate and education specialist credential from California State University, Los Angeles, and six years of teaching experience. Mr. Valerio assessed Student using the Woodcock Johnson IV Tests of Achievement, standard batteries including: letter-word identification; applied problems; spelling; passage comprehension; calculations; oral reading; writing sample; word attack; sentence reading fluency; math facts fluency; and sentence writing fluency. Student's relative strengths were basic reading skills, letter-word identification, spelling, and oral reading. However, his scores on those subtests placed him at a grade equivalent of high first grade. The majority of Student's other scores placed him at a grade equivalent of kindergarten or below kindergarten level, and some beginning first grade level.

7. Ms. Jones has a bachelor's of science degree in speech and hearing therapy from the Ohio State University, a master's degree in speech pathology from Eastern Michigan University, an American Speech and Hearing Association certification, and is a California licensed speech pathologist. Ms. Jones has 30 years of experience as a speech and language pathologist. Student required significant redirection during the

² The adaptive physical education report was not discussed during the hearing. Parent consented to the removal of physical therapy services, an increase in adaptive physical education services, and the gross motor goals, and did not assert that these denied Student a FAPE. Therefore, Student's needs pertaining to adaptive physical education, physical therapy, and gross motor are not addressed in this decision.

³ Dr. Smith Roley did not testify nor was her evaluation submitted as evidence.

assessment, he would walk around the room or ask questions when he did not want to work on the assessments. Ms. Jones's assessment concluded that Student had improved in using grammatical structures, greeting people, and using eye contact. Student still had an articulation disorder and significant deficits in semantics, morphology and syntax, and pragmatics.

Present Levels of Performance and Academic Progress

8. In addition to the formal assessment, Mr. Valerio observed Student multiple times across several different settings. He observed Student in the resource specialist program room for small group specialized academic instruction four to six times. He observed Student eight to ten times in the general education third grade classroom and three to five times during recess. Each of Mr. Valerio's observations lasted approximately 30 minutes, and took place during the 2016-2017 school year. Mr. Valerio also worked with Student individually and trained Student's aide on how to deliver concepts to Student. Mr. Valerio was familiar with Student and provided persuasive testimony during the hearing regarding Student's strengths, weaknesses, and academic needs.

9. Mr. Valerio testified regarding his testing, observations, and work with Student. Mr. Valerio was an established special education professional and had significant contact with Student in a variety of academic settings. Mr. Valerio worked with Student on both English language arts and math; however, he spent more time working with Student and his aide on math concepts within the general education class. Mr. Valerio opined that Student needed a special day class to make academic progress. Student needed significantly more repetition, and information presented at a slower pace, than what was possible in a general education class or the resource specialist program.

10. Ms. Luther, Student's third grade teacher for the 2016-2017 school year,

testified regarding Student's academic performance and experience in the general education classroom. Ms. Luther has a bachelor's degree in education from Oral Roberts University, a master's in curriculum instruction from Chapman University, and a multiple subject credential. Ms. Luther has taught at the elementary level for 20 years, and has been teaching third grade for eight years.

11. As Student's teacher, Ms. Luther assessed Student in the areas of math, reading, and writing throughout the year, as she would every student. These assessments were at the end of every trimester. Ms. Luther also conducted weekly skill assessments. Based on the assessments and her observations, Ms. Luther graded Student at the end of every trimester. For the 2016-2017 school year Student received all twos with the exception of a three for social studies during the second trimester. A two is partially meeting the academic standard and a three is adequate. Although Ms. Luther could not explain why she gave Student a three in social studies, she testified that she only gave Student twos because she believed she was not allowed to give anything less than a two to a student who had modified grading because of an IEP. Ms. Luther explained that, without modified grading, Student was not able to earn passing grades in general education.

12. Ms. Luther observed that Student was well behaved in class but always seemed to be lost. Student was aware that he was not keeping up with the students around him, and his aide needed to tell him step-by-step what to do. Consequently, sometimes Student would get frustrated and his aide would remove him from the classroom. Student struggled significantly with the general education curriculum. His curriculum was not modified, but Ms. Luther would accommodate the material for Student in the same manner she did for other students who struggled with the material. For example, she would place Student in a small group for re-teaching. Even with accommodations and re-teaching, Student was still not able to understand or benefit

from the instruction. Ms. Luther persuasively explained that Student required a special day class for his core academics. Student referred to his one-to-one aide for each step of an assignment, and even then he was not able to keep up with the pace of the class. Not only was Student at least three grade levels behind in all academic areas, he was not able to participate with his peers in shared thinking or group discussions.

13. Ms. Weatherill, Student's resource specialist program teacher, testified regarding Student's performance while receiving small group specialized academic instruction. Ms. Weatherill has a bachelor's degree from California State University, Long Beach, a master's degree in counseling from Azusa Pacific University, and a special education credential. Ms. Weatherill has taught general education elementary school for nine years and been a resource specialist teacher at District for kindergarten to third grade for three years. Ms. Weatherill observed that Student enjoyed being with other children, but did not really interact with them much. Student was able to keep up with the pace of the other students in Ms. Weatherill's small group if the information was rote, but if he was asked comprehension questions he needed much more support than her other students. Student also spent more time in the resource specialist program than Ms. Weatherill's other students. Although Student made some progress in Ms. Weatherill's class, it was below expectations. Ms. Weatherill opined that Student would have made more progress if he was in a special day class with fewer transitions during the school day.

14. Ms. Colon testified regarding her observations of Student. Ms. Colon has a bachelor's of arts in liberal studies from Azusa Pacific University, a teaching credential, and an administration credential. Ms. Colon has worked for District for 20 years and was the principal at Student's school for the last six years. Ms. Colon has known Student since he started at District, and although she never formally assessed him, she observed him in multiple settings. Ms. Colon observed that Student's gap between ability and

grade level has increased over the years while in general education.

15. As part of reviewing Student's present levels of performance, the 2016 triennial IEP team reviewed Student's prior IEP goals from October 2015. That IEP had 20 goals, including two reading goals, one comprehension goal, one writing goal, three math goals, one behavior goal, seven speech and language goals, three gross motor goals, and two fine motor goals. Student did not meet any of his seven academic goals. He met his behavior goal, four speech and language goals, gross motor goals, and one fine motor goal.

MATHEMATICS

16. In math, Student was performing at a kindergarten to beginning first grade level. Student made progress on his math goals, but did not meet any of the three goals. Although Student was working on the same concepts as the rest of his class, he was not working at the same level. Ms. Luther's class was working on addition and subtraction, and while most of the class was working on problems involving thousands, Student was performing simple addition and subtraction with single digits and using manipulatives. Student could identify basic shapes; however, a typical third grader should be identifying three dimensional shapes. Student was working on fractions with the rest of the class, however, Student was working with manipulatives to identify fractions while the rest of the class was comparing fractions and equivalent fractions. Additionally, Ms. Luther's class was working on rounding to the hundreds, but Student was not able to grasp that concept.

17. Mr. Valerio observed Student struggle with math concepts. Student needed the information broken down from abstract to concrete. He also needed manipulatives and visuals to grasp concepts. Frequently the rest of the class would move on from a concept before Student was able to grasp it. Student had a difficult time attending to tasks and would frequently look away, engage in other conversations,

and needed almost constant redirection to work on the task at hand.

18. Mother provided numerous work samples of addition, subtraction, and multiplication worksheets that Student completed at home. Mother and an applied behavior analyst worked diligently with Student in the home. The work samples presented were from June of 2017, and confirmed what Student's teachers observed; rote memorization was a skill of Student's, and he could complete math worksheets as long as the operation was the same.

WRITING

19. The only area of writing in which Ms. Luther saw improvement was Student's spelling. However, even then, Student was not able to apply his spelling words to writing. Student was able to write a simple sentence with significant prompting; however, he was not able to write in paragraph form. If Student wrote more than one sentence, each subsequent sentence would follow the same model. Ms. Luther provided work samples to explain the repetitive sentences. One example was a Valentine's Day project; the assignment was to write two paragraphs about Valentine's Day, however, Student wrote 11 sentences. Of the 11 sentences, four were "someone likes Valentine's Day," and seven were a noun followed by "Happy Valentine's Day." Student did not use correct punctuation or capitalization.

READING

20. Student made some progress on his reading fluency; however, he still struggled with comprehension. Ms. Luther assessed Student at the end of October 2016, and again in May 2017, both times he was reading at the beginning first grade level, but could not answer questions about the story.

21. Mr. Valerio observed that Student was able to answer more concrete who and what questions, but struggled with when, where, and why questions that required

more abstract thought. This was consistent with Mr. Valerio's testimony that Student is a concrete learner and has difficulty grasping abstract concepts.

OCCUPATIONAL THERAPY

22. Ms. Pradhan provided occupational therapy services to Student for four years, since he was in kindergarten. Ms. Pradhan has been an occupational therapist for 17 years, the last five with District. Ms. Pradhan has a bachelor's of science degree in psychology and occupational therapy, is a California licensed occupational therapist, and is nationally board certified.

23. Student receives individual occupational therapy once a week for 30 minutes. In addition to working with Student individually, Ms. Pradhan also observed Student in his general education classroom, at recess, and during lunch approximately four or five times during the course of the 2016-2017 school year; each of those observations lasted 30 to 40 minutes.

24. Ms. Pradhan believes the occupational therapy services Student receives are appropriate as Student made progress on both goals and met one of his goals. At the beginning of the 2016-2017 school year Student was not able to legibly far point copy, copy something written on a board far away, and his near point copy skills, copy something written next to him, were approximately 60 percent legible. By the end of the school year, Student was able to far point copy and near point copy with improved legibility; although Student still uses paper that is slightly larger than what a typical fourth grader would use.

25. In observing Student in the general education setting Ms. Pradhan believes the information presented is at a higher level than he can comprehend. Student needs information broken down in smaller steps and presented at a slower pace. Consequently Student seeks help from his one-to-one aide more frequently.

26. One of Student's supports is sensory breaks. Based on a recommendation

from Dr. Smith Roley, District implemented frequent planned sensory breaks, every 10 minutes, instead of letting Student decide when he needed a break as he was previously doing. Student's aide took data during the trial and observed that Student seemed frustrated with the frequent breaks, did not want to stop working, and struggled to catch up with the work after the break.

SPEECH AND LANGUAGE

27. Ms. Jones provided speech and language therapy to Student for three years. During the 2016-2017 school year, Ms. Jones saw Student three times a week, twice for individual therapy for 20 minutes per session and once for group therapy for 25 minutes per session. Ms. Jones saw significant progress in Student's communication and speech ability. Student had seven speech and language goals, he met four of the goals, made significant progress on two, and struggled with one goal. Three years ago Student could only speak three word utterances; presently he speaks up to 14 word sentences.

Proposed Goals, Supports, Services, and Placement

28. Based on the assessment data, progress on goals, and teacher observations, District proposed 20 new goals.

29. Ms. Pradhan proposed two occupational therapy goals. One was to demonstrate the ability to copy one to three sentences with 80 percent or better legibility in four out of five trials. The other goal was to gather all materials for a task and put them away after a task with no more than two verbal prompts per task on four out of five school days. Both occupational therapy goals were measurable, appropriate, and specific for Student. The IEP team discussed the sensory breaks and the planned breaks proposed by Dr. Smith Roley; the IEP team decided that Student was using sensory breaks by going to the bathroom, getting a drink of water, and running at

recess appropriately, and the planned breaks were a disruption. Ms. Pradhan proposed continuing the same level of services and sensory breaks as needed by Student.

30. Ms. Jones proposed six speech and language goals. The first goal was for Student to be able to produce the concepts of between, over, below, half, whole, rough, and smooth when referring to a picture or object with 80 percent accuracy. The second was to state similarities between objects when given verbal or visual cues with 80 percent accuracy. The third was to describe an object's parts, sensation, and function with 80 percent accuracy. The fourth was to correctly produce the /r/ sound in nonsense syllables and words with 80 percent accuracy. The fifth was to correctly produce the possessive marker /z/ in nouns with 80 percent accuracy. And the sixth was to initiate a conversation of choice with an adult, peer, or small group and maintain the conversation for four to five turns with 80 percent accuracy. Each goal was specific and measurable. Mother did not consent to the goals. However, during testimony, Mother was not able to explain why she disagreed with the goals. Mother did not have any specific concerns with the goals, nor did she allege there was anything she suggested that District did not consider. Mother's testimony was less persuasive than Ms. Jones, who persuasively testified in support of the goals. Ms. Jones proposed continuing the same level of service for speech and language based upon his progress on previous goals.

31. District proposed six academic goals for Student. During the IEP team meeting the team discussed each goal. Mother and advocate asked questions about the goals and made suggestions that District incorporated into the IEP. District made several of the goals more challenging based on Mother's input. However, Mother still did not consent to any of the academic goals. While testifying, Mother conceded Student's comprehension goal, to listen to a third grade story and use a set of pictures or sentences to identify characters, sequences, and details, with 80 percent accuracy in two out of three trials, was appropriate.

32. Mother disagreed with Student's decoding goal, to read a list of 10 novel multi-syllable words with blends and digraphs, as well as common prefixes and suffixes with 80 percent accuracy in two or more trials, because she believed he could already do that task. However, Mr. Valerio more persuasively testified that Student was still mastering sight words. Ms. Weatherill similarly testified that Student struggled with new information that was not rote.

33. Mother also disagreed with Student's sentence writing goal, that he will determine the correct sequence of events in a second grade text and write a four to five sentence paragraph in two out of three trials, because Mother believed Student should be reading a third grade text. However, Mother's testimony was less persuasive than Ms. Luther, who testified that Student could not read and comprehend a third grade text and use that text to answer questions. Ms. Luther credibly explained that the school's curriculum, common core, expects this of third grade students, and Student was not able to meet that standard, or the second or first grade standards for reading comprehension.

34. Mother also disagreed with Student's computation goal, to calculate the sum or difference of two whole numbers up to two digits with regrouping with at least 80 percent accuracy in two out of three trials; she believed he was already able to do that task. Mother provided one work sample of two digit subtraction with regrouping where Student was able to accurately complete at least five problems, however, that was completed on June 1, 2017. In contrast, Mr. Valerio and Ms. Weatherill testified that Student was able to complete single digit addition, subtraction, and multiplication worksheets, but that was rote memory and if the problems were mixed, as in some of each operation, Student would get confused and could not complete the problems. Mr. Valerio and Ms. Weatherill also persuasively testified that Student was not able to complete addition or subtraction problems with regrouping.

35. Student's second computation was to draw an array or tape diagram and match that to number sentences displaying an understanding of twos, threes, and fours multiplication tables with 80 percent accuracy in two out of three trials. Mother agreed this was an appropriate skill to work on, but not an appropriate goal because she believed Student could already explain this concept. Mother provided as an example that if she asked Student for two sets of three he could give her two sets of three. However, Mr. Valerio and Ms. Weatherill testified that in the classroom Student was not demonstrating this skill. Although Student could complete worksheets of multiplication facts, he could not show his work or explain the concept.

36. Student's final academic goal was to round whole numbers, up to 100, to the nearest 10 with at least 85 percent accuracy in two out of three trials. Mr. Valerio opined that this was an appropriate goal for Student because he could count and write his numbers in order, but could not yet round to the nearest 10. Ms. Luther testified that her third grade class was working on rounding, but that was not a skill Student could comprehend.

37. The IEP team had an extensive discussion regarding the amount of specialized academic instruction Student required to meet his goals. Student was receiving 600 minutes of specialized academic instruction per week in the resource specialist program. District prepared a document outlining the total minutes in the school day, including how many minutes Student spent receiving related services and how Student's time in general education could be maximized while still receiving the required specialized academic instruction. District proposed increasing the specialized academic instruction minutes to 930 minutes per week for core academics and keeping Student in the general education classroom for recess, lunch, physical education, reading, science, and social studies. In addition, District offered: 1,925 minutes a week of intensive individual support in the form of a one-to-one aide; 50 sessions of individual

speech and language services for 20 minutes each; 25 sessions of group speech and language for 25 minutes each; 50 sessions of group adaptive physical therapy for 30 minutes each; and 25 sessions of individual occupational therapy for 30 minutes each. District also offered: 30 minutes twice a week of consultation and collaboration of the specialized academic instruction staff with other staff members to support Student's needs; 20 minutes a day of collaboration with Student's aide and other staff; 60 minutes a month of training for Student's aide; sensory breaks and equipment available throughout the day; 20 minutes monthly of occupational therapy consultation; an adult escort around campus as needed, and a behavior intervention plan with a token board, incentives, and verbal praise.

38. The IEP team discussed a range of placement options. Mother believed Student could be successful in general education. However, Mr. Valerio, Ms. Luther, Ms. Weatherill, and Ms. Colon more persuasively testified that the general education setting for core academic classes was not appropriate for Student because of the repetition and pace necessary for Student to learn. Student needed one-to-one support and repetition to ensure that he learned the concepts. He was not able to keep up with the class or engage in the group activities in core academic classes in general education. Ms. Weatherill testified that Student's program was not typical for a resource specialist program student as he needed more support and could not keep up with the other students. On this basis, District offered 930 minutes of specialized academic instruction per week in a special day class setting.

39. Jann Garcia, District's special day class teacher for fourth and fifth grades, testified regarding her classroom, the proposed setting for Student to receive specialized academic instruction. Ms. Garcia has a bachelor's degree in special education from California State University, Pomona, has a special education teaching credential with an autism clearance, and is an a master's program. Ms. Garcia has been teaching

special education at District for the last two years. Ms. Garcia's class has 11 students, one instructional aide, a one-to-one aide for one student, and herself as the teacher. There are seven, fifth grade students and four, fourth grade students in her class. Ms. Garcia provides whole group teaching, a lot of small group teaching, and some one-to-one teaching. Her class works on the same common core state standards as the general education classes. However, she is able to modify the work and slow down the pace so students are able to grasp the concepts.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁵ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free and appropriate public education 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

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

⁵ All subsequent references to the Code of Federal Regulations are to the 2006 version.

standards, and conform to the child's individualized education program. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and nondisabled 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.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) 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] (*Schaffer*); *see* 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) By this standard, District had the burden of proof for the issue alleged in this matter.

ISSUE: DISTRICT'S OCTOBER 3, 2016 IEP OFFER OF FAPE

6. District contends its October 3, 2016 IEP offered Student a FAPE in the least restrictive environment such that District should be allowed to implement the IEP without Parent consent. Student contends a special day class is too restrictive of an environment and he should remain in a general education class with specialized academic instruction in the resource specialist program.

General Requirements for IEP's

7. There are two parts to the legal analysis of a school district's compliance

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

8. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A 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.)

9. 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).)

10. 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.)

11. In formulating the October 3, 2016 IEP District held three IEP team meetings with all required team members, including Mother and her advocate. Both Mother and advocate actively participated in the IEP team meetings, asked questions, and made suggestions and changes to the goals. The IEP team had a significant discussion regarding the amount of specialized academic instruction Student required and in what setting the academic instruction should take place. Although ultimately there was not agreement regarding the setting, Mother had an opportunity to discuss her concerns and District considered her suggestions.

Contents of IEPs

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

13. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§

56032, 56345.) It is the “modus operandi” of the IDEA, “a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs.” (*School Comm. of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].)

14. An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student’s needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).) In *Union School Dist. v. Smith* (1994) 15 F. 3d 1519, cert. den., 513 U.S. 965 (*Union*), the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand.

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

16. In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child’s education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).) 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 Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

17. If a child's behavior interferes with his learning or the learning of others, the IDEA requires the IEP team, in developing the IEP, to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

18. The October 3, 2016 IEP included all the content required by law. It identified accurately Student's present level of academic performance at a kindergarten or first grade level, identified fluency and spelling as relative strengths and noted his struggles with comprehension. The present levels also correctly identified the considerable amount of time Student required to complete tasks and assignments and the chunking of assignments and verbal prompting Student required. The IEP established various accommodations, modifications, supports and related services necessary to adequately address Student's needs and academic performance, which included sensory breaks, a one-to-one aide, a behavior intervention plan, speech and language therapy, occupational therapy, adaptive physical education, and specialized academic instruction. It set forth measurable annual goals designed to meet Student's unique needs, which included identify key details in a story, decode multi-syllable words, correctly sequence events in a story, calculate the sum or difference of two whole numbers with regrouping, draw a diagram to match number sentences, round whole numbers up to 100 to the nearest 10, and established the services and supports which would be provided to achieve those goals. The IEP appropriately determined the extent

to which Student could participate in regular educational programs, and concluded that because Student needed to work on foundational skills and needed slower instruction and more repetition than a general education classroom, he required a special day class for his core academics.

Requirement of FAPE

19. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program, not parent's preferred program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, comported with the student's IEP, and was in the least restrictive environment, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*) School districts need to "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Endrew F., supra*, (2017) 580 U.S. ___, [137 S. Ct. 988].)

Least Restrictive Environment

20. Both federal and state law require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be

achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398,1403; *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

21. Placement in the least restrictive environment is not an absolute. In an appropriate case, it must yield to the necessity that a student receive a FAPE: The IDEA does not require mainstreaming to the maximum extent possible or to the maximum extent conceivable. It requires mainstreaming to the maximum extent appropriate. Mainstreaming is an important element of education for disabled children, but the IDEA does not permit, let alone require, a school district to mainstream a student where the student is unlikely to make significant educational and non-academic progress. (*D.F. v. Western School Corp.* (S.D.Ind. 1996) 921 F.Supp. 559, 571 [citation omitted].)

22. The IDEA recognizes that some students should not be placed in general education. Despite this preference for “mainstreaming” disabled children, that is, educating them with nondisabled children, Congress recognized that regular classrooms simply would not be a suitable setting for the education of many disabled children. The Act expressly acknowledges that “the nature or severity of the disability [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” § 1412(a)(5). The Act thus provides for the education of some disabled children in separate classes or institutional settings. (*Rowley, supra*, 458 U.S. at p. 181, fn. 4 [citation omitted].)

23. Consequently, in appropriate cases, courts have approved placements outside of general education. When it is clear that a student cannot benefit academically or socially from general education, the Ninth Circuit has interpreted its decision in *Rachel H., supra*, 14 F.3d 1398, to approve placements for all or part of a school day in other than general education settings. (See *Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1118, 1136-1138 [approving temporary placement of student with

Down syndrome and IQ between 50 and 70 in self-contained special education classroom]; *Clyde K. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 35 F.3d 1396, 1398, 1400-1402 [approving placement of student with Tourette's Syndrome in private school for disabled].)

24. In *Rachel H., supra*, 14 F.3d 1398, the Ninth Circuit Court of Appeal set forth four factors that must be evaluated and balanced to determine whether a student is placed in the least restrictive environment: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Id.*, 14 F.3d at p. 1404.)

25. Here, the evidence established that District thoroughly evaluated the *Rachel H.* factors in developing the October 3, 2016 IEP, and properly determined that Student's academic deficits prevented him from benefitting academically from placement in a general education classroom for core academics. Student was not able to participate in group discussions, he was not able to follow along during whole group instruction, and he required constant prompting from his aide to complete work. Additionally, Student was not completing the same level of work as his peers. Although District did not present any evidence that Student did not receive non-academic benefit from the general education classroom, District maximized Student's time in general education so he would still have access to general education peers during recess, lunch, physical education, reading, science, and social studies, as he would spend 44 percent of his day in general education. Ms. Luther testified that even with his aide, Student was

not able to keep up with the pace of the class.⁶ Additionally, Student already received specialized academic instruction outside the general education classroom for 600 minutes per week. District's offer increased that to 930 minutes per week. Despite District's best efforts, Student was not making academic progress in general education. Ms. Weatherill testified that Student was making some progress in her resource specialist program, but not what she expected. Student could not keep up in the general education classroom and could only keep up in the resource specialist program if the information was rote memorization. District established that Student is a concrete learner who needs information broken down into simple steps with significant repetition. In his present setting, Student is unlikely to make any significant educational progress and requires a special day class for core academics to make meaningful educational progress. Accordingly, District's offer of 930 minutes weekly of specialized academic instruction in a special day class is the most appropriate manner in which Student can receive a FAPE.

Clarity of Placement Offer

26. In *Union, supra*, 15 F.3d 1519, the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. *Union* emphasized the need for rigorous compliance with this requirement, finding that the requirement of a formal, written offer creates a clear record which helps to eliminate subsequent factual disputes regarding when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any.

⁶ Neither party presented any evidence or made any argument concerning the fourth *Rachel H.* factor, the cost of the proposed placement, so that factor is not addressed here.

27. The issue of placement was thoroughly addressed at Student's IEP team meeting. The team discussed keeping Student in the resources specialist program for specialized academic instruction, placing Student in a special day class for specialized academic instruction, and ways to maximize Student's participation in general education. The IEP team meeting notes reflected this discussion, as did the services page of the IEP. The IEP offer, including placement and services, was clear, in writing, and easy to understand.

28. In sum, the October 3, 2016 IEP was based on assessments District conducted, observations of District staff, and Student's progress on goals. District's proposal to change Student's placement was based on reliable and valid data, assessments and information relating to Student's cognitive abilities, academics, occupational therapy, and speech and language needs, which represented all areas of suspected disability related to his education. The IEP identified Student's present levels of academic achievement and functional performance, established goals which addressed Student's needs, and offered services and supports which were appropriate.

29. The weight of the evidence demonstrated that Student requires specialized academic instruction in a special day class to benefit from his education. Student made minimal, if any, progress receiving specialized academic instruction from the resource specialist program. Although Student had a one-to-one aide and received 600 minutes per week of specialized academic instruction, he was still performing at a kindergarten to first grade level while in third grade. Student was not able to keep up with the instruction in the general education classroom, and the gap between where he was functioning and grade level was widening. Student requires instruction that is modified and delivered at his level and broken down into concrete steps with repetition.

30. Accordingly, District offered Student a FAPE in the least restrictive environment.

ORDER

1. The October 3, 2016 IEP offered Student a FAPE in the least restrictive environment.
2. District may implement the October 3, 2016 IEP without parental consent.

PREVAILING PARTY

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

RIGHT TO APPEAL

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

Dated: September 22, 2017

_____/s/_____
LINDA JOHNSON
Administrative Law Judge
Office of Administrative Hearings