

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

EAST WHITTIER CITY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2017070729

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v.

EAST WHITTIER CITY SCHOOL DISTRICT.

OAH Case No. 2017060297

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on June 7, 2017, naming East Whittier City School District. On June 14, 2017, District served its written response to the complaint on Student. On July 19, 2017, District filed its complaint with OAH, naming Student. On July 24, 2017, OAH granted District's motion to consolidate the complaints, making District's case the lead case.

Administrative Law Judge Cole Dalton heard this matter in Whittier, California, on August 2, 3, and 8, 2017.

Darin Barber, Attorney at Law, represented District. Diana Grant, Director of Special Education and Student Services, attended each day of hearing on behalf of District.

David German, Attorney at Law, represented Student. Parents attended each day

of hearing.

At the parties' request, the matter was continued until August 28, 2017, to permit the parties to file written closing arguments. A further request for continuance to file written closing arguments was granted for good cause and the matter continued again from August 28, 2017 to September 1, 2017. Upon timely receipt of closing arguments on September 1, 2017, the record was closed and the matter submitted for decision.

ISSUES¹

STUDENT'S ISSUE:

1. Did District deny Student a FAPE for the 2017-2018 school year, in the spring of 2017, by failing to offer an appropriate placement in the least restrictive environment?

Student seeks an order that he be placed in the general education setting with a fulltime individual aide from a non-public agency. Student also seeks an order that District provide Student with consultation and supervision services from an inclusion specialist.

¹ The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.) To the extent Student's closing brief argued issues concerning the appropriateness of inclusion and behavior support during the 2016 – 2017 school year, those issues were not pled in the due process hearing request, and are not addressed in this decision. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.)

DISTRICT'S ISSUE:

2. Did District offer Student a FAPE for the 2017-2018 school year at the March 20, 2017 and May 31, 2017 IEP team meetings such that District can implement its offer without parental consent?

District seeks an order that it may implement its 2017-2018 offer of FAPE without parental consent.

SUMMARY OF DECISION

Student contends District's spring 2017 individualized education programs did not offer placement in the least restrictive environment and that full inclusion, with appropriate supports offered Student a free appropriate public education. District contends that its offer of placement in a kindergarten to second grade moderate to severe special day class offered Student placement in the least restrictive environment appropriate to meet his unique needs.

Student proved that a general education placement with appropriate supports offers him a placement in the least restrictive environment appropriate in light of his circumstances. Student received some educational benefit from full inclusion during kindergarten, even though District did not provide appropriate inclusion and behavior support. Student also sought retention in kindergarten with appropriate supports and demonstrated this to be an appropriate remedy in light of his age, intellectual functioning, stature, and social functioning. District will not be allowed to implement its spring 2017 IEP's. Rather, Student shall be placed in a kindergarten general education classroom with additional inclusion and behavior supports.

FACTUAL FINDINGS

1. Student was six years old and in kindergarten at the time of hearing. He resided with Parents within District boundaries at all relevant times. Student has Down

syndrome and initially qualified for special education in the fall of 2013 under the eligibility category of intellectual disability due to a mild global developmental delay.

2. Student demonstrated needs in the areas of leg strength and balance; fine and visual motor skills; expressive and receptive language; articulation; pragmatic communication; and adaptive skills such as dressing, grooming, and toileting. He communicated his wants and needs using a variety of gestures, signs, and words. He gained peer attention through hitting and hair pulling.

3. Throughout his education, providers described Student as excited, joyful, and interested in peer interaction. By his 2014 – 2015 school year, he demonstrated the ability to make good eye contact, greeted peers, and learned to gain attention and interact during reciprocal play with adult support.

4. Student spent his 2014 – 2015 and 2015 – 2016 school years in District's integrated preschool class. District referred to the class as its moderate to severe preschool special day class. Patricia Magana-Perez, Student's preschool teacher, holds a bachelor of arts in child development and an early childhood special education clear credential. She described Student's class as reverse integration in that typically developing peers attended the class for three of its four hours. The class had approximately 14 special education students and four instructional assistants.

5. General and special education students worked on the same curriculum, though modified differently as needed, in letters, numbers, colors, writing their names, and sequencing. Special education students were grouped with typically developing peers during instructional activities. Student demonstrated the ability to work with two to three other children in a group, with the help of his aide.

6. Student enjoyed being part of a group, participating in story time, and dressing up and playing during play-time. He loved going to school. He took on responsibilities like opening the gate for the children in line, then following them onto

campus.

7. Student exhibited deficits in behavior including attention and sometimes throwing objects during non-preferred activities. Socially, he greeted his peers, but required a lot of encouragement to interact with them. Nonetheless, he learned from watching them. For example, during circle time, Ms. Magana-Perez would call on other children first to provide Student an example that he would imitate. Similarly, during story time, when he first heard other children answering questions, he could respond during his turn.

8. Student demonstrated that he could model appropriate behavior from peers as he met his goal for doing so in November 2015, and continued to demonstrate that he benefitted from role models. Student's peers enjoyed being around him. He initiated peer interactions a few times per day.

9. Ms. Magana-Perez's experience with inclusion preschool showed that children give each other cues during interactions that adults do not, such as, "that's mine," or "let's go, come on!" Student benefitted from proximity to typically developing peers in her class. Ms. Magana-Perez found that integration provided students with examples of good verbal skills, compliance, rule following, and socialization. She also observed the general education children benefit by learning that, though students each develop differently, they are all the same in many ways.

10. Throughout Student's education, Parents volunteered in his classes and actively participated during IEP team meetings. They joined outside organizations to learn more about Down syndrome and sought out early intervention therapies to help their child. Parents wanted Student to attend school with typically developing peers to emulate the world he will continue to live in outside the classroom.

SPRING 2016 TRIENNIAL ASSESSMENTS

11. District conducted comprehensive assessments in preparation for

Student's transition into kindergarten in the 2016 – 2017 school year. The IEP team reviewed the assessments at the May 11, 2016 IEP team meeting.

12. Based on the assessments and her experience with Student, speech language pathologist, Jasmine Simmons, determined that Student demonstrated receptive vocabulary within the average range compared to same age peers. That meant that Student could learn to segment phrases, then simple sentences, at which point his verbal expression could flow with fewer prompts. To this end, she recommended Student experience different environments, including parks and zoos, where modeling vocabulary would help Student continue to expand his expressive vocabulary.

13. Ms. Magana-Perez, conducted the Battelle Developmental Inventory, 2nd Edition, and prepared a transition report. The Battelle measured progress on Personal-Social, Adaptive, Motor, Communication, and Cognitive developmental milestones. Though Student showed significant delays in all areas, he also demonstrated mastery and emergence of various skills related to social-emotional and academic development. For example, Student mastered the areas of responding differently to familiar and unfamiliar children; playing with peers using the same materials without disturbing the other child's play; expressing affection or liking for a peer; and attending to small group tasks for five minutes. He demonstrated emerging ability to express sympathy or concern for others; allowing others to participate in activities; and completing learning tasks having two or more steps without assistance.

14. Based on her experience with Student in class, along with the results of the Battelle, Student demonstrated the need for adult assistance throughout his school day. When challenged by work he avoided tasks by throwing materials on the floor, saying no, and attempting to leave the area. However, he developed the ability to attend circle time for up to 10 minutes during routines, preferred stories, and music. Overall, Student made good progress in all areas, improving his attention, participation, and social skills.

15. At hearing, Ms. Magana-Perez described Student's ability to model typically developing peers during academic tasks, following routines, and play. He made progress on all of his goals and good progress on pre-academic skills. He demonstrated the ability to work in small groups for most of the day with adult support. Student continued to require skill development in completing tasks without prompts, following rules when game playing with peers, following classroom rules, using words for social contact and peer interaction.

16. School psychologist Adriana Sevilla, found that, while Student required some support and redirection, he behaved well in the classroom. He demonstrated the desire to interact with other students in play, though he required moderate support to play appropriately with friends. Ms. Sevilla reported that cognitive testing results should be interpreted with caution due to Student's communication deficits, impulsivity, and non-compliance. Ms. Magana-Perez agreed that standardized assessments do not capture all of Student's progress.

17. On this basis, with a 95 percent confidence interval, Student's intelligence quotient spanned from 44 to 70, placing him in a range of developmental delay anywhere between severe and borderline, according to assessment descriptors. Ms. Sevilla's report included a review of Student's initial assessments from December 2013. In 2013, assessments showed a Brief IQ Composite Score of 74 on the Leiter International Performance Scale - Revised, a language free test and a standard score of 71 on the Cognitive Domain of the Battelle. Testing demonstrated that Student fell within the borderline range. However, reviewing overall test results, the school psychologist in 2013 determined Student demonstrated a mild developmental delay.

18. The May 11, 2016 IEP, restates District's least restrictive environment analysis from the prior annual IEP, indicating that Student required 95 percent of his educational time be spent outside the regular class. Given Student's progress in an

integrated educational environment, Parents disagreed with District's offer of 30 minutes of inclusion time per day.

19. Parents opined that inclusion in only the morning routine, which consisted of putting away backpacks and taking attendance, felt like a step backward. Parents suggested a behavior plan be implemented if Student engaged in behaviors that impeded learning while fully included.

DR. FALVEY

20. Dr. Mary Falvey conducted an independent evaluation of Student's placement, at Parent request in October 2016. Dr. Falvey holds a bachelor's degree in social sciences and master's and doctoral degrees in special education. She worked as a special education teacher for four years. She became a professor of special education in 1980, where she continued to teach as Emerti Professor, part time, through the time of hearing. She was Dean of the Charter College of Education for the University from 2006 – 2013.

21. Over the course of several decades, Dr. Falvey researched and wrote several peer reviewed published works on the development of education programs and inclusion of students with disabilities. For 15 years, she worked as a consultant in District's local plan area to build inclusive school programs. She supervised teachers in many school districts in the local plan area, but had no experience with District.

22. Dr. Falvey described the paradigm shift that occurred over the past 15 years in developing inclusive models that changed teachers' attitudes toward inclusion. In over 100 published research studies, students taught with their general education peers showed more academic and social gains over student in self-contained classrooms. Because all students learn in different ways and at different rates, using differentiated instruction results in a positive impact on both special and general education students in inclusion classrooms.

23. Dr. Falvey's expert opinions carried much weight given her experience and training in the area of inclusion. She expressed her ultimate conclusion, that all students should be included to the greatest extent possible. At first blush, this sweeping generalization might cast doubt on her bias and credibility. However, this opinion aligns with the IDEA's policy preference for inclusion to the maximum extent appropriate. Further, Dr. Falvey provided specific examples of how Student benefitted from full inclusion and could continue to make progress in a full inclusion environment.

October 2016 Observations

24. Dr. Falvey's evaluation consisted of observations on October 9, 11, and 18, 2016. She prepared a report dated November 29, 2016. Dr. Falvey observed Student in his home and at his integrated preschool placement. She observed Tracey Jennum's general education kindergarten class, in which Student was later placed, and the K-2 moderate to severe special day class District offered in the May 11, 2016 IEP. District again offered the K-2 class in the spring 2017 IEP's, which are the subject of this hearing.

25. Dr. Falvey determined the K-2 special day class would not meet Student's needs. The class offered a much slower pace than Student experienced in his inclusion preschool class. Further, the very low level of verbal communication would not provide sufficient modeling opportunities for Student's language development. Her opinions were consistent with those of Ms. Magana-Perez and Ms. Simmons, in this regard.

26. Based upon her training, experience, and observations, Dr. Falvey recommended placement in a general education kindergarten class using Universal Design for Learning and Multi-Tiered System of Support teaching strategies. These teaching strategies accommodate learning differences, increasing access to instruction. Dr. Falvey recommended inclusion support services for consultation, collaboration, and communication with all of Student's providers to establish a basis of knowledge of Student's needs and properly support inclusion.

2016-2017 SCHOOL YEAR

27. The parties entered into a settlement agreement on November 28, 2016. Under the terms of the agreement, Student began attending Tracey Jennum's general education kindergarten class at Leffingwell Elementary School on December 1, 2016. Student received 60 minutes per week of inclusion specialist support, along with continued support from his instructional aide.

28. Ms. Jennum worked as a general education teacher for District for 17 years, teaching students in kindergarten, first and second grade. She holds a bachelor of arts degree in kinesiology - elementary school physical education; a master of arts in education; and a clear multiple subject teaching credential.

29. Ms. Jennum described her class's daily routine. Upon arrival, students hung up their back packs, took out lunch pails, determined whether they brought or would buy lunch, did a morning warm up page, placed that in their cubbies, went to the rug, obtained a book for reading or looking for sight words, then worked on the English language arts program until recess. After the morning routine, the class worked in centers and on math, then went to lunch. After lunch, they read aloud again, shared, had social studies and science, met with buddies, then packed up and went home.

30. Student learned the classroom routine and rules in two to three weeks, with some re-teaching after the winter break. Most students learned the routine within the first week of school.

31. Ms. Jennum found Student happy to be at school. He enjoyed the songs and dancing and liked to be with other students. In academics, Student demonstrated a big discrepancy with the rest of his kindergarten peers. While Student would sit with other children during circle time, he did not participate as much, she opined, because the information exceeded his developmental level.

32. Ms. Jennum used Universal Design Learning strategies, differentiated

support, to match student needs, and provided reinforcement in the form of praise and support. During the 2016 – 2017 school year, Student exhibited maladaptive behaviors in her classroom including sitting down to refuse engagement, not going into class after recess, not wanting to leave class after school, and touching another student's belongings. Ms. Jennum developed a behavior log, which she sent home to communicate Student's behaviors to Parents. District did not develop a behavior intervention plan² to address these maladaptive behaviors.

33. At hearing, Ms. Jennum opined that Student should not be fully included because he required support to complete his work, did not keep pace with typically developing peers, demonstrated inconsistent social participation and required prompting to remain on task.

34. Ms. Jennum did not explain why she found Student's need for modification of curriculum, aide support, or prompting unusual, given that he required supports to address his unique needs. She did not describe Student as requiring all of her attention, depriving other students of access to their education, or exhibiting severe maladaptive behaviors. Yet it was clear she did not believe he should be included in a general education classroom.

March 20, 2017 IEP Team Meeting

35. The IEP team met on March 20, 2017 for Student's annual review. Parents; Dr. Falvey; program specialist James "Packy" Crowell; Special Education Local Plan Area Liason Lara Ulmer; Leffinwell Principal Scott Blackwell; itinerant educational specialist Sharon McAleese; general education teacher Tracey Jennum; special education teacher Jesselle Escalante; speech and language pathologist Beth Miller; physical therapist Kelly

² Witnesses used the terms "behavior support plan" and "behavior intervention plan" interchangeably.

Hilliard; and occupational therapist Olivia Edmonson attended the meeting.

36. Along with placement and services, the team discussed Parents' three main concerns: school-home communication, inclusion opportunities, and retention. The parties did not dispute the appropriateness of goals or related services in speech and language, occupational therapy, or physical therapy for the 2017 – 2018 school year.

37. Student demonstrated a desire to communicate and interact with typically developing peers in his class. However, he often did so in an inappropriate manner, disrupting the play of peers by grabbing, throwing or knocking over their toys.

38. Ms. McAleese holds a bachelor of arts in child development, a master of science in education, and teaching credentials in multiple subjects, learning handicapped, and severely handicapped. She worked as District's inclusion specialist since 1996, collaborating with and training teachers, aides, and support providers; modifying and adapting curriculum; developing positive behavior support plans; designing programs and educating other inclusion specialists in successful inclusion practices for children in kindergarten through eighth grade.

39. Ms. McAleese developed an informal behavior plan and social stories to address attention and reinforce "target behaviors" described as sitting, listening and quiet hands. Student's aide used visual icons to show Student behavior expectations, such as using a picture of sitting. Student earned time to draw on paper or a white board when exhibiting "target behaviors." In formal behavior intervention plans, target behaviors identify the maladaptive behaviors the plan seeks to extinguish. Here, Ms. McAleese used the term "target behavior" to identify desired behaviors.

40. Ms. McAleese did not take antecedent-behavior-consequence data to develop the plan. Because of the lack of data collection, she could not track whether target behaviors changed in frequency or duration. There was no way to determine whether the plan was consistently implemented. As a result, Student's behaviors

improved but did not diminish.

41. At hearing, Ms. McAleese explained her ability to support Student in the general education setting as limited, because she was an itinerant and not full time. She provided services at Student's school only one day per week. She explained that Student's aide communicated with her via text, daily. To meet Student's needs in kindergarten, she wrote out a script for the aide to say to Student to support him. She modeled interventions and strategies for the instructional aide. Ms. Jennum provided her with three weeks of curriculum at a time for modification. Ms. McAleese, over time, trained the aide to modify work.

42. Socially, Ms. McAleese described Student as a lovable, happy, little guy, with a cute personality. He demonstrated success in social opportunities including carpet time and free play. He played house with other students under the slide. He interacted with other students, playing with blocks or cars. His goals for the 2017 – 2018 school year are tied to state standards, but highly modified. For example, Student's goal for identifying eight letters of the alphabet addresses reading foundation, an English Language Arts standard. First grade students typically address phonemic awareness, blending sounds and need to know the alphabet as a precursor to reading.

43. Ms. McAleese concluded that Student required placement in a first grade special day class, as he did not demonstrate sufficient progress in his general education kindergarten placement. He required multiple teaching strategies, such as re-teaching and prompting, in the same lesson to target skill acquisition.

44. Ms. McAleese reasoned that, if a special education teacher with a moderate to severe credential worked with Student in a special day class, and supervised the instructional aides directly, he would achieve more academically than he would if fully included in a general education class. Instructional aides are not teachers and not familiar with curriculum, how to scaffold, and assess moment by moment

whether Student is accessing the information. For these reasons, she believed Student should not be in a general education placement.

45. However, Student's present levels of performance showed that he made some progress academically in his general education placement. He had two math goals. He demonstrated rote counting to four with no more than two prompts, towards a goal of counting to 20. The prior year he imitated counting behaviors to five. In one to one correspondence, a building block for addition and subtraction, he counted up to three objects, knowing that three equaled the total amount. By March 2017, he counted six objects but could show correspondence between one object and the numeral one.

46. In the area of behavior, Student completed two-step tasks with no more than three prompts. He transitioned between activities with an object or icon and verbal instruction during center time with no more than three prompts. His teacher used immediate reinforcement to aide improvement in this area. Student could use words and exchange toys with peers, though he did not meet his goal to do so independently. In literacy, Student learned three additional letters of the alphabet, for a total of eight towards the goal of 24.

47. Ms. Jennum agreed with the District team, that providing time for social interaction with typically developing peers during recess and lunch was appropriate for Student's first grade IEP. She described the Visual and Performing Arts program at Leffingwell Elementary School, which would comprise a component Student's inclusion for the 2017 – 2018 school year. Once a month a team of teachers held an art lesson, dance, physical education, science, or art project, in which Student could participate.

48. The IEP team discussed Student's behaviors and the informal behavior plan. Mr. Crowell recommended a functional behavior assessment to determine the function of Student's behaviors and develop a consistent plan to address them. Mr. Crowell holds a bachelor of arts in history and a master of science in special education.

He holds an administrative credential and a clear moderate to severe education specialist credential. At hearing, he described his participation in the development of Student's spring 2017 IEP's as an administrator.

49. Mr. Crowell led the least restrictive environment discussion. The team considered options from general education without support to special day class with support. Mr. Crowell agreed with other District providers that Student should not be fully included, based upon his experience and information obtained during the IEP team meeting.

50. Ms. Escalante taught the K-2 moderate to severe special day class being recommended to Parents. She described the class at the IEP team meeting. Ms. Escalante holds a bachelor of arts in urban education and a special education teaching credential. She holds a master's of education in curriculum and instruction. She has worked with District since 2009.

51. Ms. Escalante's K-2 class had approximately 11 students, some with instructional aides. None of her students from the 2016 – 2017 school year matriculated to a general education placement. She did not teach an overarching general education curriculum and had limited familiarity with first grade curriculum. Rather, aides taught students in her class using their IEP goals.

52. Ms. Escalante's class joined a general education class during lunch. At play- time, students could play with their general education friends. Otherwise, instructional aides facilitated social play with typical peers, fading support to enable natural interactions. Ms. Jennum described how her general education class ate and played together at lunch, being assigned its own lunch table. The class aide facilitated play amongst classroom peers, who were typically developing children. She did not describe interaction between her class and the K-2 class.

53. Parents requested that Student repeat kindergarten, so that he could learn

the things he missed by starting his kindergarten year so late. Ms. Jennum, Mr. Crowell, and Ms. Ulmer believed that repeating the school year would not benefit Student, as he did not perform as a typical beginning kindergarten student. Rather, having him repeat a grade would be detrimental in that it would shorten the amount of time he would have in his adult transition program after high school. Because of his learning rate, Student would not be an independent learner even if he did repeat kindergarten.

54. Ultimately, District offered placement in a K-2 special day class with 22 percent inclusion in lunch, recess, and District's arts program. District did not make a decision on retention at the team meeting as Mr. Crowell mistakenly believed this was an administrative decision.

DR. FALVEY'S PLACEMENT OPINIONS

55. In addition to Dr. Falvey's October 2016 observations, she met with Student four to five times, attended three IEP team meetings with Parents, and reviewed Student records. Her knowledge of Student's academics derived from her review of records and attendance at IEP team meetings.

56. Dr. Falvey opined that Student would benefit educationally from continued placement in a general education setting, with proper supports. Such supports included accommodations, modifications, inclusion specialist support, aide support, and an appropriate behavior intervention plan. Student demonstrated appropriate cognitive skills, communicative intent, and the ability to model typically developing peers. Though Student did not understand academics in the same way as his peers, he made some progress within the general education curriculum. He demonstrated the ability to listen to and watch typical peers, then model appropriate behaviors.

57. At Student's developmental level, he required appropriate models of conversation. The K-2 placement offered by District had some students with limited verbal skills. Student demonstrated the ability to watch and listen to typical students in

his general education class. From those examples, he modeled appropriate behavior and responses, thereby increasing his participation. He benefitted from listening to his general education peers read and answer questions. She believed that further inclusion in the general education curriculum would help Student continue to develop pre-reading and reading skills. Finally, Student required structured support to expand appropriate social interaction in the class and on the playground. Since District's offer of placement did not include these components, it would not meet Student's needs.

58. Dr. Falvey recommended increasing inclusion specialist support to 90 minutes per week to collaborate with the general education teacher and aide on modifying and sequencing Student's curriculum and to ensure consistent application of his behavior plan.

59. She explained the difference between accommodations and modifications. Accommodations included helping Student focus by highlighting text and would not change performance standards. Modifications affected performance standards, but Student still learned from being taught a more basic aspect of the same performance standards of typically developing peers. For example, while other children wrote out numbers on a calendar, Student could trace over numbers. The act of tracing provided tactile input, another method that helped Student to learn.

60. Further, Dr. Falvey persuasively described the correlation between appropriate modifications and diminished maladaptive behaviors. Student, here, engaged in challenging behaviors when working on difficult tasks. She recommended breaking up difficult tasks with easier tasks. That would allow Student to continue working without escalating to the point of engaging in escape behaviors.

61. Dr. Falvey opined Student should be retained in kindergarten. Student did not receive the benefit of the first three months of the school year, when other students in his general education class learned expectations and rules. Since Student is smaller in

stature, his age difference would not have an impact on new, younger, kindergarten classmates.

APRIL 5, 2017 IEP TEAM MEETING

62. District determined that retention was an IEP team decision, provided Parents with the District policy on retention and scheduled an addendum meeting on April 5, 2017. Parents, Dr. Falvey, Mr. Crowell, Ms. Ulmer, Ms. McAleese, Ms. Jennum, Mr. Blackwell, Ms. Miller, and Ms. Hilliard, attended the meeting.

63. Parents expressed their goal of having Student become an independent, functional member of society. In order to achieve that goal, Parents believed that Student should participate in school with typically developing peers. Parents and District reiterated their positions on retention of Student.

64. Dr. Falvey discussed inclusion research which, she explained, did not support District's position that a special day class would better meet Student's needs. Nonetheless, Parents agreed to observe the K-2 class and a typical first grade class with Dr. Falvey. Parents signed consent for a functional behavior assessment. District made no changes to its March 20, 2017 offer of FAPE.

FUNCTIONAL BEHAVIOR ASSESSMENT

65. Behavior specialist Artemisa Torres conducted a functional behavior assessment of Student resulting in a report dated May 31, 2017. Ms. Torres holds a bachelor of arts in psychology, a master of science in counseling and behavior intervention case management, and became a board certified behavior analyst in 2015. She holds credentials in Pupil Personnel Services, and Child Welfare and Attendance. She became a behavior specialist with the local plan area in 2016. Her duties included conducting functional behavior assessments, developing behavior intervention plans, training staff to implement behavior plans with fidelity, collaboration with team

providers, and writing IEP goals. Ms. Torres conducted a record review, classroom observations, staff interviews, parent interview, obtained observational narrative data, and an ecological analysis.

66. Parents identified maladaptive behaviors as refusal, swiping, sitting on the floor, turning away from adults, throwing items, dropping items, and eloping. Parents found that giving a “time out” did not work as a consequence for Student. Rather, removing the activity to redirect his attention, teaching consequences, and letting him know “that’s not ok” are things that worked with him.

67. Ms. Jennum identified similar behaviors. At school, Ms. Jennum and Student’s aide used various strategies, including setting a timer to let Student know how much time he had before a transition, using visuals, modifying the amount and difficulty of work, priming on transitions, and using a token economy. Consequences included redirection, allowing breaks, and reminding him of his reward.

68. The functional behavior assessment showed that Student engaged in refusal behavior to escape tasks, receive sensory or physical stimulation, attention, or a tangible (desired object).³ However, the behavior intervention plan only targeted escape. The sole behavior goal required Student to use functional communication to request a break, instead of engaging in refusal.

69. Student’s providers used time-outs and breaks as a consequence for Student’s escape behaviors during class. At hearing, Ms. Torres conceded that type of consequence could have reinforced Student’s negative behavior. Even so, she concluded that Student should not attend a general education class, even with an appropriate behavior intervention plan.

³ Ms. Torres observed that Student sat during a task for 10 minutes, without reinforcement, consistent with Ms. Magana-Perez’s earlier description.

70. The behavior intervention plan failed to address Student's varying needs driving inappropriate refusal. Without developing a plan to target Student's need for sensory/physical stimulation, attention, or access to tangibles, District could not expect to diminish his maladaptive behaviors. Further, the plan encompassed the same strategies already used in the classroom during the 2016 – 2017 school year, with limited success.

71. Elizabeth Schwandt, Student's behavior expert, was a doctoral student in clinical child psychology with a master of education at the time of the hearing. She became a board certified behavior analyst in 2007. Her experience in behavior analysis and intervention included being program director for public school districts, instructor at various colleges, and clinical director at entities providing services to schools, families, medical practices, and hospitals. She had extensive experience developing curriculum, staff training, development of supports, and providing direct services to children with developmental disabilities.

72. Ms. Schwandt answered questions candidly, in a manner evidencing the depth of her experience in behavior analysis and intervention. Based upon her training, experience, and demeanor at hearing, she offered credible opinions and conclusions regarding District's functional behavior analysis and behavior intervention plan. Ms. Schwandt was familiar with Student. She reviewed Student records and met with Student and his family.

73. She met Student in July 2017 and observed him outside of the school setting, due to the summer break. Consistent with other witnesses, she found Student playful, funny, and engaging. She observed him playing games with his sister and noted his idiosyncratic communication patterns where he answered questions to the side or under his breathe.

74. Ms. Schwandt reviewed Ms. Torres' functional behavior assessment. The

assessment included thorough descriptions of Student's behaviors in class, including demands made on Student, his responses, and interventions engaged in by his providers.

75. Within Ms. Torres' detailed descriptions, Ms. Schwandt identified several instances where providers reinforced Student's maladaptive behaviors. For example, Ms. Torres identified the function of Student's challenging behaviors as escape or avoidance. But when Student engaged in challenging behaviors, he was given time outs or breaks. Ms. Schwandt explained that this pattern taught Student the likelihood of being able to escape tasks if he sat on the floor saying "no," growled, or swiped at items.

76. Additionally, Ms. Torres' descriptions showed that staff inconsistently implemented reinforcers by, for example, stewarding him back to an area he had left. She described deficiencies in the operational definition of Student's maladaptive behavior. The operational definition should describe the challenging behavior and the reasons driving the behavior. Here, all behaviors were clumped into one category, refusal.

77. Ms. Schwandt recommended a more in depth behavior assessment to identify the function of each of Student's behaviors, since the behavior plan only addressed refusal. She explained that a behavior assessment should analyze Student's competing responses to input: access to escape, access to tangibles, and access to sensory input. Aligning Student's responses to input would allow improvement in his structural environment and teaching strategies, in other words, appropriate provider responses to Student's competing needs. A speech language pathologist should be consulted, she opined, to help Student develop functional, pragmatic, and social communication. Further, Student required clinical supervision from a board certified behavior analyst. Such supervision would train staff; address inconsistencies in implementation of behavior supports; allow alignment of reinforcement schedules with

Student's behaviors; and reduce physical prompting in exchange for allowing Student to approximate appropriate behaviors.

78. Ms. Schwandt recommended four hours per week of clinical supervision for at least four consecutive school weeks, then two hours per week thereafter to review data, observe transitions, provide input on new strategies, and train staff. Staff required didactic training, which would allow them to ask questions about the program and obtain suggestions on new strategies. The clinical supervisor would collect and review weekly data; train the paraprofessional to collect data; and observe providers to ensure fidelity in implementation of the program.

79. Ms. Schwandt recommended aide training to facilitate peer interaction. Specifically, District's assessment recounted instances of Student being prompted to go to an area where other students played, without being guided through the process of how to approach a peer for play. Instead of asking Student if he wanted to go to the sandbox, the aide could have asked a peer to pick a toy and coax Student to the sandbox to play. Student should be rewarded for compliance, like, "you get to play with your favorite truck by yourself when you're done."

80. Ms. Schwandt observed Student's interest in engaging with peers in Ms. Torres' assessment. At lunch, Student compared food he brought with the other children. On another occasion, Student declined being given a popsicle, until he saw a friend walk by with one. He then joined a group of other students eating popsicles. He enjoyed participating in class birthday celebrations.

81. Ms. Schwandt persuasively demonstrated that Student required modifications to his behavior intervention plan. The plan grouped all behaviors into the category of escape and provided for consequences that reinforced Student's negative behaviors. The plan did not address Student's needs in sensory/physical stimulation seeking, attention, and tangibles.

82. Student expressed interest in typically developing peers and his behavior services could be implemented in a general education environment. Therefore, Ms. Schwandt credibly opined that his needs could be appropriately met in a general education placement.

MAY 31, 2017 IEP TEAM MEETING

83. The IEP team met to review the results of Student's functional behavior assessment on May 31, 2017. Team members included Parents, Dr. Falvey, Mr. Crowell, Ms. McAleese, Ms. Jennum, Ms. Ulmer, Ms. Hilliard, Ms. Miller, and Ms. Torres.

84. At the May 31, 2017 meeting, the team reviewed the functional behavior assessment and determined that Student required additional behavior supports. Student had demonstrated behaviors that impeded his learning in the general education kindergarten class since he began his placement there in December 2016.

85. Ms. Torres described Student's maladaptive behaviors as inappropriate refusal. Parents believed Student engaged in the behavior for escape and sensory purposes. Ms. Jennum described the function of his maladaptive behaviors as escape and to obtain tangibles.

86. Ms. Torres presented the proposed behavior intervention plan described above. She recommended 20 hours per year of behavior specialist related service to train staff on implementation of the behavior intervention plan and for data monitoring.

87. At the meeting, Dr. Falvey described the behavior assessment as thorough and saw a theme of Student's need for routine. Specifically, that Student required another opportunity to learn and follow along with the routine of a typical kindergarten classroom. She again requested that Student be retained in kindergarten and sought additional inclusion specialist support. Ms. Ulmer indicated that District's offer of FAPE did not include retention in kindergarten. For this reason, Student did not require increased inclusion support.

88. District offered Student placement in a kindergarten to second grade special day class for moderate to severe children, with related services of occupational therapy, physical therapy, and speech and language, a full time one-on-one aide, and extended school year. Parents agreed to all aspects of the IEP except for the academic setting in which the IEP would be implemented.

89. Parents continued to seek retention of Student in a kindergarten general education based upon his academic and social skills progress. At hearing, Parents described Student's friendships with classmates, play-dates, and the growth he experienced through engaging with typically developing peers.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)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 appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their Parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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.

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 individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of Parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that

is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’...” (*Endrew F. v. Douglas School Dist. RE-1* (2017) 137 S.Ct. 988, 1000 (*Endrew*)). The Supreme Court in *Endrew* stated that school districts must “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.” (*Id.* at p. 1002.)

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

5. 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. 56-62 [126 S.Ct.

528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Thus, each party had the burden of proof on the issues raised in their respective complaints.

ISSUES 1 AND 2: LEAST RESTRICTIVE ENVIRONMENT

6. The parties dispute the appropriate educational environment in which to implement Student's IEP. Student contends District's offer of placement for the 2017 – 2018 school year denied him a FAPE because it failed to offer placement with typically developing peers to the maximum extent appropriate. District contends Student requires placement in a kindergarten to second grade moderate to severe special day class for the majority of his school day to appropriately address his academic needs.

Legal Authority

7. In developing the 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).)

8. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged exclusively in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

9. The IDEA expresses a clear policy preference for inclusion to the maximum extent appropriate as an aspiration for all children with special needs. (See 20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. §§ 300.114 & 300.116.) School districts are required to provide each special education student with a program in the least

restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

10. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (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. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

Analysis

11. Applying the four *Rachel H.* factors here demonstrates Student required continued placement in a general education class in order to make progress appropriate in light of his circumstances. District may be correct in proffering that Student could receive more educational benefit in a special day class, where he could obtain a greater deal of one-on-one specialized academic instruction. The same could be said of most students. However, the standard is not to offer a better placement, it is simply to offer the least restrictive environment in which Student can obtain some educational benefit.

12. The evidence demonstrated that Student achieved some educational benefit from placement in Ms. Jennum's general education kindergarten class. He made some progress academically towards math goals and literacy goals. He made some progress on his goal for transitions. Even though he often required prompting to play appropriately with peers, he demonstrated the ability to engage in imaginative play with them. The undisputed evidence showed Student's communicative intent, average

receptive language, and developing social skills.

13. District and Student witnesses agreed that Student's progress was slow and that he should not be expected to meet grade level standards. Coupling slow progress with the degree of modification Student required to access his curriculum, District argued, supported Student's placement in a special day class. While that may be true if the academic and behavioral gap between Student and typically developing peers widens, that is not the case presently.

14. District's placement offer of a K-2 class denies Student access to general education curriculum. The evidence showed that the K-2 class instructs students based only on their goals. The class does not teach a general education curriculum. Though Student received instructional supports from his aide during Ms. Jennum's class, he also received the benefit of being included in the general education curriculum. Student made progress on his goals in the general education environment, academically and socially, showing that general education continued to be the appropriate least restrictive environment for him.

15. Modification of Student's curriculum was a recurring theme throughout his IEP's and during the hearing. Ms. McAleese, though an experienced and caring inclusion specialist, worked on an itinerant basis. She worked at Student's school only one day a week. She provided training on curriculum modification to Student's instructional aide to keep pace with academic packets provided by Ms. Jennum.

16. District presented no evidence that the instructional aide had the educational background or training in inclusion support to properly modify Student's curriculum. With knowledge that Student required additional inclusion support for curriculum modification, it did not offer any. Instead, District offered placement in a more restrictive setting for the 2017-2018 school year.

17. District did not persuasively demonstrate that Student required instruction

from a teacher credentialed to instruct a moderate to severe special day class. Neither an outside expert nor a school psychologist testified on this point. However, the evidence demonstrated Student's intellectual functioning scores fell predominantly in the borderline range in 2013 and 2016 testing. His average score in receptive language supported placement in a general education setting over a moderate to severe special day class.

18. Student had communicative intent and demonstrated that he can learn in a general education environment, which provided models for language, social interaction, and behavior. Dr. Falvey, whose expert testimony was undisputed, determined that Student had the cognitive ability to make progress within general education standards, generally. Alternatively, the K-2 special day class did not offer exposure to general education curriculum or typically developing peer role models in class.

19. The evidence showed that Student demonstrated behaviors impeding learning throughout his educational career. Behaviors exhibited during his time in general education kindergarten led Ms. McAleese to develop an informal behavior plan, which, six months later, led to the development of a behavior intervention plan.

20. Ms. Schwandt persuasively demonstrated that without the behavior intervention plan in place during Student's kindergarten year, providers inconsistently administered reinforcement to Student, which contributed to ongoing maladaptive behaviors. Further, providers reinforced Student's escape behaviors by administering breaks or a time out.

21. The behavior intervention plan, developed on May 31, 2017, had not been implemented during the 2016 – 2017 school year. District did not know how the plan would impact Student's ability to more consistently access his education before it offered a more restrictive placement during the spring 2017 IEP team meetings. The

evidence demonstrated that the behavior intervention plan, once created, still did not address each of Student's behaviors impeding learning. Specifically, Student demonstrated sensory/physical input seeking behaviors, attention, receipt of tangibles, and escape behaviors throughout his educational career. But the behavior intervention plan lumped these target behaviors together and did not parse out antecedents or consequences to the specific behaviors exhibited. The plan offered support for escape, which impacted Student's ability to attend. Nonetheless, gaps remain in addressing sensory/physical input seeking behaviors, attention, and receipt of tangibles, which may have different functions and require different consequences.

22. Student met his burden of proof that he could receive some educational benefit in a general education class. He demonstrated progress towards academic goals in kindergarten even in light of lacking additional inclusion specialist support and an appropriate behavior intervention plan.

23. Non-academic benefits, the second *Rachel H.* factor, weighed in favor of Student's continued inclusion in a general education classroom. Student demonstrated average receptive communication and showed progress in communication and socialization with peers. All witnesses agreed that Student should be included in social activities with typically developing peers.

24. Student and District witnesses described him as a happy, excited boy, who loved attending school. He enjoyed engaging with his peers, despite having difficulty doing so. At times he refused to engage in an activity, but watching his typically developing peers provided motivation for him to take part. Beginning in preschool, Student demonstrated that he learned by the examples of his general education peers. He listened to classmates answer questions, then answered during his turn. He learned how to line up for class and recess by modeling. His speech language pathologist recommended continued exposure to typical peers to help Student expand his

expressive vocabulary. Student made friends in his general education kindergarten placement and attended birthday parties and play-dates with them. For the foregoing reasons, District's offer of inclusion for only 22 percent of Student's school day was deficient.

25. Third, the evidence demonstrated that the effect Student's inclusion had on his teacher and classmates, overall, did not warrant a change in placement to the K-2 class. Ms. Jennum generally described instances when Student interrupted classmates during small group instruction and required redirection during whole group instruction. She opined that he could only attend to instruction for up to a few minutes at a time. But these descriptions contradicted other providers and, for that reason, carried less weight. Ms. Magana-Perez saw Student develop his ability to attend and work with typically developing peers in her class. Multiple providers described Student's ability to attend to task for up to 10 minutes. Student's behaviors did not shut down class instruction. All providers agreed that the social component of Student's program weighed in favor of inclusion.

26. Dr. Falvey persuasively demonstrated the positive effect of inclusion on all students. She described how children learn and grow from the examples around them, good and bad. Student showed that effect here, as he developed friendships with classmates. He engaged in make believe games with typical peers, helped them celebrate birthdays, and they helped him learn to share and grow socially and academically. As such, this factor did not weigh against full inclusion.

27. Fourth, District did not weigh the costs of supports and services in its decision to deny full inclusion to Student.

28. The evidence weighed on both sides of the inclusion analysis. On balance, however, Student persuasively demonstrated that he required full inclusion in order to make progress appropriate in light of his circumstances in the least restrictive

environment.

29. Weighing the four factors in *Rachel H.*, Student met his burden of proof that the least restrictive environment at the time of the spring 2017 IEP's, was continued inclusion in a general education class, with additional inclusion supports and an appropriate behavior intervention plan.

REMEDIES

1. Administrative Law Judges have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Committee of Burlington, Mass. v. Department of Education* (1985) 471 U.S. 359, 370; *Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School Dist. v. T.A.* (2009) 129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168.) An ALJ can award compensatory education as a form of equitable relief. (*Park v. Anaheim Union High School Dist., supra*, 464 F.3d 1025, 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.) The fashioning of equitable relief in IDEA cases requires a "fact-specific" analysis. (*Student W. v. Puyallup School Dist., No.3, supra*, at p. 1497.)

RETENTION

2. Student's request to be retained in kindergarten is granted as compensatory education. Student began attending general education kindergarten on December 1, 2016, pursuant to a settlement agreement. District demonstrated that Student learned classroom routines within a few weeks of starting the kindergarten class. However, the parties agreed that Student learns much slower than his classmates

and there was no dispute Student missed important instruction that occurs during the start of the school year.

3. His slight age difference from new kindergarten peers is offset by both his smaller stature and cognitive delays, which weigh in favor of retention. Further, Student should have an opportunity to experience gains in kindergarten, with appropriate inclusion specialist supports and an appropriate behavior intervention plan.

4. Parents argue for retention in kindergarten over having that year in a transition program at the end of Student's education. Parents seek to build on Student's ability to make developmental gains, presently. Student demonstrated that retention is an appropriate equitable remedy, under these circumstances.

PLACEMENT AND SERVICES

5. Student persuasively demonstrated that he can obtain some educational benefit in a kindergarten general education class with appropriate supports and services. Dr. Falvey established that Student required inclusion support for 90 minutes per week for provider collaboration, curriculum modification, and implementation of Student's program.

6. Therefore, in addition to the supports and services already agreed upon in their joint stipulation and those agreed to by Parents in the operative IEP's, District shall provide Student with 90 minutes per week of inclusion support from a non-public agency of Student's choosing. Inclusion support shall provide collaboration with Student's providers, modification of curriculum, and supervision of Student's instructional aide to ensure the fidelity of implementation.

7. Further, Ms. Schwandt credibly explained Student's needs in behavior required clinical supervision by a board certified behavior analyst for staff training, data review, collaboration, and implementation. The clinical supervisor would be able provide input on the functions of Student's behaviors and help the IEP team parse out

environmental and teaching strategies to address each of the functions of his behaviors. Therefore, District shall provide Student with four hours per week of clinical supervision from a board certified behavior analyst for four consecutive school weeks, then for two hours per week for the remainder of the 2017-2018 school year for the reasons stated above. The clinical supervisor shall also observe Student during transitions and peer interactions, develop teaching strategies to remediate Student's maladaptive behaviors and provide training to the instructional aide on such strategies.

COMPENSATORY EDUCATION FOR THE 2016 – 2017 SCHOOL YEAR

8. Student, in his closing brief, requested compensatory education for District's failure to provide him with appropriate behavioral supports during the 2016 – 2017 school year. However, whether District denied Student a FAPE during the 2016 – 2017 school year was not presented as an issue for this hearing. Student's request for compensatory education is, therefore, denied.

9. In conclusion, District shall place Student in a kindergarten general education class with the supports and services identified above, and those agreed to by the parties in their joint stipulation. These remedies sufficiently address District's failure to offer an appropriate placement for the 2017 – 2018 school year.

ORDER

1. District shall provide Student with placement in a kindergarten general education class for the 2017 – 2018 school year, with the following supports and services, in addition to those already agreed upon by the parties in their joint stipulation:

- a. Inclusion specialist support for 90 minutes per week from a nonpublic agency provider, chosen by Parents. Inclusion specialist support shall include collaboration with Student's providers, modification of Student's curriculum,

and supervision of Student's instructional aide. The inclusion support shall also provide training, as needed, of Student's providers on the nature of his disability and implementing his program with fidelity.

- b. Board certified behavior analyst clinical supervision services from a nonpublic agency provider, chosen by Parents. Services shall be provided at a rate of four hours per week for the first four school weeks of Student's attendance in general education kindergarten, after the issuance of this Order. Thereafter, such supervision services shall continue at a rate of two hours per week for the remainder of the 2017 – 2018 school year. The clinical supervisor shall observe Student during transitions and peer interactions, develop teaching strategies to remediate Student's maladaptive behaviors and increase peer interaction. The clinical supervisor shall provide training to Student's instructional aide on such strategies and shall oversee implementation of Student's behavior intervention plan.
- c. The District may set guidelines for nonpublic agency providers, including qualifications and costs, if the District or local plan area has such guidelines.

2. District shall hold an IEP team meeting within 30 days of implementing the nonpublic agency behavior support to obtain input from the clinical supervisor and determine whether Student's behavior intervention plan requires modification, unless the parties agree to an extension of time, in writing.

3. District's spring 2017 IEP's failed to offer a FAPE because placement in a special day class for 78 percent of Student's school day was not the least restrictive environment for Student. District shall not implement its special day class placement offer.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing

decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on all issues presented.

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: September 29, 2017

_____/s/____

COLE DALTON

Administrative Law Judge

Office of Administrative Hearings