

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

NORWALK-LA MIRADA UNIFIED SCHOOL  
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2017120789

DECISION

Norwalk-La Mirada Unified School District filed a due process hearing request with the Office of Administrative Hearings, State of California, on December 20, 2017, naming Parents on Behalf of Student.

Administrative Law Judge Ted Mann heard this matter in Norwalk, California, on April 24, 25, and 26, 2018.

Ricardo Silva, Attorney at Law, appeared on behalf of District. District's Director of Student Services Beth Nishimura attended each day of the hearing on behalf of District. Parents did not attend the first day of the hearing. Student's mother and father appeared on behalf of Student on the second and third days of the hearing. Student attended the final day of hearing. An interpreter was present to interpret from Spanish to English and English to Spanish on each day of the hearing.

At the request of the parties, OAH continued this matter to May 29, 2018, for written closing arguments. The record was closed upon timely receipt of written closing arguments and the matter was submitted on May 29, 2018.

## ISSUE<sup>1</sup>

Whether District's offer of placement and services in the individualized educational program of February 20, 2018, offered a free appropriate public education in the least restrictive environment such that District may implement the IEP without Parents' consent?

## SUMMARY OF DECISION

District proved that the offer of placement and services in the individualized educational program of February 20, 2018 offered a FAPE in the least restrictive environment such that District may implement the IEP without Parents' consent. The IEP offer was based upon objective evidence and Mother participated in the decision-making process and had her input considered by the IEP team in making the team decision.

## FACTUAL FINDINGS

1. Student resided with Parents within District's boundaries at all relevant times. Student was nearing his seventh birthday at the time of the hearing. Student received a g-tube shortly after birth during a stay in the neonatal intensive care unit. Following his release from the hospital, he was diagnosed with Prader-Willi Syndrome.

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<sup>1</sup> District filed its initial request for due process on December 20, 2017, seeking an Order from OAH allowing District to implement the IEP offer of March 1, 2017, and May 16, 2017, over Parents' objection. Following Student's annual IEP on February 20, 2018, on March 2, 2018, District sought to amend its due process request to reflect the IEP offer of February 20, 2018. District's request to amend its due process request was granted by OAH on March 8, 2018.

Prader-Willi Syndrome is associated with developmental delays, cognitive impairment, muscle weakness, and an insatiable appetite. The g-tube was not removed until January of 2014. Further surgery was required in January of 2015 to repair the g-tube site incision.

2. Student became a client of the local regional center beginning in August 2011. In January 2014, while under the care of the regional center, Student underwent a psychological assessment by Giselle Crow, Psy.D. Dr. Crow found that Student presented with a developmental delay due to Prader-Willi Syndrome, and had borderline intellectual functioning deficits that needed to be reevaluated when he turned four and a half years old. Student also presented with moderately low adaptive skills in the areas of communication, socialization, daily living, and motor skills.

3. Student's initial special education assessment was completed by District just ahead of his third birthday following his referral to District by the regional center. The initial assessment found that Student's cognitive abilities were within the below average to low range based upon three different assessment tools. Student also presented with very low physical adaptive skills, with significant fine and gross motor skill deficits. Student showed strengths in the areas of social-emotional development and daily living skills with the assessor crediting early intervention occupational therapy for remediating prior deficits in daily living skills. Student also showed significantly underdeveloped skills in imitation, attention and behavioral compliance. Student attended to preferred tasks only, ignoring inhibitory words such as stop, wait, get down, or my turn. Due to attentional issues, the assessor recommended that Student be assessed for intellectual disability prior to his transition to kindergarten.

4. At his initial IEP team meeting in April 2014, Student was found eligible for special education under the primary eligibility of other health impairment and the secondary eligibility of speech/language impairment. Parents accepted District's FAPE

offer in the initial IEP, including a moderate-severe special day class preschool program based at Nuffer Elementary School. The FAPE offer also included weekly speech therapy and goals in attending to task, motor imitation, copying figures (vertical line, horizontal line, and circle), and speech goals in functional communication, vocabulary development, and following directions/spatial concepts. Student enrolled at Nuffer Elementary on September 4, 2014; however he did not attend school that year, nor did he utilize the special education services from his IEP.

5. On November 13, 2015, Student's mother requested an IEP team meeting to discuss beginning Student's special education services. Student's parents declined the offer of FAPE for specialized academic instruction and placement in the moderate-severe SDC program, but accepted the speech and language services. As a result, Student's parents chose to send Student to a Head Start preschool program in a general education class without specialized academic instruction.

6. Student's annual IEP review was held on April 15, 2016. The IEP team was concerned that Student's educational needs were not being met by only accessing the speech and language services. Parents nonetheless continued to agree only to those services, and continued to decline placement in a special day class or specialized academic instruction, choosing to have Student continue in the Head Start program for the remainder of the 2015-2016 academic year.

7. District next convened an IEP team meeting on June 15, 2016, to discuss Student's transition to kindergarten, as well as the results of adapted physical education, occupational therapy, and physical therapy assessments District administered. Student's mother continued to have concerns about the appropriateness of Student attending a special day class. She requested that Student attend Dolland Elementary, his school of residence. She requested placement in a general education class with specialized academic instruction delivered to Student through the resource support program with a

follow-up IEP after eight weeks of the start of the 2016-2017 school year to assess Student's progress in the program. In response to Student's mother's request, the IEP team provisionally recommended specialized academic instruction delivered by a resource teacher at Dolland. District's FAPE offer was 180 minutes per week of specialized academic instruction, along with weekly adapted physical education and occupational therapy. Parents agreed to the IEP offer.

8. On October 11, 2016, District held an eight-week follow-up IEP team meeting to discuss Student's progress in the general education program at Dolland, and progress on his goals. At that time, school staff shared concerns that Student was making limited progress towards his goals, and experiencing significant behavioral challenges related to task-demands and transitions. As a result, a behavior support plan was developed to address tantrum behavior in response to non-preferred or challenging task demands, transitioning between centers in the classroom, and transitioning to and from the restroom. The IEP team suggested that Student's mother observe the moderate-severe special day class program (functional academic skills training or FAST class) and reconvene following her visit.

9. On November 11, 2016, the IEP team reconvened to discuss the FAST class visit. Student's mother felt that the FAST class program did not meet her expectations for Student, and she did not want him to attend the class. In response, the IEP team agreed to conduct an early triennial assessment of Student in order to obtain data reflecting Student's then current skill levels and academic needs.

#### MARCH 1, 2017 PSYCHOEDUCATIONAL ASSESSMENT REPORT

10. Following the agreement for an early triennial assessment, and Parents' signing of an assessment plan, Student was assessed in February of 2017, and District documented its findings in a psychoeducational assessment report dated March 1, 2017. The assessments were conducted by District's school psychologist Jennifer Barrett, M.S.

and District's special education teacher Mark Del Pino. The report was written by Ms. Barrett.

11. Ms. Barrett reviewed school records and Student's health and developmental history, conducted observations of Student, interviewed the teacher and obtained a report. She considered Student's linguistic background and devised a plan to effectively assess Student in English with strategies to limit the negative effects of Student's language skill deficits on his performance during the psychoeducational assessment. She also utilized standardized assessments in order to employ a variety of tools and strategies to gather information for the assessment.

12. Ms. Barrett administered the Differential Ability Scales - Second Edition standardized assessment to Student on February 7, 2017 and February 9, 2017. The assessment is a formal measure of cognitive functioning designed to give separate estimates of verbal abilities (Verbal Cluster), nonverbal abilities (Nonverbal Cluster), spatial abilities (Spatial Cluster), and a composite of the three scores (GCA) for children ages 3:6 to 6:11 years old. Ms. Barrett believed the Special Nonverbal Composite to be the best indicator of Student's learning potential as it did not include the verbal index, reducing the impact of Student's weaknesses with language. Student's nonverbal composite score fell in the very low range. Student's scores in all other areas also fell in the very low range. Ms. Barrett observed Student to be engaged and participatory during the assessment without significant issues with transitions, but he needed regular redirection.

13. Ms. Barrett reported the results of adaptive behavior assessment rating scales completed by Student's mother and Student's classroom teacher. The adaptive behavior scales are a comprehensive, norm-referenced assessment of adaptive skills needed to effectively and independently care for oneself, respond to others, and meet environmental demands at home, school, work, and in the community. The assessment

was designed to evaluate whether an individual displays various functional skills necessary for daily living without the assistance of others. The scales produced a general adaptive composite score that was made up of conceptual, social, and practical sub-domains. Scores from Student's mother and Student's teacher indicated that Student had significant delays in overall adaptive skills, and relative to individuals of comparable age, was functioning in the very low range, particularly in the areas of communication, functional academics, and self-direction. Student did show a relative strength in his ability to socialize with other children his age, and safely function in the school community.

14. Ms. Barrett observed Student in his classroom as part of the assessment, and saw many of the strengths and weaknesses in adaptive skills as reported by Student's mother and the teacher. In particular, Student displayed great difficulty in functional academic skills, and an inability to keep up with the class in pre-academic tasks. Student also displayed problems complying with teacher directions and participating in group activities.

15. Ms. Barrett reported scores obtained by Mr. Del Pino on the Brigance Inventory he administered to Student. The Brigance was a standardized assessment tool for use with children from birth through 7:11 years of age and the assessment provided both individual skill levels as well as normative information allowing comparison with other students. Student was assessed in the Academic Skills/Cognitive Development domain. That domain assessed Student in literacy and mathematics.

16. On the literacy subtest, Student could recite the letters A, B, and C from memory, and he identified the uppercase letters O, A, and B. Student could not copy his name from a model, instead producing unrelated letters. He could not segment compound words, rhyme, blend words, or discriminate between words that sounded the same. He could not read common words from signs in the community. Although he

could trace words, he could not copy a letter from a model independently, and could only identify the capital B in his name, but not the remaining letters.

17. On the math subtest, Student understood one and two, but not three. He could count objects to five, but could not compare the value of different amounts (e.g. one is smaller than three). He could sort objects by color, but not by size, and could not match quantities with numerals. He could not complete addition or subtraction problems of any kind.

18. Ms. Barrett summarized her evaluation of Student and was of the opinion that Student met the eligibility requirements for both intellectual disability and other health impairment. She recommended that Student receive specialized academic instruction in a small group setting with a low student to staff ratio. She also recommended that Student participate in structured social activities with same age peers that were facilitated by an adult in order to allow him to develop skills necessary to engage in appropriate peer play.

#### IEP TEAM MEETING – MARCH 1, 2017

19. District held Student's early triennial IEP team meeting on March 1, 2017, to review District's assessment and discuss Student's special education needs. The required members of the IEP team attended, including Student's mother; Ms. Barrett; speech/language pathologist, Karen Kampen; Mr. Del Pino; a school nurse; an occupational therapist; a program specialist; and Student's general education (classroom) teacher. Student was approximately five years and 10 months old at the time of the IEP team meeting, in a general education kindergarten classroom at Dolland.

20. Ms. Barrett presented her psychoeducational assessment report, detailing her observations, the standardized assessment results, and her opinion that Student met the eligibility requirements for intellectual disability and other health impairment. She also stated that Student would benefit from a small, structured specialized academic



instruction setting where he would be able to work on his functional academic skills.

21. Next, Ms. Kampen presented her speech and language assessment report to the IEP team. She reported that Student was significantly low performing in standard measures she utilized and that he was quite far behind his same age peers, including using an average of 1.8 words per sentence instead of the expected 4-6 words per sentence. In her opinion, Student had difficulty listening, paying attention, following directions, and responding to prompts.

22. The team then discussed Student's medical issues, including vision and allergy problems. The school nurse arranged with Student's mother to obtain medical records, and expressed the opinion that an epi-pen might be needed at school for Student in case of a severe allergic reaction. The meeting was then continued to a second session to occur on March 8, 2017.

#### IEP TEAM MEETING – MARCH 8, 2017

23. The IEP team reassembled on March 8, 2017, to continue the meeting begun on March 1, 2017. The required members of the IEP team attended once again, along with Student's mother and father.

24. The occupational therapist presented her orthopedic therapy assessment of Student to the IEP team. She reported that Student scored in the low range for visual and motor skills. Student was showing improvement in drawing straight and horizontal lines, but required visual and aural cues to draw circles or crosses. Student was unable to trace or copy independently, although he was able to use scissors to cut paper in a straight line and to cut out a square shape. He could feed himself at lunch using a Spork, and he could open his milk container.

25. The IEP team next reviewed Student's present levels of performance and progress on his IEP goals. Overall, Student met his occupational therapy goals, but did not meet goals in reading, math, or self-help. He partially met his writing goal.

26. In pre-academic, academic, and functional skills, Student had significant limitations. He could not identify any of the letters of the alphabet or sound out sight words. He could flip through a book and look at the pictures, but did not attempt to read the words. He could not match the appropriate colors with words. He was not able to copy more than one or two letters, and could not copy words. He could trace letters, although with improper strokes, but he was unable to write his first or last name. Student could count up to 10, but inconsistently. He could not identify numbers presented in random order or identify shapes. He could not identify the elements of the calendar, nor count on number charts.

27. In self-help skills, Student continued to need prompts to use the restroom and to pull his pants up and down. He could independently wash and dry his hands. He would sit on the toilet for 10 or more minutes without using the toilet, and had difficulty dressing himself. He continued to wet himself almost daily, and continued to be unable to communicate his need to use the restroom with adults.

28. The IEP team discussed an offer of FAPE and the least restrictive environment for Student. The proposed placement was the FAST moderate-severe special day class at Nuffer Elementary with mainstreaming of at least 30 minutes per day. District members of the IEP team did not believe that Student's needs could continue to be met at Dolland, even with maximum resource program support. District IEP team members noted that Student was non-participatory and inattentive in kindergarten, and not able to keep up with the Common Core curriculum. Parents objected to the proposed placement as too restrictive and too remedial for Student, as they did not believe that Student had disabilities as severe as the typical students in the moderate-severe special day class. Parents proposed that Student continue in general education at Dolland with one-to-one support. Based upon Parents' disagreement with the IEP offer, Student remained in the general education kindergarten class at Dolland.

## IEP TEAM MEETING – AUGUST 23, 2017

29. After the start of the 2017-2018 school year, Student's mother requested an IEP team meeting to discuss retention of Student in kindergarten, rather than continuing in the first grade. District held an IEP team meeting on August 23, 2017. Student's mother; an interpreter, Veronica Banuelos; Program specialist, Beth Raposa; Ms. Barrett; another District school psychologist, Annette Diaz; a District general education teacher; Ms. Kampen, and school principal, Lorena Sierra attended.

30. Student's mother expressed her concerns about Student's ability to make academic progress in first grade, and expressed her opinion that he should repeat kindergarten with the help of a one-to-one aide. She explained that he was unable to write his name, letters of the alphabet, or numbers. She noted that Student was making progress socially, seemed engaged with school, and seemed to interact well with the first grade teacher.

31. District personnel, including the general education teacher and Ms. Raposa, expressed their concerns that Student was unable to work at grade level, and was falling farther behind because he had yet to acquire sufficient pre-academic skills, and also worked at a much slower pace than his typical peers. Ms. Raposa indicated that the FAST class would be an appropriate placement as that class would allow Student to work at his own pace and continue to acquire pre-academic skills, while mainstreaming during non-academic time.

32. District's FAPE offer remained the same as that of the March 1, 2017 IEP. Student's mother continued to believe that Student should be retained, and no agreement was reached. Student continued in the general education first grade class with resource support program services.

## IEP TEAM MEETING – DECEMBER 4, 2017

33. An IEP team meeting was held on December 4, 2017, to address Student's mother's concerns with Student's placement and to discuss Student's academic progress. Student's mother; Ms. Banuelos; Mr. Del Pino; first grade general education teacher, Mariaelena Cleven; Ms. Kampen; and Ms. Sierra attended the IEP team meeting.

34. Mr. Del Pino discussed Student's lack of progress toward academic goals. Student could not trace letters or numbers with the correct form. He was only able to identify one out of 26 letters of the alphabet correctly, and he was unable to count the correct number of objects.

35. Ms. Kampen reported that Student had met two benchmarks in speech, including producing three syllable words with 60 percent accuracy, and pointing to three pictured items in a given category in a field of five with 50 percent accuracy. Student was able to formulate noun plus verb constructs as elicited by action pictures at 40 percent accuracy with the goal being 60 percent accuracy.

36. Ms. Cleven reported that Student was far behind his typical first grade peers as they were working on writing narrative paragraphs in class, and Student lacked the pre-academic skills, much less the grade level skills, to produce that level of work. Student's mother believed that his lack of skills was a reason for retention. The District team members recommended that Student visit the FAST class at Nuffer to see how he would respond to such a setting. Student's mother was concerned about undertaking such a step at that time. She was also concerned about the FAST class placement because she had heard that some staff member did not treat the students kindly, and that the class was too severe for Student because of the greater disabilities of the other children in the class. District reiterated that Student would have mainstreaming opportunities while in the FAST class. No decision was reached on changing Student's placement at the IEP team meeting. Student's mother agreed to have Student visit the

FAST class, and Mr. Del Pino indicated he would accompany Student and his mother to visit the class.

### OBSERVATION VISIT TO NUFFER FAST CLASS – DECEMBER 2017

37. In December 2017, Student, his mother, and Mr. Del Pino visited the Nuffer FAST classroom proposed as Student's placement. The school day began at 8:10 a.m. Student participated in the class and appeared to enjoy himself and fit in well with the class. Student was able to participate in and benefit from the classroom morning routine of singing and music. He began to learn the routine, and did not resist the activity. Student continued with the music class and was able to sit in the group area, participate, and follow directions.

38. After music class, the class had breakfast. Student participated appropriately and with good manners. He ate his breakfast at a table with three other students, and cleaned up appropriately thereafter by washing his hands and throwing away his trash. Student transitioned to post-breakfast recess, and was able to socialize with other students and play on the play-area apparatus.

39. After recess, the class began its learning time. The class sang the alphabet song, and Student participated, although he needed prompting to say each letter. He completed the task of choosing a color crayon and coloring the letter O without resistance. Student next went to the library with the class, sat in the carpeted area with the class and sang a song. He picked out a book, read it with peers and the teacher and transitioned back to class from the library.

40. Back in the classroom, Student engaged in an appropriate activity in his work area, while the teacher asked developmentally appropriate questions. He successfully ate lunch with the class, and cleaned up appropriately, before playing appropriately until it was time to transition to physical education. Student participated in the class PE activities, and engaged with other students while doing so.

41. Following PE, the class transitioned back to the classroom, and completed a group song activity. Student sang along, performed the appropriate movements, and enjoyed the activity. The school day ended at 1:30 p.m.

#### IEP TEAM MEETING – FEBRUARY 16, 2018

42. An IEP team meeting was held on February 16, 2018, to discuss District's continuing placement offer of the FAST class at Nuffer Elementary. Student's mother, Ms. Sierra, Ms. Cleven, Mr. Del Pino, and Ms. Nishida attended the IEP team meeting.

43. The team discussed Student's mother's concerns with the amount of time in mainstreaming and increased Student's mainstreaming percentage from 10 percent to 26 percent. The minutes of service were changed to 1375 minutes weekly. The team also discussed a transition plan for Student to his new classroom. It was agreed that the Nuffer IEP team would hold an IEP team meeting within 30 days to discuss Student's mother's request for additional speech/language services and use of assistive technology. Student's mother agreed informally to all parts of the District's FAPE offer of March 1, 2017, with the exception of the amount of time Student would spend being mainstreamed. However, she did not sign the IEP as she wished to think about it more before signing. Student remained in the general education class at Dollard.

#### IEP TEAM MEETING – FEBRUARY 20, 2018

44. An annual IEP team meeting was held on February 20, 2018. Student's mother; Ms. Sierra; Ms. Cleven; Mr. Del Pino; Ms. Raposa; speech/language pathology intern, Cassandra Coleman; Ms. Kampen; Ms. Banuelos; occupational therapist, Alison Carson; and adapted physical education teacher, Ayline Amirayan attended the IEP team meeting. Student was six years and 10 months old. Student's mother was concerned that Student was not learning in the general education classroom, and that he was falling farther behind his classmates, as he was still unable to write his name, or navigate

colors, shapes, letters, and numbers.

45. Student's present levels of performance were discussed. In reading, Student could identify one out of 26 letters of the alphabet. He did not know his sounds. He would attempt to participate at times, but was often off topic and off task. He could properly hold a book and turn the pages. In writing, Student could trace letters, but when writing independently only traced the same letter over and over. Even with scaffolded writing prompts, he was unable to complete writing tasks. In math, Student could count consistently to 10, but could not identify numbers in or out of order, nor could he add or subtract single digit numbers. He could name three of nine colors, and six of nine shapes. In comparison, his first grade peers were writing paragraphs, and were able to perform two-digit addition and subtraction.

46. Student met three speech and language goals from his previous IEP, and was making progress with his expressive and receptive communication. Student met his goal in occupational therapy, and both of his goals in adapted physical education. Student continued to have difficulty following classroom procedures or participating in non-preferred tasks. Student could follow one-step directions involving a preferred activity, but not for academic-related directions. He could not complete classwork or homework, even when the assignment was modified.

47. Student could feed himself and clean-up in the classroom, but continued to be unable to alert the teacher about using the bathroom. He continued to wear a diaper, and only cooperated about 50 percent of the time in going to the bathroom. Toileting remained a problem area. The IEP team found that Student continued to tantrum when attempting to transition from preferred to non-preferred activities, a behavior intervention plan was prepared, and a behavior goal was drafted. A total of 11 goals were drafted at the IEP team meeting, including three communication goals, three orthopedic/adapted physical education goals, and four academic goals, each addressing

an area of need identified for the Student. Student's mother agreed to all 11 goals.

48. The IEP team discussed placement options, including discussions of the least restrictive environment for Student. Student's mother participated in the discussions and understood Student's need to address pre-academic skills, with her principal concern being the amount of time that Student would be mainstreamed. The District IEP team members concluded that based upon Student's then present levels of performance Student needed a small, structured setting, with a low student to teacher ratio, such as the FAST class. The need for such a placement outweighed any potential harmful effects of such a placement, such as lack of mainstreaming, or lack of exposure to appropriate behavioral models from non-disabled peers.

49. District's offer of FAPE included the following elements: 1375 minutes weekly in the FAST classroom at Nuffer Elementary with Student outside of general education for 74 percent of the day and mainstreamed the remaining 26 percent (approximately 95 minutes) of the day; two, 30-minute group speech/language sessions per week; occupational therapy for 25 minutes per week, and adapted physical education for 20 minutes per week. Student's mother signed the IEP offer with the exception of the placement at Nuffer, and the 26 percent mainstreaming.

#### STUDENT'S BEHAVIOR AND TOILETING AT TIME OF THE FEBRUARY 20, 2018 IEP

50. At the time of the February 20, 2018 IEP, Student's classroom behavior and toileting issues were frequently a disruption to his general education class. Student frequently would resist going to the bathroom and would often disrupt class as a result. He had regressed from the previous school year in the level of his ability to notify an adult of his need to use the bathroom. Instead, Student was only able to notify his classroom teacher after using his diaper, and then the teacher would have to get assistance to get Student to the bathroom. Student's resistance to toileting would often require the classroom teacher to discontinue her teaching and focus on getting Student



to the bathroom, and such resistance to going to the bathroom could last 10 minutes or more and occur more than once per day. Others would lose instructional time while Ms. Cleven dealt with Student. On at least one occasion, Ms. Cleven was forced to take Student to the bathroom, and have a teacher in an adjoining classroom watch her classroom. Student could need anywhere from 15 minutes to nearly an hour for a bathroom visit depending on how resistant he was to toileting on any given day.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION - LEGAL FRAMEWORK UNDER THE IDEA<sup>2</sup>

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) et seq.,<sup>3</sup> Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17)

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<sup>2</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>3</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

“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 Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Supreme Court’s recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, \_\_\_\_ L.Ed.2d \_\_\_\_] (*Endrew F.*) reaffirmed that

to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances; any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

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).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, 56505, subd. (j).) 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].)

5. District requested the due process hearing and had the burden of proof. District contended that the offer of placement in the FAST class at Nuffer Elementary contained in the February 20, 2018 IEP offered Student a FAPE in the least restrictive environment. Student contends the offer is not in the least restrictive environment.

6. 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 reasonably calculated to enable the child to receive educational benefit and make progress appropriate in light of the child's circumstances. (*Ibid.*)

7. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP team meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*) [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].) School districts are legally required to take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents whose native language is other than English. (34 C.F.R. § 300.322 (e).)

8. The IEP team is required to include one or both of the student's parents or their representative, a regular education teacher if a student is, or may be, participating in the regular education environment, a special education teacher, a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum and is knowledgeable about available resources. (34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise

regarding the child. (34 C.F.R. § 300.321(a).) Finally, whenever appropriate, the child with the disability should be present. (34 C.F.R. § 300.321(a).)

9. An IEP should include: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

10. 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).)

11. Federal and state laws require school districts to provide a program in the least restrictive environment to each special education student. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-

disabled peers to the maximum extent appropriate and may be removed from the regular education environment only when 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).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's syndrome].)

12. If it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education, supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

13. In resolving the question of whether a school district has offered a FAPE,

the focus is on the adequacy of the school district's proposed program. (*See Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.*, citing *Fuhrmann, supra*, 993 F.2d at p. 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*)

14. If the parent or guardian of a child who is an individual with exceptional needs refuses some or all services in the IEP, and if the public agency determines that the special education program or program component to which the parent does not consent is necessary to provide a FAPE to the child, the local educational agency shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (f).)

15. Here, in developing the February 20, 2018 IEP, District complied with the procedural requirements of the IDEA and California law. Student's mother was provided with the opportunity to participate in the development of Student's IEP. She participated in and assisted with the development of Student's present levels of performance, goals, educational program, related services and discussion of the continuum of placement options. Her participation was with the assistance of an interpreter, and was meaningful. She expressed her opinions and disagreements. The IEP team, comprised of the necessary participants, developed an IEP which comported with the procedural requirements of IDEA and California law including a statement of present levels, measurable goals, education program and services. In developing the IEP, the District IEP team members considered Student's strengths, his mother's concerns, the result of the most recent assessments, and Student's academic, developmental, and functional needs.

16. More specifically, District showed that Student's then present placement was not adequate for his specific needs. Due to his disability, he learned at a much slower rate than his neuro-typical peers, and that slower rate of learning manifested in Student's significant delays in acquiring pre-academic skills; i.e. the skills needed to learn in the classroom. Student was unable to recognize more than a letter or two and was unable to write characters or recognize or draw shapes competently. Student could count to 10, but could not use numbers to perform arithmetic. His first grade peers were writing paragraphs, and were able to perform two-digit addition and subtraction. Student simply was not able to learn a first grade curriculum, nor derive any academic benefit from the first grade general education classroom. He needed the time and opportunity to learn at his own pace in a learning environment tailored to helping him acquire the fundamental, pre-academic skills to be able to learn and succeed in the classroom.

17. In contrast, the placement proposed by District, the moderate-severe special day class at Nuffer, would provide the small, structured setting with a low student to teacher ratio that would allow Student to make progress at his own pace. It would provide him with the supports necessary to learn pre-academic, foundational skills, before attempting to address the core curriculum head on without such skills.

18. The *Rachel H.* factors, noted above, strongly support Student's placement in the FAST class at Nuffer<sup>4</sup>. While the FAST class would be a more restrictive setting than Student's current placement, the small class size and focus on foundational skills would allow Student to develop the skills needed to access the core curriculum and as

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<sup>4</sup> No evidence was presented regarding the fourth prong of *Rachel H.* concerning the cost of educating Student in the general education setting, and this factor was not considered in the least restrictive environment analysis.



accordingly to make progress appropriate in light of his circumstances. Student has not benefitted from the general education setting, and his prospects for doing so without developing his pre-academic skills is diminishing steadily. The non-academic benefits of the general education class were similarly blunted as Student operated at a much lower social level than his typical peers, and lacked the foundational social skills to function in the general education environment. In contrast, the small, structured setting of the FAST class would allow Student to acquire the social skills he needs to progress in his education, and Student would still retain 26 percent participation in general education under District's FAPE offer. Of additional concern is that Student's presence in the general education class was disruptive to the teacher and to other students, both from non-adherence to non-preferred tasks and especially from his issues with toileting, and the loss of instructional time for other students arising from the classroom teacher's need to focus on Student and his toileting one or more times per day. In contrast, Student was observed participating successfully in the FAST class during his classroom visit, and appearing to enjoy the experience, while not disrupting the classroom or detracting from others' time in the classroom.

19. In sum, District established by a preponderance of the evidence that it met all the procedural and substantive requirements for establishing that the proffered special education program and services were necessary for Student to receive a FAPE. As District has met the applicable legal requirements, and timely moved for a due process review of the appropriateness of the FAPE offer, if Parent's chose to enroll Student in District, District may, over Parents' objection, place Student in the proposed FAST class at Nuffer Elementary with the accompanying services and accommodations, and with the proposed balance of time spent in special education (74 percent) and mainstreamed in the general education setting (26 percent).

## ORDER

1. District's request for relief is granted.
2. If Student is enrolled within District, District may implement the February 20 2018 IEP, without Parents' consent.

## PREVAILING PARTY

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

## RIGHT TO APPEAL THIS DECISION

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.

DATE: June 29, 2018

/s/

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TED MANN

Administrative Law Judge

Office of Administrative Hearings