

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SANTA MONICA-MALIBU UNIFIED
SCHOOL DISTRICT.

OAH Case No. 2017080121

DECISION

Parents on Student's behalf filed a due process hearing request with the Office of Administrative Hearings, State of California, on August 1, 2017, naming Santa Monica-Malibu Unified School District. OAH continued the matter for good cause on September 13, 2017. Administrative Law Judge Adrienne L. Krikorian heard this matter in Santa Monica, California, on January 23 and 24, 2018.

Attorneys Eric Menyuk and Bryan Winn represented Student. Student's parents attended the hearing. Attorney Kristen Myers represented District. Special Education Director Pam Kazee attended the hearing on District's behalf.

The ALJ granted a continuance for the parties to file written closing arguments. The record remained open until February 21, 2018. Upon timely receipt of the written closing arguments, the record was closed, and the matter was submitted for decision.

ISSUE

Did District deny Student a free appropriate public education for the 2016-2017

school year by failing to offer her an appropriate educational setting to meet her unique needs in the areas of emotional disturbance and transition?

SUMMARY OF DECISION

This case involves a then 17-year-old girl who was eligible for special education under the categories of emotional disturbance and other health impairment. Student transitioned back home from a residential treatment center in Utah in summer 2016 after approximately 18 months in Utah. District offered Student placement for her senior high school year, during the 2016-2017 school year, at a nonpublic school, Beach Cities Learning Center in Manhattan Beach, California. The offer included onsite therapeutic mental health counseling, and parental support. Parents declined the offer and placed Student at an independent private school, Areté Preparatory School.

Student contended that District's placement offer at Beach Cities was not appropriate because the student population was exclusively special education students, it did not offer sufficiently rigorous academic challenges for her level of intellect and functioning, and it did not have the resources on campus to help Student meet her goal to complete all of the class requirements she would need to attend a California four-year university. Parents sought reimbursement from District for educationally related expenses for the private placement. District contended the placement offer met Student's unique academic, emotional and transition needs from residential treatment center back to home, and Beach Cities had the resources to provide her with the level of academic instruction necessary to be challenging while satisfying the requirements for graduation with a diploma.

Student did not meet her burden of proving that District denied her a FAPE by failing to offer an appropriate educational setting to meet her unique needs in the areas of emotional disturbance and transition. The placement offer at Beach Cities was appropriate. All relief sought by Student is denied.

FACTUAL FINDINGS

1. Student was 18 years old at the time of hearing and had graduated high school with a diploma. She assigned educational rights to Parents on July 27, 2016. Student was eligible for special education during all relevant times under the eligibility of emotional disturbance and other health impairment. She resided within District boundaries with Parents or Mother except between November 2014 until July 2016, when she resided in residential treatment facilities in Westwood, California and Utah.

2. Student first became eligible for special education while in kindergarten as other health impaired, based on attention deficit hyperactivity disorder. At the end of fifth grade, with Parents' consent, District exited her from special education and placed her on a Section 504 Plan under Section 504 of the Rehabilitation Act of 1973. She was bright and academically successful through middle school, but experienced deficits in social skills, school refusal, impulsivity and behavior related issues.

3. Student entered ninth grade at Santa Monica High School in the fall of 2013 and attended through the 2013-2014 school year. During the school year, she experienced low self-esteem, bad social experiences, was a perfectionist regarding school work, tended not to participate in class by rejecting teacher directed activities, and missed class time by spending time with the school psychologist. School refusal was pervasive during that school year. The school psychologist expressed concern about Student's emotional issues and because Student was not performing to her abilities. The school psychologist recommended a mental health evaluation, which District performed. District held an individualized education program team meeting during which the IEP team found Student eligible for special education under the categories of emotional disturbance and other health impaired. District offered mental health counseling, which Student refused to attend.

4. In July 2014 Student witnessed a traumatic event to a family member

which impacted Student's emotional well-being. Her school refusal exacerbated and she refused tutoring services. District, at Student's fall 2014 annual IEP team meeting, offered Student placement at Westview School, a non-public school. Student did not cooperate during the interview at Westview and the director of Westview and the IEP team, including Parents, agreed Westview was not an appropriate placement for Student. In November 2014, Student ran away from home, cut her wrists, and was hospitalized in the inpatient adolescent unit of the University of California, Los Angeles for two to three weeks. She transitioned to a partial inpatient program at UCLA, during which she ran away after three days of instruction. She was readmitted to the inpatient program. UCLA recommended a residential treatment placement.

5. In January 2015, Parents visited a number of placements recommended by District including the Structured Education Therapeutic Program at Malibu High School, and Beach Cities Learning Center. Beach Cities was a District contracted nonpublic school whose students consisted of high functioning autistic children and children with mild emotional disturbance. It had a small campus, and onsite therapeutic services, including educationally related intensive counseling services.

6. Parents chose to privately place Student at Alpine Academy Residential Treatment Center in Urda, Utah. Student attended the remainder of 10th grade and all of 11th grade at Alpine, through the 2015-2016 school year. Alpine Academy provided a family living teaching model, where students lived with a therapeutic host family, attended Alpine's academic program during school days and received mental health counseling services. District agreed to fund the educational component of the placement through 11th grade.

7. When Student first arrived at Alpine, she was anxious, depressed, disinterested about school, had low frustration tolerance, often turned to a victim stance, was verbally aggressive, had cognitive rigidity, and experienced issues with

building and maintaining relationships. She had executive functioning deficits, but was bright, a deep thinker, and believed in social justice. Alpine worked on Student's IEP goals throughout the day including during her time with the host family.

8. District was part of the Tri-Cities Special Education Local Plan Area. SELPA mental health case manager Eileen O'Connor monitored Student during her residential placement after District began funding the educational component at Alpine. Ms. O'Connor has a Master of Arts in education, a Bachelor of Science in psychology, is a credentialed special education specialist and has a multiple subject credential and pupil personnel services credential. She has worked in special education since 1991. She visited Alpine three to four times to monitor Student's progress. Each visit and her resulting progress report included consultation with Student's psychologist, local family members, Parents, Student and other staff. She was a member of Student's IEP team during the relevant time period. Her knowledge of Student and her needs, along with her education, credentials, and experience contributed to her credibility as a witness at hearing regarding Student's needs.

9. Ms. O'Connor wrote progress reports for District, which she shared with Parents. Based upon her observations and interviews with Alpine staff, Parents, and Student over 18 months, she credibly opined that, as of April 2016, Student made huge growth in the area of social emotional self-regulation, accountability and taking responsibility for her own actions, and in making and keeping friends. Her previous habits of deflecting responsibility on third parties for unpleasant situations were largely resolved.

10. Angie Alvey was the academic director at Alpine during the time Student attended. Ms. Alvey had a Master of Science in psychology, and she held Utah licenses in: special education mild/moderate disabilities; educational leadership/supervision; level one school counselor for K-12 students; and administrative/supervisory. She

worked in the field of education for more than 20 years. Ms. Alvey met approximately a dozen times with Student, and periodically with her teachers, therapists, and host family members, regarding Student's needs and progress. She was a member of Student's transition IEP team in 2016. Ms. Alvey's knowledge of Student and her needs along with Ms. Alvey's credentials and experience contributed to her credibility as a witness at hearing. Ms. Alvey concurred with Ms. O'Conner that Student made great progress at Alpine. Student learned to accept coaching, became more open to her impact on others, and as her behavior improved she received tokens entitling her to benefits and eventually more home visits. Alpine prepared monthly progress reports that it shared with Ms. O'Connor and Parents.

11. Student was academically successful at Alpine. Student had very successful home visits, she was becoming more independent, and was assuming more responsibility. Her social emotional status improved and Alpine recommended that she was ready to transition back home by July 2016 for her senior year of high school in the 2016-2017 school year. Parents were nervous about her transition back home, but were confident Student was ready to do so.

APRIL 2016 IEP TEAM MEETINGS

12. In preparation for Student's transition back home, District held an IEP team meeting on April 11, 2016. Representatives of Alpine, District, the SELPA (collectively referred to as "District IEP team members"), and Parents attended the meeting. The IEP team reviewed Student's present levels of performance, considered Parent's input, developed annual goals based on Student's present levels of performance at Alpine, and discussed possible placement options. Parents had the opportunity to and did ask questions and express concerns, contributing actively to the discussion. They agreed to the goals developed by the IEP team. The IEP team adjourned and agreed to reconvene to discuss Student's transition plan and services. District's offer of FAPE remained

Student's last agreed upon IEP, specifically academic placement at Alpine, until the IEP team reconvened.

13. The IEP team next met on April 25, 2016. Parents, Student, Ms. O'Connor, Ms. Alvey, District's special education coordinator Darci Keleher, and Student's therapist attended the meeting. Parents and Student actively participated in the meeting, expressing concerns, asking questions and sharing information.

14. The IEP team discussed Student's individual transition plan. Student expressed her interest in pursuing a career in music through study at an out-of-state four-year art college or music program. Due to Student's uncertainty about future plans, the IEP team discussed a "gap program" with her.¹

15. The IEP team discussed Student's academic status, the number of credits she needed for graduation with a diploma, and the electives she needed to attend a four-year college. Student expressed interest in completing the foreign language requirement at Santa Monica College. The IEP team discussed that she could complete her lab science course in chemistry and foreign language during her senior year.

16. The IEP team discussed placement for Student's senior year. Student was unsure where she wanted to attend school during the 2016-2017 school year. She left the meeting for a short time after reporting that she did not want to return to Santa Monica High School. The IEP team continued to discuss the continuum of placement options in the least restrictive environment, including the Structured Therapeutic Program at Malibu High School, which District had suggested before Student's residential placement. Mother shared her continued concerns about the peers in the Structured Therapeutic Program at Malibu High School. Student returned to the

¹ The parties did not offer written or testimonial evidence defining the term "gap program" as referenced in the IEP notes.

meeting; the IEP team recommended she visit the Beach Cities campus as a possible placement option, during her next home visit, in addition to reconsidering placement at the Structured Therapeutic Program at Malibu High School. The meeting adjourned to June 2016, to allow Parents and Student the opportunity to visit Beach Cities. Parents did not consent to an IEP at that meeting.

17. Mother opined at hearing that she did not agree that Beach Cities was appropriate for Student.² She was concerned that the population of students consisted exclusively of special education students. She felt Student needed to interact with typically developing peers. In Mother's opinion, Beach Cities lacked sufficient academic challenges. She opined that the peers at Beach Cities would exacerbate the issues that originally required Student to be placed in a residential treatment center. She opined that Student was highly motivated to attend a four-year university or college. Mother was concerned that Beach Cities did not offer Student A-G³ courses because Student

² Mother was a psychologist, had experience with clients who had individualized education programs, and had attended IEPs for her clients. However, she offered no specific evidence about her education, licensure or credentials which qualified her testimony as expert testimony, which would have been impacted by inherent bias. Therefore, her opinions at hearing were given weight solely based on her maternal relationship to Student.

³ A-G courses consist of courses in English, science, math, foreign language, history/social science, arts, and electives, which must meet certain requirements in areas including course content, textbooks, testing, and types of assignments. All such courses must be submitted to the University of California Regents for approval to ascertain that the courses meet the University requirements. No evidence was presented as to what the specific requirements are. A student's satisfactory completion of a specified number

was interested in qualifying for admission to certain California four-year colleges. Mother opined that Student needed one more year of Japanese language, and one year of lab science, to complete her A-G requirements, which she understood Beach Cities did not offer on its campus. Mother was also concerned that Student suffered from motion sickness and the commute between her residence in Santa Monica and Manhattan Beach would be difficult for Student. However, although Student had a doctor's note regarding motion sickness, neither she nor Parents ever informed the IEP team of any concerns regarding transportation or provided the District IEP team members with the doctor's note.

18. Ms. O'Connor was very familiar with Beach Cities and had monitored other students placed there by the SELPA. She credibly opined that Beach Cities could provide social emotional and executive functioning supports to meet Student's needs. All of the students at Beach Cities had IEPs. However, the Beach Cities program offered its students the opportunity to attend El Camino Community College, which was approximately 10 minutes driving distance from Beach Cities, to take electives that were not available at Beach Cities. Approximately 15 to 20 percent of students at Beach Cities attended classes at El Camino. Beach Cities also offered an extensive online catalogue of courses for its students.

19. District members of Student's IEP team suggested, and Ms. O'Connor concurred at hearing, that Student's high intellect would be well-served at Beach Cities. Beach Cities offered courses that would meet California A-G requirements. Student

of these courses in a specified subject area confers eligibility for admission into a college in the University of California and California State University systems. A-G courses are not required for a high school diploma. The mandated classes for a public high school diploma are governed by Education Code section 51225.3.

could access specific electives she wanted to take to meet California A-G requirements either at Beach Cities, online or at El Camino, where she could access Japanese language and lab science to fulfill her A-G requirements. In addition, Beach Cities had the resources to provide Student with onsite mental health counseling, a critical component to address her educational needs.

20. Ms. Alvey opined that Student was not particularly successful with the online Japanese class when she attended Alpine. Although Student attempted a Japanese online course, the materials were rigorous, and Student struggled with task initiation, motivation, and time prioritization. Student spent more of her time at Alpine in courses where someone was working with her to coordinate getting tasks done. Ms. Alvey was familiar with Beach Cities. She opined that it was small, structured setting with sophisticated staff to support Student's IEP goals, while coaching her through relationships with peers and conflict resolution. She opined Student would be motivated by taking a course in a more generalized population, such as at El Camino. Student demonstrated on home visits that she was generalizing skills that would keep her safe, and she was making good choices. Student took a college level course on campus at Alpine with an adjunct professor. She performed well academically and emotionally when she felt challenged and interested.

21. Student and Mother visited Beach Cities and the Structured Therapeutic Program at Malibu High School during Student's next home visit. Student's experience during her visit to Malibu High School was not satisfactory and she rejected that option for her senior year placement. Both Mother and Student continued to have concerns about Beach Cities, and they were considering placement at Areté, which Mother had heard about through colleagues and friends.

JUNE 2016 IEP TEAM MEETING

22. The IEP team reconvened on June 6, 2017, to further discuss Student's

transition. Parents, District special education coordinator Darci Keleher, Ms. Alvey, Ms. O'Connor, and other District and Alpine representatives attended. The entire IEP team discussed Student's present levels of performance, including potential challenges she faced during the transition home. Mother actively participated in the discussions, expressing concerns and opinions. Father asked some questions. The IEP team clarified Student's transition goal in response to Parents' questions. The IEP team discussed Student's post-graduation academics, her status toward graduation, and the courses needed for a diploma and a four-year California university.

23. Student was doing well overall, showing a lot of growth. She continued to experience trouble with follow through on tasks and required prompting and monitoring. After considering feedback from Ms. O'Connor, Parents, Ms. Alvey, Alpine's after-care coordinator, and the therapist, the IEP team agreed that the Structured Therapeutic Program at Malibu High School was not a good fit for Student. Ms. O'Connor suggested Beach Cities as an option for placement.

24. Parents reported they were looking at Areté as a private school placement for Student. Mother described her opinion of the student population and the academic options available to Student at the private school. Mother asked the IEP team what would happen if the private school did not work out for Student. Ms. O'Connor assured Mother that if Parents chose to place Student privately and it did not work out, Student could reenroll in public school with supports through her IEP. The District IEP team members did not agree that Areté was appropriate because it lacked onsite therapeutic services, which Parents would be required to privately obtain.

25. After considering Parents' input regarding the private school, the District IEP team members concluded that Beach Cities could offer Student the academic challenges and therapeutic support she needed, including meeting her A-G requirements for a four-year university. District offered placement for the 2016-2017

school year through April 11, 2017, at Beach Cities; individual counseling 60 minutes a week, 60 minutes a month of consultation for Parents through an outside therapist, 240 minutes of case management through a mental health counselor, and roundtrip transportation. Ms. Keleher explained that once Student enrolled, District would hold a 30-day placement review meeting when the IEP team would review services and offer group counseling if necessary. Parents did not consent to District's April 2016 IEPs as amended by the June 6, 2016 IEP.

26. Parents privately placed Student at Areté for the 2016-2017 school year after giving District written notice on August 15, 2016.

STUDENT'S EXPERTS

27. Dr. Deborah Budding testified for Student at hearing. Dr. Budding held a PhD in clinical psychology and a post-doctoral certificate in neuropsychology. She attended graduate school with Mother. Mother contacted Dr. Budding in the fall of 2016, when Student was 17 years old, to evaluate Student for the purpose of assisting Parents and Student in planning for her education after high school graduation. As part of her evaluation, Dr. Budding observed Student for 30 minutes at Areté. She also reviewed past assessment reports through December 2015. During the week before hearing in this case, she visited Beach Cities and spoke with the director, Karen Sullivan. She never assessed Student, never observed her at Alpine, and never participated in any of Student's IEP meetings during the relevant statutory period. She did not review any records, including assessments and test results, from Alpine or talk to any of the staff at Alpine about Student. No one shared Dr. Budding's report or conclusions and recommendations with Student's IEP team. Parents did not ask Dr. Budding during the relevant time period to give the IEP team an opinion as to District's placement offer or to contemporaneously evaluate the offer. Dr. Budding's focus was on the future. She testified at hearing, and offered opinions regarding Student's performance at Areté, and

her recent observations at Beach Cities.

28. Dr. Budding opined Student needed structure and support to assist her with task completion, and executive functioning, as well as mental health counseling, which was consistent with information the IEP team knew at the April and June 2016 IEP meetings. Based on her recent observation of Beach Cities, Dr. Budding opined she was pleased with what she saw at the time, she was impressed with the director, and it was an appropriate setting for many children. However, because she did not know Student in spring of 2016, and did not review Student's Alpine records at any time, Dr. Budding's other opinions, including concerns about placement and transitions between campuses at Beach Cities, were not informative or relevant as to what District IEP team members knew or should have known between the April 2016 and June 2016 IEP team meetings.

29. Batsheva Frankel was the dean of Areté. She was with the school for five years at the time of hearing. She testified at hearing, but she offered no relevant opinions regarding District's placement offer at Beach Cities. Her testimony was focused on Areté, how the curriculum was structured there, and how Student performed during the 2016-2017 school year. Ms. Frankel did not know whether Areté had typical developing peers as opposed to special education qualified students. Student graduated from Areté at the end of the 2016-2017 school year with a diploma and satisfied her A-G requirements.

LEGAL AUTHORITIES AND CONCLUSIONS

ISSUE: DID DISTRICT OFFER STUDENT AN APPROPRIATE EDUCATIONAL PLACEMENT?

1. Student contends District's offer of a non-public school placement at Beach Cities in Student's June 6, 2016 IEP was not appropriate because the placement was too restrictive, did not have a population of typical peers from which Student could benefit, and necessitated prolonged travel times that were detrimental to Student's

health and well-being. Student also contends the placement offer did not appropriately address her transition needs. Student contends that Areté was an appropriate placement for Student, where she successfully completed her A-G requirements and obtained a diploma at graduation. Parents seek reimbursement for out-of-pocket expenses related to Student's educationally related costs for the 2016-2017 school year.⁴

⁴ Student's counsel argued in the first half of Student's closing brief that District procedurally violated the IDEA by predetermining Student's placement offer, resulting in depriving Parents of the opportunity to participate in a meaningful way in the decision on placement. The issue of predetermination, while stated in Student's prehearing conference statement, was expressly withdrawn by Student's counsel at the prehearing conference. It was not alleged in the complaint or raised on the first day of hearing. "The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the [complaint], unless the other party agrees otherwise." (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) The parties did not agree to include the issue of a procedural violation relating to predetermination of placement at the prehearing conference or at hearing. Neither party offered any evidence at hearing relating to predetermination or denial of parental participation at IEP meetings. On the contrary, Mother's testimony and the IEP notes established unequivocally that Parents, including Mother who was familiar with the IEP process as a clinical psychologist, and Student actively participated in discussions and research regarding placement options at IEP meetings during the statutorily relevant time period. This Decision therefore does not address or make any legal conclusions on Student's proposed new issue of whether District specifically procedurally violated the IDEA by predetermining Student's placement, thereby depriving Parents of the opportunity to

2. District contends its April 11 and 25, 2016 IEP, as amended on June 6, 2016, offered Student a FAPE. District argued that Student did not offer any evidence that proved placement at Beach Cities was not an appropriate placement. On the contrary, the evidence established Beach Cities had all the necessary elements of an appropriate placement to meet Student's unique needs and provide Student a FAPE.

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA

3. 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. 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

participate in a meaningful way in the decision regarding placement, because the issue was not raised and fully litigated at hearing.

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

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

5. 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.)

6. In a recent unanimous decision, the United States Supreme Court 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 County Sch. Dist. RE-1* (2017) 580 U.S.____[137 S. Ct. 988, 1000-1001] (*Endrew F.*)) Directly adopting language from *Rowley*, and expressly stating that it was not making any "attempt to elaborate on what 'appropriate' progress will look like from case to case," the *Endrew F.* Court instructed that the "absence of a bright-line rule ... should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'" (*Endrew F., supra*, 137 S.Ct. at p. 1001 (*citing Rowley*, 458 U.S. at 206)). The Supreme Court wrote that school districts needed to "offer a cogent and responsive explanation for their decisions" and articulated FAPE as that which is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstance." *Id.* The Court wrote that the adequacy of a given IEP turns on "the unique circumstances of the child for whom it was created." The *Endrew F.* Court noted that the presumed expertise of the exercise of judgment by school professionals after meeting with all necessary IEP team members should be given deference, with the expectation of a reviewing court that they would "act in such a manner as to support their decisions that show the IEP was reasonably calculated to enable the child the make progress in light of his appropriate circumstances." (*Endrew F., supra*, 137 S.Ct at p. 1002.)

7. 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); 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, § 56505, 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).)

8. 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].) Here, Student had the burden of proof on the single issue for hearing.

PLACEMENT

9. School districts are required to provide each special education student with a program in the least restrictive environment. School districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114 (a)(2006); Ed. Code, § 56031.)

10. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed

modifications in the general education curriculum. (34 C.F.R. § 300.116).

11. 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 Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]).

12. If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment 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., 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.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to

meet the student's unique needs, comport with the student's IEP, be reasonably calculated to provide the pupil with some educational benefit in light of the child's appropriate circumstances, and in the least restrictive environment. (*Ibid*; *Rowley*, 458 U.S. at 188- 89; *Endrew, supra*, 137 S.Ct at pp. 1001-1002.)

14. Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Adams*)). The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid*.)

ANALYSIS

15. Here, the only issue is whether District's placement offer at Beach Cities for Student's senior year of high school denied her a FAPE by failing to offer an appropriate placement to address her emotional and transitional needs. The decision turns on whether the placement offered by District was appropriate, not whether Parents' preferred school of placement maximized Student's potential.

16. Student did not meet her burden of persuasion. Student attempted to prove that Parents' private school of choice was more appropriate than District's offer of Beach Cities. That position is not relevant to the issue of whether District's placement offer constituted a FAPE.

17. Both parties agreed that a public school general education setting was not an appropriate placement for Student. Parents and Student both declined the offer of the Structured Therapeutic Program at Malibu High School, in part based on Mother's and Student's concern about the peer population. Everyone agreed Student should not return to Santa Monica High School.

18. District's offer of nonpublic school, and specifically Beach Cities, included a

sufficiently rigorous curriculum on a smaller campus to meet Student's academic potential, including elective courses on the Beach Cities campus, online, and at nearby El Camino Community College where Student would be with typically developing peers. The offer included onsite therapeutic mental health services, which was a critical component to Student's transition from Alpine and her completion of high school. Parents never shared their concerns with the IEP team between April and June 2016, about Student's physical ability to travel between Beach Cities and El Camino for an elective, or her medical diagnosis of motion sickness. Mother's concerns were focused at the time on finding a placement that would challenge Student academically to ensure she would be able to attend a California four-year university, if she chose that path after graduation.

19. Beach Cities included the potential for Student to take one or two classes at El Camino Community College. That setting offered Student the opportunity to mainstream with typical peers in one or two elective classes, while affording her a smaller environment for the majority of each school day with high functioning special needs students, and with therapeutic support and counseling.

20. The District IEP team members reached their conclusion about placement based on feedback from Parents and Student, progress reports from both Ms. Alvey and Ms. O'Connor, as well as Student's progress reports and grades from Alpine. Student made substantial progress at Alpine emotionally and was academically successful and highly intelligent. Dr. Budding, Ms. Alvey and Ms. O'Connor credibly opined Student continued to need structure and support to assist with her task completion and executive functioning. She needed mental health counseling as part of her placement. Beach Cities offered all of those services and supports, along with exposure to typically developing peers. Overall, Beach Cities was the least restrictive environment for Student under the circumstances.

21. Student argued that *Andrew F.*'s holding, *supra*, 137 S.Ct at pp. 1001-1002, implies that school districts are now held to a higher standard, including ensuring that consideration of a student's transition goal of attending a four-year university with additional academic requirements is mandatory. Student argued that satisfying the A-G requirements so she could attend a four-year college was part of Student's transition goal. However, neither Student's post-graduation transition IEP goals nor the notes from the April and June 2016 IEP team meetings refer to a specific transition goal relating to a California four-year university requiring A-G classes. Mother testified at hearing about her personal interest in Student achieving that goal, but no one offered evidence that such a goal was discussed during the IEP team meetings in April or June 2016. Instead, the evidence demonstrated that Student was unsure at the April 2016 IEP meetings what her future course of study would be, other than pursuit of a career in music and attendance at colleges out of state.

22. Nevertheless, District met the "more than de minimus" standard that *Andrew F.* defined and went beyond Student's general objective of graduating with a diploma. The evidence established that Beach Cities could provide Student with classes that would satisfy the A-G requirements for her to attend California four-year universities. Student did not prove that Beach Cities could not help Student achieve that objective. On the contrary, Mother testified that Student specifically wanted to take Japanese and a lab science. Beach Cities offered those specific classes online and through the local community college. Student had access on Beach Cities' campus to other language and science classes that qualified for the A-G requirements. The District IEP team members, including representatives of Alpine who knew Student and worked with her for 18 months, credibly opined Student was capable of attending El Camino Community College classes. Based upon all the first-hand information they had at the time of the April and June IEP meetings, they opined that the process of transitioning to

a class at the community college would be beneficial to Student's maturation and emotional growth. Student did not prove by the preponderance of evidence that she was incapable of attending classes at El Camino Community College, where she could take Japanese and chemistry as a lab science.

23. Although Parents' school of choice was Areté, the IDEA does not require a school district to place a child at a parentally preferred placement if it has the appropriate placement for a child. Notably, Areté did not offer mental health counseling, which was a critical component to Student's transition needs. Parents had to contract privately for those services. On the other hand, Beach Cities could not only meet Student's academic needs to achieve her diploma, it also had professionals to provide onsite therapeutic counseling and mental health services to Student, which were essential to her transition from Alpine. Beach Cities also had credentialed special education teachers qualified to address Student's needs in executive functioning and task completion, which, based upon Ms. Frankel's testimony, Areté did not have.

24. Student argued in her closing brief that *Endrew F.* has somehow reduced the importance of the snapshot rule. She argued that the IEP team was required to consider what was reasonable in light of all the circumstances, based on what District *should have known* at the time. The snapshot rule focuses the analysis of the appropriateness of an IEP on the information *available to the IEP team* at the time it developed the IEP, whether or not the team considered that information. It is illogical to assume that, when looking at the elements an IEP team considers in creating an IEP, including for example historical data, assessment reports, and teacher interviews, one would not consider as part of the analysis what was known about those items at that time, whether the information was accurate or complete, or whether necessary elements were missing.

25. The principles underlying the snapshot rule developed by the Ninth Circuit

in *Adams, supra*, 195 F.3d at p. 1149, are to prevent the analysis from relying on what one knows at the time of hearing as opposed to what a school district knew or should have known at the time in question. This approach was supported in *E.M. v Pajaro Valley Unified School Dist., et al.* (9th Cir.2011) 652 F.3d 999, 1006 (*E.M.*). A trier of fact can use later acquired information to inform the analysis to the extent it informs the trier of fact in administrative proceedings that the same characteristics existed and or were available or evident to the IEP team when it developed the IEPs. In *E.M.*, the Ninth Circuit Court of Appeals was faced with the issue of whether the district court, under 20 U.S.C. 1415(i)(2)(C)(ii), incorrectly rejected as “additional evidence” an evaluation report that did not exist until three years after the administrative hearing. The court held that the district court erred by not considering whether the report was otherwise admissible and relevant to the determination of whether the district met its obligations to the student under the IDEA several years earlier. (*Ibid.*) However, the holding in *E.M.* does not abrogate the general principle articulated in *Adams, supra*, 195 F.3d at p. 1149, that the actions of school districts cannot be judged exclusively in hindsight, which is applicable to administrative hearings.

26. In this case, Student’s argument attempts to bootstrap Dr. Budding’s opinions and conclusions into the analysis of what the IEP team knew, did not know or should have known when the IEP team was evaluating placement options for Student. However, Dr. Budding did not review any records, progress reports or test results after Student was placed at Alpine, and she admitted at hearing she did not talk to anyone from Alpine as part of her 2016 assessment of Student. Both Mother and Dr. Budding admitted the focus of Dr. Budding’s evaluation in late 2016 was on Student’s performance at Areté and her plans for college after graduation. Dr. Budding did not offer any credible opinions that criticized the District IEP team members’ conclusions or that proved that information about Student existed at the time of the relevant IEPs that

District IEP team members should have known and did not consider. Therefore, Dr. Budding's opinions, while not inconsistent in certain respects with opinions by Ms. O'Connor and Ms. Alvey, were generally irrelevant to what the IEP team knew or should have known about Student from April through early June 2016.

27. The IEP team relied on progress reports prepared by professionals who worked directly with Student during the 18 months she was at Alpine, including Ms. O'Connor and Ms. Alvey. Mother did not disagree with their conclusions regarding Student's present levels of performance and continued needs in April through June 2016. Those professionals had contemporaneous and personal knowledge of Student's needs and progress and attended and actively participated at all of the relevant IEP meetings. Dr. Budding offered no opinions as to whether, at the time of the April and June 2016 IEP meetings, District should have known additional information that it did not otherwise consider.

28. Notably, Dr. Budding was complimentary of Beach Cities. She had no firsthand knowledge as to whether Student would take classes off campus, when those classes would be held during the school day, how often Student would make that transition, or whether Student had the option to choose other electives that allowed her to remain on the Beach Cities campus and satisfy the A-G requirements. Although she offered an opinion as to Student's ability to transition between campuses, her opinion was irrelevant for the reasons discussed above.

29. District's June 6, 2016 IEP offer of placement at Beach Cities, with therapeutic counseling services, was an appropriate placement for Student's emotional and transitional unique needs, including providing her with the opportunity to graduate with a diploma and receive credits necessary for admission to a four-year university. Student did not prove that District denied her a FAPE by making an offer of an inappropriate placement, or that the offer failed to include supports and services to

address Student's emotional and transitional needs. Therefore, Student is entitled to no remedies.

ORDER

All relief sought by Student is denied.

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, District was the prevailing party on the only issue 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: March 21, 2018

/s/

ADRIENNE L. KRIKORIAN

Administrative Law Judge

Office of Administrative Hearings