BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: SUMMIT PUBLIC SCHOOLS-DENALI, v. PARENT ON BEHALF OF STUDENT	OAH Case No. 2018070224

DECISION

Summit Public Schools –Denali, a California Charter School, filed a due process hearing request (complaint) with the Office of Administrative Hearings on July 3, 2018, naming Student as respondent.

Administrative Law Judge Penelope Pahl heard this matter in Oakland, California on August 28, 29, and 30, 2018. Megan Moore and Rachael Tillman, attorneys at law, represented Summit-Denali. Kevin Bock, Executive Director of Summit-Denali, attended the hearing each day on behalf of the district. Valerie Mulhollen, Attorney at Law, represented Student. Student's Father attended each day of the hearing on behalf of Student. Neither Student's Mother, nor Student, attended.

The parties requested permission to file written closing arguments. A continuance was granted for that purpose and the record remained open until September 18, 2018 at 3:00 p.m.. Closing arguments were timely received at which time the record was closed and the matter was submitted for decision.

ISSUES

1. May Summit-Denali assess Student pursuant to its March 7, 2018 assessment plan, including the diagnostic placement, without parental consent?

2. Does Summit-Denali's June 12, 2018 Individualized Education Program offer, including its offer of placement, services, and accommodations, provide Student a free, appropriate public education in the least restrictive environment? [1]

SUMMARY OF DECISION

Summit-Denali did not meet its burden of proving that the proposed "diagnostic assessment" requiring Student's change of educational placement to the Summit-Denali campus met the statutory standards for an assessment absent parental consent. The location proposed for the diagnostic placement is no longer available rendering the assessment plan moot. Additionally, Summit-Denali did not establish a methodology for the diagnosis or criteria to be evaluated during the diagnostic placement that would determine Student's ability to engage in Summit-Denali's academic program. Finally, Summit-Denali declared that all of the proposed assessments were contingent upon parental consent to a new placement for an unspecified time. Summit-Denali is, therefore, not authorized to conduct the assessment proposed in the March 7, 2018 assessment plan without parental consent.

Summit-Denali also did not meet its burden of proving that the proposed June 12, 2018 IEP offered Student a free, appropriate public education. The IEP offer itself was fatally unclear and failed to meet the statutory requirements for offering a reduced school day. Summit-Denali is not authorized to implement the IEP without parental consent.

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[1] In the Prehearing Conference Order, Summit-Denali was reminded that all of the required elements of its IEP offer would have to be proven to establish that the offer constituted a free, appropriate public education despite the fact that only a few examples of the elements of an IEP offer are mentioned in the issue.

FINDINGS OF FACT

JURISDICTION

1. Student is a 16 year-old young man who, at all times relevant to these proceedings, was enrolled in the Summit Public Schools Denali campus. Summit-Denali is a California charter high school. [2]

2. Student is eligible for special education and related services with emotional disturbance as a primary eligibility category as well as secondary categories of other health impairment, due to a diagnosis of attention deficit disorder; and specific learning disability.

STUDENT'S EDUCATIONAL HISTORY WITH SUMMIT-DENALI HIGH SCHOOL

3. Student started his education in Summit-Denali as a high school freshman at the beginning of the 2016-2017 school year. When he entered Summit-Denali, he was a general education student not yet deemed eligible for special education and related services. In elementary school, he had received accommodations based on a plan created pursuant to Section 504 of the Rehabilitation Act of 1973. Summit-Denali was

[2] At the beginning of the hearing, the parties presented the undersigned with a list of 8 stipulated facts which included that all evidence submitted was authentic; that Summit Public Schools is a nonprofit benefit corporation that operates and governs Summit-Denali; that Summit-Denali is a California public charter school; that Summit-Denali is a local public agency for purposes of special education; that Parents received timely notice of the IEP team meetings convened on March 7, 2018 and June 12, 2018; that the assessment plan was in Student's native language of English; that Parents received a copy of the March 7, 2018 assessment plan; and that Parents received copies of Procedural Safeguards on March 7, 2018, March 14, 2018, and June 12, 2018.

provided with a copy of the 504 plan.

Initial Assessment of Student

4. Within a few weeks of the beginning of the school year, Student began having significant difficulties attending school due to depression and anxiety. Student's parents sent an email to Summit-Denali on October 3, 2016, explaining that their son was experiencing such extreme emotional reactions to school that there were many days it was impossible for him to attend school or do assignments. In the email, Parents described symptoms of severe depression impacting Student's ability to function, including: sitting and staring when he was unable to move; tears resulting from feelings of being overwhelmed; and pulling out his hair. Parents asked for help from Summit-Denali.

5. On October 11, 2016, Kevin Bock, the executive Director of Summit-Denali, held a meeting with Parents, which included a faculty member and input from other teachers. On October 28, 2016, Parents sent an email requesting assessments of Student for purposes of determining eligibility for special education. The email noted that Student had "recognized disabilities" in the areas of dysgraphia, anxiety, depression, executive functioning, sustained attention and social cognitive dysfunction. Mr. Bock requested any information available to assist with the assessments. Parents referred him to the 504 plan from Student's prior school.

6. Parents signed an assessment plan on October 31, 2016. In November of 2016, Summit-Denali's school psychologist, Dr. Karen McGee, conducted psychoeducational, and academic assessments. [3] Summit Denali also had an

[3] Dr. McGee earned a Doctorate of Education in 2007 from University of San Francisco; and a Bachelor's and Master's degree in Counseling-Psychology from Stanford University, as well as a Masters of Secondary Education from Stanford

occupational therapy assessment completed. Summit-Denali scheduled an initial IEP team meeting for January 14, 2017.

Student's IEP History

2016-2017 SCHOOL YEAR

7. Student was originally deemed eligible for special education during Student's first IEP team meeting on January 14, 2017, under the category of Specific Learning Disability. During this meeting, Parents reemphasized Student's overwhelming depressive state that resulted in his inability to leave the house to go to school or even to do school work at home. By that time, Student had not attended school since October of 2016.

8. Parents did not consent to any aspect of the IEP at the January 2017 IEP team meeting. Parents requested an independent educational evaluation to assess the educational impact of Student's depression. Summit-Denali granted this request. Dr. Brendon Pratt assessed Student during several sessions which occurred between February 6, 2017 and March 29, 2017.

9. Dr. Pratt presented his assessment findings at the April 4, 2017 IEP team meeting and recommended a therapeutic day class to address Student's depression. The team discussed Esther B. Clark School, a therapeutic day school focusing on students

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University. Dr. McGee has been a credentialed school psychologist since 1983 and a Licensed Educational Psychologist since 2013. As a Licensed Educational Psychologist, Dr. McGee is authorized to conduct private educational assessments and make diagnoses pursuant to the Diagnostic and Statistics Manual, version V (DSM-V). She has worked for Summit-Public Schools approximately ½ day per week as a licensed contractor since 2012.

who are scholastically competent but debilitated by depression and anxiety. However, the school was full for the year and an enrollment process had to be completed prior to admission. The team decided that Summit-Denali would continue working with Parents while a therapeutic day school placement was pursued. Summit-Denali was to suggest ways in which Student could work towards credits in one or two classes, depending on the advice of Student's doctors. On April 24, 2017, Parents consented to eligibility categories of emotional disturbance; other health impairment, due to Student's ADHD; and specific learning disability. Parents also consented to the goals of the April 4, 2017 IEP. Parents did not consent to any other aspects of the IEP.

10. On May 15, 2017, Parents provided notice to Summit-Denali of their unilateral placement of Student at Fusion Academy, a local private school that provides one-to-one educational opportunities with substantial flexibility as to attendance. The notice included a statement of Parents' expectation that Summit-Denali would reimburse them for Student's tuition at Fusion and continued therapy with Dr. Michael Loughran. Summit-Denali refused payment for Fusion or for therapy. Summit-Denali sent a work packet to Student to offer him the opportunity to earn credit toward graduation at home pending his ability to enter Esther B. Clark.

11. The IEP team met again on June 15, 2017, to discuss Student's current needs. Student's therapist, Dr. Loughran informed the team that Student was one of the most severely depressed teenagers he had ever worked with. Student was diagnosed with drug resistant, cyclical, existential depression that was not tied to a situation or his environment. However, Student's depression had improved and a therapeutic day class could be a dangerous setting for Student as it might trigger a depressive episode. Parents reported that, since Student's enrollment in Fusion Academy in May of 2017, he had been able to attend only twice. Student remained on 24-hour suicide watch and had limited ability to leave the house. Dr. Loughran recommended a one-to-one based

program such as Fusion because it slowly reintroduced a group-type setting while providing the flexibility that allowed Student to make achievements to feel success. The doctor informed the team that he believed getting Student back into a school setting was critical to avoid Student's self-isolation.

12. Based on the prior IEP discussions, Chris Harris, the Director of Esther B. Clark school was present at the June 15, 2017 IEP team meeting. The Esther B. Clark representative explained that the school's approach was one of slow introduction into a group setting using their team's therapist, behaviorist and teachers who work together to help students reintegrate.

13. Summit Denali and Parents agreed that Student would have temporary one-to-one instruction at Fusion pending stabilization. This would allow for transition to Esther B. Clark. The team agreed to "check in" during the summer, in anticipation of Student beginning at Esther B. Clark in late August 2017. The check-in phone conferences were not formal IEP team meetings. It was reported that Student was improving and attending one-two classes at Fusion.

14. Summit-Denali requested releases of information from Dr. Loughran and from Fusion Academy. Parents did not agree to releases, but offered to arrange conference calls with the therapist in which they would participate. Scheduling meetings was difficult due to the competing calendars of the multiple professionals. Summit-Denali had no access to information from Fusion Academy.

2017-2018 SCHOOL YEAR

15. Student continued to attend Fusion at the beginning of the 2017-2018 school year. Summit-Denali attempted to arrange an IEP team meeting in October of 2017. However, due to scheduling conflicts, the meeting was ultimately scheduled for December 15, 2017.

Notice of Need for Residential Treatment

16. Student's struggle with mental health instability continued. On December 1, 2017, Parents provided Summit-Denali a "10 day Notice of Unilateral Placement." The notice explained that Student had experienced a reversal and Parents now believed he needed a residential treatment center. Student had not yet been placed in a residential treatment center and Parents did not identify one they preferred.

17. On December 12, 2017, Summit-Denali wrote to Parents denying their request for a residential treatment center but also stating that all information presented at the upcoming December 15, 2017 IEP team meeting would be considered and all appropriate placement options discussed at that time. Summit-Denali also requested the opportunity to conduct an educationally related mental health services assessment and health assessment, due to the significant change in Student's mental health being reported by Parents. Parents did not consent to the proposed assessments.

December 15, 2017 IEP Team Meeting

18. The purpose of the December 15, 2017 IEP team meeting was to consider Parents' request for residential treatment. Neither of Student's doctors attended the IEP team meeting. Parents reported that Student had made good progress for a while but had not been able to attend school for the past three weeks; that Student's medication was recently changed but was not titrated to a therapeutic level yet; and that Student remained under 24 hour suicide precautions in his home, which meant always having his door open with Parents able to enter without knocking.

19. While Parents had requested residential treatment two weeks earlier, they were now interested in exploring options that did not include residential treatment as they considered a residential program a last resort. Parents reported that, since sending the December 2017 unilateral placement notice, Student had improved somewhat, although he still found even leaving the house to go to therapy a challenge. Due to the

nature of his depression, doctors expected that he would have unpredictable regressions until they found a medication that worked.

March 7, 2018 IEP Team Meeting

20. Another significant change in Student's mental health was reported by Parents during an IEP team meeting on March 7, 2018. Over the previous four to six weeks, Student was attending Fusion regularly, completing work and interacting in his one-to-one classes. He had also been working out with a personal trainer and interacting with the family most evenings at dinner, as well as hosting two friends for an overnight game night. Parents informed the IEP team that Student currently had unscheduled visits to his therapist, with Student able to make the decision as to when an appointment was needed. He had not been to his therapist for three weeks.

21. Dr. Loughran participated by telephone and informed the team that Student had made remarkable progress in the past four-to-six weeks. The medication combination was starting to work. Student was exhibiting a desire to take charge of his life, pushing to work on his health by going to the gym, and to work towards high school graduation. He had gotten a driver's permit online. Dr. Loughran was checking in with Student at least once a month for an hour. He believed the threat of suicide was much less concerning, although Student continued on suicide protocols at home. However, Dr. Loughran and Parents also acknowledged that Student could experience set-backs. Dr. Loughran told the team he considered Fusion to be a good placement for Student because they had been supportive during the worst of times and offered flexibility for Student to complete credits toward graduation.

March 7, 2018 Proposed Assessment Plan Using "Diagnostic Placement"

22. Summit-Denali believed it did not have adequate information regarding Student's needs to identify an appropriate placement given the many, substantial

changes reported regarding Student's condition in just the past few months. An assessment plan was provided to Student following the March 7, 2018 IEP team meeting. Summit-Denali offered to assess Student in the areas of health, social emotional, and adaptive/behavior as well as conduct an educationally-related mental health services assessment, and a "diagnostic placement" as an alternative means of assessment. The assessment plan did not designate a time frame for the "diagnostic placement."

23. In a Prior Written Notice of March 14, 2018, Summit-Denali more fully explained the assessment plan offer. Summit-Denali stated that it proposed using a "diagnostic placement" to assess Student's educational needs at its Linda Vista campus. The school chose this campus in response to Parents' concern that returning Student to the Summit-Denali campus would be difficult for him because he had experienced such severe depression while attending Summit-Denali.[4] The assessment plan specified that the "diagnostic placement" was to be conducted by the school psychologist, program specialist and education specialist. The Linda Vista campus housed the sixth grade class attending Summit-Denali. Student would be in a room by himself with a teacher when completing his studies. He was to be offered opportunities to socialize, if he could tolerate them, during lunch at the Summit-Tahoma campus on Blossom Hill Road in south San Jose. Neither the plan for lunch visits to another campus nor transportation to the Tahoma campus were specified in the assessment plan, although the program specialist, Brittany Wolak, testified she believed a taxi would be arranged for the approximately 20 minute drive. These plans had not been discussed during the March 7, 2018 IEP team meeting. The IEP team had not considered how Student, in his current

[4] Summit-Denali's Linda Vista campus, on Linda Vista Avenue in Mountain View, California, is just a few blocks away from the main Summit-Denali campus.

state of fragile mental health, would socialize with people he neither took classes with nor knew. No safety plan, taking into consideration Student's 24-hour suicide watch, had been discussed for the lunchtime socialization or for the "diagnostic placement". As of the date of the hearing, the Linda Vista campus of Summit-Denali had been closed.

24. The Prior Written Notice described the "diagnostic placement" assessment as including one-to-one instruction, consisting of 90 minutes of general education instruction twice a week and 90 minutes of special education instruction twice a week with an educational specialist. The one-to-one instruction was chosen as an instructional model for the assessment with the intention of mirroring the educational system used at Fusion where Student was reported to be demonstrating academic success. This was not the educational system used at Summit-Denali and was to be specially created for Student's "diagnostic assessment". The assessment plan did not specify the academic subject for Student's general education. The IEP team discussed choosing a subject based on a review of Student's transcript from Fusion. Consultation with Student as to a subject he was interested in taking was also discussed by the IEP team. The method of selecting an academic subject for the diagnostic placement was neither included in the assessment plan nor in the prior written notice given to Parents. [5]

25. Education specialist Devany Smith was to provide the specialized academic

[5] The Prior Written Notice informed Parents that Summit-Denali would pay for individual and family counseling with Student's private therapist during the "diagnostic placement" assessment, if: 1) Parents consented to the March 7, 2018 IEP that accompanied the assessment plan (which is not at issue in this case); and 2) Dr. Loughran recommended that he should stay involved. The assessment plan did not provide for counseling services during the assessment.

instruction. She would be supervised by Brittany Wolak, the program specialist. [6,7] The assessment plan did not define what Student would work on with the education specialist. Ms. Smith was informed by her superiors at Summit-Denali that the focus of her work with Student would be determined if Parents consented to the assessment. As of March 7, 2018, the only special education goals to which Parents had consented were from the April 4, 2017 IEP.

26. The program specialist was to collect data regarding the "diagnostic placement." However, no details as to the type of data to be collected or the criteria to be used to evaluate the placement were included in the assessment plan or in the Prior

[6] Devany Smith holds a California clear credential as an Education Specialist for students with mild to moderate disabilities which she earned in May of 2017. She earned a Master of Arts degree in Special Education and Teaching from Loyola Marymount University in Los Angeles in May of 2018 and a Bachelor of Arts degree in Integrated Educational Studies, Community and Leadership from Chapman University in May of 2016 and has been a special education teacher for Summit-Denali ("Education Specialist" in Summit-Denali's vernacular,) through the Teach for America program since March of 2016.

[7] Brittany Wolak holds a California clear teaching credential as an Education Specialist for students with mild to moderate disabilities. She is also similarly credentialed in Michigan. She earned a Master of Arts in Reading in 2012 and a Bachelor of Science in Special Education in 2008 from Eastern Michigan University. She was a special education teacher from August of 2008 to 2013 and continued teaching in California until July of 2017 when she became a special education program specialist for Summit Public Schools. She is currently employed as a resource service provider and special education department chair for San Jose Unified School District.

Written Notice. The one-to-one program Student was offered during the "diagnostic placement" was not Summit-Denali's usual educational model.

27. None of the Summit-Denali's witnesses could articulate the criteria to be applied to evaluate the "diagnostic placement" and no evidence was presented that any methodology had been identified or developed to assist in drawing conclusions about how the diagnostic placement was proceeding.

28. Neither the assessment plan nor the Prior Written Notice defined the length of the "diagnostic placement". During the hearing, Father and Summit-Denali witnesses testified they discussed a period of 60 days in the IEP team meeting, with an IEP team meeting to review Student's progress to be scheduled after the first 30 days.

29. On March 26, 2018, Parents consented to all of the assessments with the exception of the "diagnostic placement." Parents pointed out that Student had only recently started being successful in attending school for five classes and informed Summit-Denali that Student was earning credits towards graduation and earning excellent grades from Fusion. Parents were concerned about disrupting Student's Fusion attendance and recent progress for the purpose of assessing Student, during which time Student would have no ability to complete any credits towards graduation, and would lose the opportunity to complete the credits he had started recently at Fusion. On March 29, 2018, Parents provided Ms. Wolak a series of Fusion daily reports summarizing Student's performance in different classes on 11 different days he attended Fusion between February 9, 2018 and March 27, 2018.

30. A Prior Written Notice dated April 18, 2018, responded to Parents' partial consent to the assessment plan, stating that Student would be able to engage in more than one class if he could tolerate it. The notice went on to say that Summit-Denali would not conduct the other assessments listed without consent to the "diagnostic placement" because "obtaining that data without also measuring [Student's] ability to

engage in an academic program would hinder the IEP team from determining what to offer as FAPE." Parents were informed that if they did not consent to the entire list of proposed assessments, Summit-Denali would request a due process hearing seeking permission to implement the entire assessment plan. No evidence was presented as to how the other assessments listed in the assessment plan would fit into Student's time in the "diagnostic placement", given that Student was scheduled to attend school for only three hours, on two days per week.

31. Summit Denali did not conduct any of the assessments to which Parents consented.

June 12, 2018 IEP Team Meeting

32. The IEP team met for Student's annual IEP on June 12, 2018. Father reported to the IEP team that Student continued to regularly attend school. Prior to the meeting, Parents provided daily reports from Fusion teachers regarding Student's work on nine days between April 20, 2018 and June 6, 2018. All of these were positive reports indicating Student was generally interested in learning and was receiving As and Bs.

33. Father reported some academic concerns, as well, noting that Student did only the bare minimum when given a writing assignment. Student refused to edit or revise his written work. His grammar was below grade level. He was behind in both English and Math. His handwriting was illegible. Fusion Academy provided no special education services.

34. Father told the team Student continued to improve; that he was socializing more and doing well in school at Fusion. Father noted, however, that Student was still fragile. He did not engage in his previously favorite activities of guitar playing and "airsoft." Father had concerns about Student's working memory and continuing suicidal ideation. Student was also reported to lack self-advocacy skills and suffer from social anxiety.

The June 12, 2018 IEP Offer

35. The June 12, 2018 IEP offer included an offer for both the regular school year and extended school year instruction. The offer was to begin June 12, 2018 and continue through June 11, 2019. Extended school year services were to begin June 11, 2018 and continue through July 20, 2018. Summit-Denali's 2017-2018 school year began on August 15, 2017 and ended on June 7, 2018. The evidence did not establish whether the two offers were to be implemented concurrently or sequentially.

THE EXTENDED SCHOOL YEAR OFFER

36. The June 12, 2018 IEP included an offer for extended school year services for a term from June 11, 2018 through July 20, 2018. Student was offered 120 minutes per week of intensive individualized services, consisting of one-to-one instruction with a credentialed teacher in Student's home or "any other location or setting." Student was also offered 120 minutes per week of specialized academic instruction with a credentialed special education teacher at "any other location or setting." No details regarding the instruction offered for the extended school year were included in the IEP so there was no information as to what courses Student would take or how they would be provided.

37. During the extended school year term, Student was also offered 30 minutes twice a week of individual counseling and 45 minutes per week of Parent counseling. No provider was designated for either, although the location of the services was to be the Summit-Denali campus.

REGULAR SCHOOL YEAR OFFER

38. For the regular school year, Student was offered a "diagnostic placement" to coincide with Summit-Denali's assessment offer to give it the opportunity to assess Student's current needs. The "diagnostic placement" consisted of two classes: individual

specialized academic instruction, provided by a special education teacher, 90 minutes, twice a week; and intensive individualized services consisting of one-to-one instruction with a general education English teacher for 90 minutes, twice a week. Instruction would take place at the Summit-Denali's high school campus Student had previously attended. Although not clearly stated in the IEP offer, Ms. Wolak testified that she believed Summit-Denali expected that the "diagnostic placement" instruction would begin over the summer.

39. The IEP offer did not identify the basis for the determination that Student should be limited to instruction for 180 minutes per day, two days per week. Student's fragile mental health was discussed in the IEP team meeting and was noted in the IEP document. However, no reconciliation of Student's five-course schedule at his private school with the two day per week, two-course schedule in Summit-Denali's IEP offer was detailed. The IEP document stated, "Summit will provide a setting similar to [Student's] current educational environment to minimize the impact of transition and will slowly add additional time for both academic opportunities and peer interactions as [Student] becomes accustomed to the setting and schedule." Summit-Denali presented no evidence as to why two 90 minute sessions, two days per week was appropriate given Student's current needs.

40. The team discussed the possibility of Student using Summit-Denali's personal learning time to work on his homework. Personal Learning Time is designated time during which students gather in a mentor teacher's classroom to work on projects or homework and have access to their mentor teacher. Despite the mention in IEP Notes, the IEP offer did not include the use of Personal Learning Time for either additional academic assistance or socialization; nor was provision for Personal Learning Time made for any instruction to be provided over the summer months when the regular faculty and other students would not be on campus.

41. Although the IEP notes reflect discussion of an expectation to reconvene after 30 days to evaluate Student's progress and "determine the next steps to take," the IEP itself does not specify a timeframe for the "diagnostic placement" offered. Nor was evidence presented that Summit-Denali was willing to continue the one-to-one instruction model for Student for the IEP's duration. One-to-one instruction was not Summit-Denali's usual instructional model.

42. The team discussed that 4 weeks would not be enough to complete a course for credit at Summit-Denali. Father asked if Student could work on completing his courses at Fusion while engaged in the offered "diagnostic placement". He was told the offer could not be implemented at Fusion Academy.

43. The IEP also offered Student 240 minutes per year of college awareness and 90 minutes per year of career awareness group education to be provided by Summit-Denali. However, the "diagnostic placement" model of instruction did not include time allocated for these courses.

44. The IEP offer also included individual counseling with an educationally related mental health services therapist for 50 minutes per week; as well as Parent counseling for 90 minutes per month. The provider of Parents' therapy was not designated.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) 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 higher education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel. The IEP describes the child's needs, academic and functional goals related to those needs; and contains a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and nondisabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the

potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

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

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 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).) At the hearing, the party filing the complaint has the

burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62.) In this case, Summit-Denali, as the complaining party, bears the burden of proof.

CHARTER SCHOOL RESPONSIBILITY FOR SPECIAL EDUCATION

6. Public Charter school students with disabilities and their parents retain all rights under the IDEA and its regulations. (34 C.F.R. § 300.209(a).) A school that is chartered by a local educational agency must serve children with disabilities attending the charter school in the same manner as the local educational agency serves children with disabilities in its other schools, including the provision of all supplementary and related services on site at the charter school to the same extent to which the local educational agency has a policy or practice of providing such services on its other public school campuses. (Ed. Code § 47646 subd. (a); 34 C.F.R. § 300.209 (b)(1)(i).) California law also imposes on the chartering local educational agency the duty to ensure that "all children with disabilities enrolled in the charter school receive special education ... in a manner that is consistent with their individualized education program" and that is in compliance with the IDEA and its regulations. (Ed. Code § 47646 subd. (a).)

ISSUE NUMBER 1: MAY SUMMIT-DENALI ASSESS STUDENT PURSUANT TO ITS MARCH 7, 2018 ASSESSMENT PLAN INCLUDING THE DIAGNOSTIC PLACEMENT, WITHOUT PARENTAL CONSENT?

7. A local educational agency is required to ensure that the needs of a child with a disability are reevaluated if the educational agency determines that the child's needs, including academic performance or functional performance of the child, warrant a reevaluation; or if a parent or teacher requests a reevaluation. (20 U.S.C. 1414 (a)(2)(A); Ed. Code § 56381(a)(1).) Reevaluations are not to be performed more than once a year unless the parent and educational agency agree otherwise. (20 U.S.C. 1414 (a)(2)(B)(i);

Ed. Code § 56381(a)(2).)

8. Generally, a reassessment of a child with a disability may not be conducted without parental consent. (20 U.S.C. 1414 (c)(3); Ed. Code §56831, subd. (f)(1).) To obtain consent, the educational agency must develop and propose a reassessment plan. (20 U.S.C. 1414 (b)(1); Ed. Code 56321, subd. (a).) If the parents refuse consent to the reassessment plan, the educational agency may conduct the reassessment only by demonstrating at a due process hearing that the assessment is necessary and the educational agency is lawfully entitled to assess. (34 C.F.R. §§ 300.300 (3)(i), 300,300(4)(c)(ii); Ed. Code §§56381 Subd. (f)(3); 56501, Subd. (a)(3); 56505, subd. (e).) Specifically, in order to proceed with assessment over a parent's objection, the educational agency must establish that (1) Parents have been provided with an appropriate reassessment plan to which Parents have refused consent; and (2) that conditions warrant assessment; a parent or teacher has requested reassessment; or Student's triennial assessment is due. (Ed. Code § 56381, subd. (a).)

9. A notice of assessment must be written in language that is easily understood by the public and be provided in Student's native language; explain the types of assessments to be conducted; and explain to Parents that no IEP will be instituted based on the outcome of the assessments without the consent of the Parents. (Ed. Code § 56381, subd. (b)(1)-(4); see also 34 C.F.R. 300.9(a).) The assessment notice must be accompanied by a copy of the Parents' procedural rights pursuant to the IDEA and related state laws. (Ed. Code § 56381, subd. (a).) The educational agency must give Parents at least 15 days to review, sign and return the proposed assessment plan. ((Ed. Code § 56321, subd. (a).)

10. A parent who wishes their child to receive special education services must allow the school district to reassess if conditions warrant it. (*Gregory K. v. Longview Sch. Dist. (*9th Cir. 1987*)* 811 F. 2d 1307, 1315. However, Parents are not required to comply

with an assessment that cannot meet the requirements of state and federal law.

11. Summit-Denali's complaint seeks a determination that the assessment plan as a whole, including the "diagnostic placement", was appropriate. Summit-Denali argues that its inability to access information directly from Student's therapist, and from Fusion Academy made it impossible for it to determine Student's ability to tolerate school work. The "diagnostic placement" would provide an opportunity to observe Student's ability to function on the Summit-Denali campus.

12. Parent argues that the assessment plan was a thinly disguised means of requiring Student to return to a Summit-Denali campus. Student also argues the March 7, 2018 assessment plan must be moot as it was scheduled to be conducted at Summit-Denali's Linda Vista campus which has since been closed.

13. Here, District established that there was a necessity for the reassessment due to changing reports from Parents regarding the severity of Student's mental health and his ability to attend school or attend therapy, or even leave his house. In addition, the parties stipulated that Parents received copies of the rights, commonly called Procedural Safeguards in California, as well as a copy of the March 7, 2018 assessment plan. Parents consented to each element of the proposed assessment plan, except the "diagnostic placement."

14. First, the proposed location designated for the assessment had been closed as of the date of the hearing. As the Prior Written Notice identified the Charter's Linda Vista campus as the location of the assessment, so that Student could be on a different campus to that where he had experienced his first suicidal symptoms, the assessment plan as written is moot. Even had the particular location not been closed, as discussed below, Summit-Denali failed to prove it met the legal requirements to conduct its assessment over parental objection.

15. Summit-Denali placed unreasonable conditions on the assessments, specifically requiring Student to abandon his then current school and attend what it termed a "diagnostic placement," for an unspecified length of time. California law does not have a provision for a "diagnostic placement." Thus if one is requested as an alternate form of assessment, the placement must meet the standard of an appropriate assessment under state and federal law. Summit Denali failed to meet its burden to prove the "diagnostic placement" proposed could meet those standards.

16. Specifically, Summit-Denali failed to adequately describe the assessment offered in the assessment plan and was unable to articulate how the offered assessment that could meet state standards. For example, no methodology was identified or criteria developed against which Student's success in the placement was to be measured. The activities in which Student would be engaged during the placement were vaguely articulated and the designation of people responsible for determining Student's achievements over the course of the assessment was unclear. Summit Denali failed to specify a safety plan for Student, who still struggled with suicidal ideation, or plan for any mental health support during the assessment. The socialization aspect of the "diagnostic placement" was poorly conceived, given Student's mental health struggles, and failed to plan for transportation. Without specificity as to the assessment methodology to be employed, and consideration of Student's unique needs for the duration of the "alternative assessment," this assessment could not meet the criteria of state or federal law mandating the use of technically sound assessment instruments or instruments used for purposes for which the assessments or measures are valid and reliabl. (20 U.S.C. 1414(b)(2) and (3); Ed. Code §.)

17. Summit-Denali has provided no legal authority that required Student to change placements as a precursor to a required assessment. No evidence was presented

as to why Summit-Denali was unable to evaluate Student's educational needs in his then current educational setting.

18. Finally, Summit-Denali failed to offer any authority for making all other assessments offered contingent on Parents' agreement to a change of placement. No explanation was provided as to why Summit-Denali was prevented from completing all of the other assessments unless Student agreed to a diagnostic placement at a Summit campus.

19. Summit-Denali did not meet its burden of proving that the assessment plan met the requirements of state and federal law. Additionally, the proposed location for the "diagnostic placement" is no longer available rendering the assessment plan moot. Finally, Summit-Denali provided no authority for the offered assessment plan being contingent on Student's change of educational placements. Therefore, Summit-Denali's request to conduct the alternative means of assessment, described on the assessment plan as a "diagnostic placement", without parental consent, is denied.

ISSUE NUMBER 2: DOES SUMMIT-DENALI'S JUNE 12, 2018 IEP OFFER, INCLUDING ITS OFFER OF PLACEMENT, SERVICES AND ACCOMMODATIONS, PROVIDE STUDENT A FREE, APPROPRIATE PUBLIC EDUCATION IN THE LEAST RESTRICTIVE ENVIRONMENT?

20. The IEP is considered the centerpiece of the IDEA's educational delivery system for disabled children. The procedures required to prepare a child's IEP emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. Adherence to the mandated process is designed to result in special education and related services that are tailored to the unique needs of a particular child. (*Endrew F.*, supra, 137 S. Ct. at p. 994.)

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

an action brought by a district under subdivision (f) of section 56346 of the Education Code, the ALJ must consider the adequacy of the proposed IEP as a whole. (20 U.S.C. § 1415(f)(3)(E)(i).)

22. California Education Code section 56501 also allows a school district to file a complaint when "[t]here is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education to the child," and when "[t]here is a disagreement between a parent or guardian and a local educational agency regarding the availability of a program appropriate for the child . . ." (Ed. Code, § 56501, subds. (a)(1), (4).)

23. "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist*. (2007) 550 U.S. 516, 524 [127 S.Ct. 1994].) Protection of parental participation is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J. v. Clark County School Dist*. (9th Cir. 2001) 267 F.3d 877, 882.)

24. In determining whether a student has been offered a FAPE in compliance with the IDEA, both a procedural and substantive inquiry are conducted to consider whether the school complied with the procedures set forth in the IDEA. (Rowley, supra, 458 U.S. at pp. 206-207.) Evaluation of procedural compliance looks at the process by which the IEP is produced. Substantive compliance is evaluated by looking at the myriad elements required to be contained in the IEP document itself. (*L.H. v. Hamilton County Department of Education,* (6th Cir. 2018.) 900 F. 3d 779,790.) The IEP is also evaluated to determine whether the IEP was reasonably calculated to enable the child to receive educational benefit. When a procedural violation denying a student a FAPE is identified, the second substantive prong of the inquiry is unnecessary. *L.J. by and through Hudson v. Pittsburg Unified School Dist.,* (9th Cir,. 2017) 850 F. 3d 996, 1003[citations omitted].)

25. Summit-Denali contends that its June 12, 2018 IEP offer, including its offer of placement, services and accommodations, offered Student a free, appropriate public education in the least restrictive environment. Summit-Denali further contends that all of the required elements of their IEP offer were included.

26. Student contends that the June 12, 2018 IEP offer lacked clarity. The diagnostic placement offered was for an uncertain term and was to proceed under uncertain circumstances.

27. The parties stipulated that Parents received proper notice in advance of the June 12, 2018 IEP team meeting; and an additional copy of their procedural rights, which was provided at the time of the meeting.

Lack of Clarity of Placement Offer

28. Clarity is a critical component of an offer of FAPE. In *Union School Dist. v. Smith* ((1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*)), the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement:

> "We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school District will greatly assist

parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." 20 U.S.C. § 1415(b)(1)(E). (*Union* , supra, 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified School Dist*. (E.D. Cal. 2009) 626 F.3d 431, 459-461; *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.) 24.

29. While *Union* involved a district's failure to produce any formal written offer, courts have consistently invalidated IEP's that were unclear or lacked adequate specificity to allow parents to make an intelligent decision as to whether to accept the offer or proceed to a due process hearing. (*S.H. v. Mount Diablo Unified School District*, (N.D. Cal. 2017) 263 F. Supp. 3d 746, 762.) One district court described the clarity requirement as "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal." (*Glendale Unified School Dist. v. Almasi*, (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108; see, also, *A.K. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine School Dist. v. K.H.* (D. Ore., June 2, 2005,) 2005 WL 1587241, p. 10, aff'd sub nom *Bend–Lapine Sch. Dist. v. K.H.*, (9th Cir. 2007) 234 Fed. Appx. 508.)

30. In this case, Summit-Denali failed to meet its burden of proving that the June 12, 2018 IEP offer was adequately clear. The evidence did not establish how Student's placement was to be implemented; or how long the offered placement would last. Finally, neither the method of providing Career and College awareness instruction, nor how Student was to socially interact with peers were specified.

31. The offer for the regular school year indicated that Student would have one-to-one instruction with a general education teacher (called "intensive individual services") for 90 minutes twice a week and with a special education teacher for 90

minutes twice a week. The offer did not specify when the one-to-one instruction was to begin, although Ms. Wolak testified she understood the 90 minute on-campus instruction would begin as soon as Parents consented. However, it was unclear whether that meant both the regular and extended school year instruction would begin concurrently or would be provided sequentially. Summit-Denali employees were unable to answer the question of whether both the extended year program and services offered during the regular school year program would run concurrently.

32. The offer for the regular school year did not specify details such as the subject matter to be taught in the general education setting or the goals on which the specialized academic instruction would focus during the limited time Student would be with the educational specialist. Furthermore, the use of the term "diagnostic placement" itself resulted in confusion as it did not indicate that Student could expect the one-to-one academic arrangements offered to continue for the full year.

33. The IEP offer mentioned college and career awareness, but no provision for Student's participation in those courses was described. Furthermore, while the IEP provided for 50% of instruction in the regular class and 50% of instruction outside the regular class, no evidence indicated that Student would be involved in "regular" activities at all. All of the coursework proposed was to be completed in a time-limited, one-to-one, isolated setting. Although a form of study hall called Personal Learning time, where Student might interact with peers, was mentioned during the hearing, as well as, in the IEP notes, a plan for including Student in the Personal Learning Time classes was not included in the IEP nor was any other description of an opportunity for peer interaction. Nor was any socialization opportunity described for Student during instruction in the "diagnostic placement" that would take place over the summer months. The discussion of these services and classes without any specific offer is akin to the failure to make a written offer as in *Union*, supra.

34. Additional confusion was caused by the extended school year offer which provided for 120 minutes per week of "intensive individual services with a credentialed teacher, in one-to-one instruction; and 120 minutes per week of one-to-one specialized academic instruction provided by a credentialed special education teacher at "any other location or setting." Neither the general nor the special education instruction source of instruction or course of instruction was specified. Individual and family counseling were also offered with the extended school year instruction. However, the provider of the offered counseling services was also left blank. During the hearing, Summit-Denali employees and former employees, who had been members of the IEP team, could provide no clarification regarding the timing or sources of services and seemed confused on this points themselves.

35. Section 3042 of title 5 of the California Code of Regulations, subdivision (a) states:

> "Specific educational placement means that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the IEP, in any one or a combination of public, private, home and hospital, or residential settings."

Summit-Denali failed to prove that their offer met the specificity requirements of state and federal law. As such, the June 12, 2018 IEP offer cannot be determined to be an offer of FAPE.

Failure to Provide an Offer for a Full School Day

36. Another flaw in the IEP offer was its failure to offer Student instructional time commensurate with other Students at his grade level or justify the limited

instructional time offered.

37. Section 3053 of title 5 of the California Code of Regulations subdivision (b)(2)(B) states:

> "When the IEP team determines that an individual cannot function for the period of time of a regular school day, and when it is so specified in the IEP, an individual may be permitted to attend a special class for less time than the regular school day for that chronological peer group."

38. Like many other IEP requirements, this regulation ensures that the IEP team actually considers an issue. A shortened school day is tolerated under the law only when the reduction is contemplated by the IEP team and is linked to the student's developmental goals and unique needs. (*Adams v. Oregon* (9th Cir. 1986) 793 F.2d 1470, 1491.)

39. In this case, Summit-Denali failed to establish that there was a team determination of Student's inability to function for a full class day. While Summit-Denali asserts that they were trying to ease Student into the change of placement, the IEP team never actually made an evaluation of why two 90-minute courses, twice a week was an appropriate schedule to meet Student's current needs. Parents were concerned that Student's five- course schedule at Fusion was not considered and were also concerned that the minimal coursework of the diagnostic placement offered would derail Student's progress towards graduation. Summit-Denali did not provide evidence that it considered, much less addressed these concerns, stating only that a second class could be added if Student showed tolerance for additional work. No criteria for determining Student's tolerance of adding a second course was described in the IEP.

40. Summit-Denali failed to prove by a preponderance of the evidence that it

provided adequate clarity in the June 12, 2018 IEP offer. This lack of clarity of the IEP resulted in a determination that its June 12, 2018 IEP does not constitute an offer of FAPE. Furthermore, the IEP failed to offer a full school day and failed to make the findings necessary to offer the substantially limited amount of weekly instructional time included in the IEP. These are fatal flaws resulting in an inability to determine that the June 12, 2018 IEP offered FAPE. Consequently, the other procedural and substantive aspects of the offer need not be addressed.

ORDER

1. Summit-Denali's request to assess Student pursuant to the March 7, 2018 assessment plan without parental consent is DENIED.

2. Summit Denali failed to prove that the June 12, 2018 Individualized Education Program offered Student a FAPE. As a result, Summit-Denali's request to implement the June 12, 2018 IEP without parental consent is DENIED.

PREVAILING PARTY

Pursuant to 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. Student prevailed on both issues presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATE: October 22, 2018

/s/

PENELOPE S. PAHL

Administrative Law Judge

Office of Administrative Hearings