

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2019080965

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PARENT ON BEHALF OF STUDENT,

v.

REDONDO BEACH UNIFIED SCHOOL DISTRICT.

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DECISION

APRIL 17, 2020

On August 26, 2019, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Redondo Beach Unified School District. The hearing was continued for good cause on October 4, 2019. Administrative Law Judge, Ted Mann, heard this matter in Redondo Beach, California on January 28, 29, and 30, 2020, and February 18, 2020.

Attorney David German, represented Student. One or both of Student's parents attended each hearing day on Student's behalf. Attorney Sundee Johnson, represented Redondo Beach. Jessica Silberling, Redondo Beach Director of Compliance, attended all

hearing days, except the afternoon of January 30, 2020, on Redondo Beach's behalf. Redondo Beach program manager, Johna Morghen, attended the hearing on behalf of Redondo Beach that afternoon.

At the parties' request the matter was continued until March 17, 2020 for written closing briefs. The briefs were timely filed, the record closed, and the matter submitted on March 17, 2020.

## ISSUES

1. Did Redondo Beach deny Student a free appropriate public education, known as a FAPE, since the beginning of the 2017-2018 school year by failing to provide him with an appropriate program of special education and services, including an appropriate type and amount of individual academic instruction, and inclusion consultation, and by failing to provide reimbursement at an appropriate rate for social skills/recreational therapy services?
2. Did Redondo Beach deny Student a FAPE by failing to offer him a program and placement in the least restrictive environment in the individualized education programs, known as IEPs, dated February 15, 2018, May 25, 2018, and May 23, 2019?

Student withdrew his claim regarding speech and language services as stated in the prehearing conference order as part of Issue 1.

## JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (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 Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. §1400(d)(1); See Ed. Code, §56000, subd. (a).)

The IDEA affords parents, adult students and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. §1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. §1415(i)(2)(C)(iii).) Student had the burden of proof. The factual statements below constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. sec. 1415(h)(4); Ed. Code, sec. 56505, subd. (e)(5).)

Student was 10 years old and would have been in fifth grade if he had been attending school at the time of hearing. Student resided within Redondo Beach's geographic boundaries at all relevant times. Student was eligible for special education under a primary eligibility of autism.

ISSUE 1: DID REDONDO BEACH DENY STUDENT A FAPE SINCE THE BEGINNING OF THE 2017-2018 SCHOOL YEAR BY FAILING TO PROVIDE HIM WITH AN APPROPRIATE PROGRAM OF SPECIAL EDUCATION AND SERVICES, INCLUDING AN APPROPRIATE TYPE AND AMOUNT OF SERVICES IN INDIVIDUAL ACADEMIC INSTRUCTION, AND INCLUSION CONSULTATION, AND BY FAILING TO PROVIDE REIMBURSEMENT AT AN APPROPRIATE RATE FOR SOCIAL SKILLS/RECREATIONAL THERAPY SERVICES?

Student contends Redondo Beach did not provide appropriate specialized academic instruction, and inclusion in general education for the majority of his academic instruction is the least restrictive environment and that nonacademic factors weigh against a more restrictive program. According to Student, Redondo Beach should provide Student a program where all but four hours a week of academic instruction would be provided in a general education setting with modified curriculum to facilitate his success in that setting and provide additional individual academic instruction outside of regular school hours. To further support inclusion, Student argues Redondo Beach should have provided more direct inclusion consultation by a specialist. Lastly, Student contends that reimbursement in the amount of \$65 per session for social skills/recreational therapy Redondo Beach agreed to pay Parents was insufficient.

Redondo Beach contends it offered Student specialized academic instruction and related services individually designed to provide educational benefit to Student through IEP's reasonably calculated to enable Student to make progress in light of his circumstances.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services individually designed to provide educational benefit through an IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000].)

California special education law and the IDEA emphasize special education and related services must be design to meet student's unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's IEP. (20 U.S.C. § 1401(9).) "Special education" is defined as "specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability...." (20 U.S.C. § 1401(29).) California law also defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California,

related services include designated instruction and services, which must be provided if designated instruction may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

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. (*Gregory K. v. Longview School District* (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. (*Id.*) For a school district's offer to a disabled pupil to constitute a FAPE under the IDEA, the educational services and/or placement offered must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*; 20 U.S.C. § 1401(9).) The IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207.) As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209; *Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992.)

## MAY 31, 2017 IEP

Student began the 2017-2018 school year in third grade in a general education classroom. The IEP in effect at that time was dated May 31, 2017. The May 31, 2017 IEP offered Student a general education placement with four hours per week of specialized academic instruction in the Group Learning Center. The IEP also provided Student with a full-time behavioral aide throughout the school day, along with eight hours monthly

of supervision of the behavioral services. The IEP included 30 minutes of counseling at school on a weekly basis. The May 31, 2017 IEP did not provide separate inclusion services, or recreational therapy/social skills training.

Parents signed and returned the May 31, 2017 IEP to Redondo Beach in early September 2017. Parents agreed to the IEP with four exceptions. In particular, Parents requested that Student receive eight hours per month of inclusion consultation through an outside agency, that Student receive four hours of specialized academic instruction by a non-public agency in the home setting outside of school hours, and the conversion of Student's weekly on-campus counseling time into one hour per week of non-public agency recreational therapy/social skills training.

Redondo Beach responded to Parents' requests with a prior written notice letter, dated December 6, 2017. Redondo Beach denied Student's request for eight hours of monthly inclusion consultation, but agreed to continue providing two hours per month of inclusion consultation by its program specialist. Redondo Beach also agreed to compromise with Student on the conversion of counseling time, and agreed to reimburse Parents in an amount not to exceed \$65.00 per week for social skills group provided by a non-public agency outside of the regular school day, provided Parents agreed to transport Student at their own expense. Redondo Beach declined to provide additional specialized academic instruction outside of school hours, asserting the program and services offered in the May 31, 2017 IEP were appropriate. Parents did not further respond to Redondo Beach's offer, nor did Parents ever submit a request for reimbursement for a weekly social skills group. Redondo Beach continued to offer inclusion services under the existing model, and continued to provide Student with the weekly counseling provided in the May 31, 2017 IEP.

## FEBRUARY 15, 2018 IEP

The IEP team met on February 15 and February 22, 2018, at Parents' request to address Student's progress. Parents reported that they had seen a lot of progress since Student returned to Redondo Beach, and the school team agreed that Student had made a lot of progress on his social skills, but comparatively less progress academically. For example, Student was making significant progress on occupational therapy, speech-language, and behavioral goals, but was still skip counting while his peers were several grade levels ahead in math, and the general education teacher reported that he was at a kindergarten level in reading comprehension. Student was working on building five, five-word sentences, while his grade level peers were writing three to four paragraphs with multiple sentences and transition words. Redondo Beach personnel expressed concerns that Student needed more direct instruction from a credentialed teacher, more repetition of each topic area, and more group work with peers at a similar grade level to make significant progress academically, and recommended a special day class placement for part of the school day.

Redondo Beach staff recommended a special day class because that environment would provide specialized academic instruction not available in a general education classroom, in a classroom with fewer students and more adult support. Parents disagreed with the recommendation. They felt Student was making significant progress in general education with four hours each week of specialized academic instruction. Even so, Parents requested additional academic support outside of regular school hours. Redondo Beach felt that rather than provide additional academic support outside of regular school hours, specialized academic instruction in a special day class during school hours would provide the kind of instruction Student required to assist him to benefit from academic instruction.

The team did not revise or change the May 31, 2017 IEP at the meetings in February 2018.

## MAY 25, 2018 IEP

Redondo Beach scheduled Student's annual IEP team meeting to be held on May 25, 2018. At Parents' request the annual meeting was rescheduled to June 11, 2018. The parties, witnesses and this decision refer to the annual IEP for the 2018-2019 school year as the May 25, 2018 IEP.

Student's general education academic subjects were taught at grade level using state standard curriculum. Student was several grade levels below his general education classmates in many areas. He was on a modified curriculum. Student could not make appropriate academic progress in a classroom taught well above his comprehension level, even with modified classwork and the support of the Learning Center program.

The Learning Center was also typically taught at grade level, with differentiation as needed, in small groups. Grade level instruction was well beyond Student's academic skill level, so his instruction was differentiated in his IEP. Student's curriculum and lessons were modified through a partnership between the resource teacher, who had extensive inclusion training, and the general education teacher, but he was generally unable to benefit from whole group and small group instruction in the general education setting. Student's work in the Learning Center had instead been converted largely to one-to-one specialized academic instruction with the resource teacher.

The May 25, 2018 IEP offered Student a blended program with specialized academic instruction in core subjects in a special day class for 1055 minutes per week in the morning, or approximately 56 percent of his school day. The specialized academic

instruction in a special day class provided a much smaller class with more adults to provide students with more opportunities for one-to-one and small group instruction than a general education classroom. Also, the special day class was taught at the students' functional grade level, and used small groups to combine students working at the same level for small group learning experiences. The remainder of the school day, including lunch, recess, enrichment, and non-core academic subjects, was offered in the general education setting, and made up approximately 44 percent of the school day. The IEP continued to offer a one-to-one behavioral aide, and supervision, throughout the school day, along with group and individual speech-language, both district and non-public agency occupational therapy, adapted physical education, and counseling and guidance.

Parents did not agree to the proposed placement and services, including the placement in the special day class, although they agreed that Redondo Beach could implement the proposed goals. Therefore, Redondo Beach continued to implement Student's full time placement in general education with Learning Center support, along with the related services in the May 31, 2017 IEP.

## MAY 23, 2019 IEP

The annual IEP team meeting for the 2019-2020 school year, when Student would be in fifth grade, was held over the course of three days, on May 23, 2019, and June 7, and June 13, 2019. A fourth meeting was proposed, but never held. Instead of attending a fourth meeting, Parents asked Redondo Beach to send the IEP offer to them by mail for their review.

Over the course of the meetings the IEP team agreed Student had made reasonable progress on his IEP goals, socially and academically, over the preceding year.

For example, Student met his interactive-cooperative play goal, and was able to add two, two-digit numbers without regrouping. However, Student's math grade level continued to be far below that of his typical peers. The IEP team agreed upon proposed new goals in behavior, special academic instruction, occupational therapy, speech-language, and adapted physical education.

Although Student made progress on his goals, he continued to perform several grade levels below his general education classmates in most academic areas, and needed a heavily modified curriculum and lessons to make progress on his academic goals. He continued to require significant one-to-one time with the Learning Center teacher with differentiated instruction, and modified curriculum lessons created by the resource and general education teachers. The district team members believed that Student could access the general education curriculum, at a lower grade level, with the individualized and slower paced instruction of a special day classroom for students with mild to moderate disabilities.

The May 23, 2019 IEP offered Student a blended program with specialized academic instruction in core subjects in a special day class in the morning. The remainder of the school day, including lunch, recess, enrichment, and non-core academic subjects, was offered in general education classes. Student was again offered a one-to-one behavioral aide, and supervision throughout the school day, along with group and individual speech-language, both district and non-public agency occupational therapy, adapted physical education, and counseling and guidance. Parents did not consent to the May 23, 2019 IEP. Instead, they pulled Student out of school for his fifth grade year and arranged for instruction with a private educational consultant, Andrea Watkins, through her private educational services business, beginning in fall 2019.

## INDIVIDUAL ACADEMIC INSTRUCTION

The individual academic instruction services provided by Redondo Beach from August 26, 2017 through August 26, 2019, resulted in undisputed progress by Student on his academic goals. Based upon the May 31, 2017 IEP, Student had four hours of Learning Center services per week with a special education resource teacher under the May 31, 2017 IEP. The services were intended to provide Student with specialized academic instruction in the core subjects of language arts and mathematics in the Learning Center's small group format. Student needed those services because he derived minimal academic value from his inclusion in general education core instruction, as he was working several grade levels below his peers, and his work was heavily modified. However, shortly after the May 31, 2017 IEP team meeting, at a June 5, 2017 IEP meeting, Parents requested the specialized academic instruction be done on an individual basis, and the IEP team agreed to do so in the spirit of compromise.

At hearing, the testimony was undisputed that Student received almost all of his Learning Center instruction in a one-on-one setting with the teacher, rather than in small groups as originally conceived. That practice continued through the third grade and fourth grade. Therefore, Student's progress on his academic goals cannot be attributed to general education with typical Learning Center support. Learning Center support was designed to be provided in a small group for students with IEPs and students that did not have IEPs, and Student's functional grade level and attentional issues rendered such a model ineffective. In addition, Parents provided Student with academic instruction one-on-one from a tutor at home, and later from Ms. Watkins for most of fourth grade.

Beginning at the February 15, 2018 IEP team meeting, the Redondo Beach team members recommended to Parents that Student be placed in a blended program combining specialized academic instruction in a special day class for core subjects with general education mainstreaming for the remainder of the school day. The recommendation was formalized by Redondo Beach's May 25, 2018, and May 23, 2019 IEP offers. Parents did not agree with the proposed change in placement offered in either of those IEPs, and did not allow Redondo Beach to implement the proposed placement.

Student argues that he should have received additional specialized academic instruction outside the school day in order to receive a FAPE. Ms. Watkins had provided one-to-one educational services to Student for four hours per week for almost all of fourth grade. She worked on specific areas she identified using portions of a standardized academic performance test. She worked with Student on a one-to-one basis on math skills and reading comprehension that were tied to Student's functional grade level standards. Student made gains in these areas during fourth grade. The evidence did not establish that Student's progress in fourth grade was due to Ms. Watkins' services rather than the instruction and services provided by Redondo Beach throughout his school day under the May 31, 2017 IEP.

The evidence showed Student made progress on academic goals with one-on-one in school instruction. Redondo Beach was not obligated to provide tutoring outside of school hours at home, the methodology preferred by Parents. Accordingly, Student failed to show that tutoring delivered outside of school hours in the home was required to provide Student a FAPE.

Although Student made progress on his academic goals, the evidence does not support his claim that the progress was due to placement in a general education classroom with Learning Center support. In fact, the Learning Center instruction was heavily modified so as to be essentially one-to-one instruction with the resource teacher, and as such more restrictive than the proposed special day class setting. The program offered by Redondo Beach conformed to Student's IEP, met his unique needs, and was reasonably calculated to provide an educational benefit. Student did not prove that Redondo Beach failed to provide him with an appropriate type and amount of individual academic instruction.

## INCLUSION CONSULTATION

Student contends Redondo Beach denied him a FAPE by failing to provide an appropriate time and amount of inclusion consultation. Redondo Beach contends that it provided Student with adequate inclusion services.

Redondo Beach used a whole team methodology to support inclusion for Student. A program was in place, working with inclusion consultant, Wendy Murawski, along with the school's principal, to develop a school-wide culture of inclusion and accessibility. Both training and meetings with the special education department and school-wide were held on a regular and on-going basis for training in inclusion.

Inclusion consultation services were provided to Student in three ways during the 2017-2018 and 2018-2019 school years. First, through the Learning Center teacher, in consultation with the general education teacher on a daily and weekly ongoing basis for approximately 30 to 60 minutes per week. Second, inclusion support and consultation provided by the staff that worked with Student such as the occupational therapist and the speech language pathologist, along with the program manager who was part of

Student's team. Third, as described above, Redondo Beach used a whole team methodology to achieve inclusion at a school-wide level. As discussed above, Student's preferred method of service delivery does not control.

Student was included across the broad spectrum of general education activities, and both teachers, service providers, and Parents reported significant gains in social skills, typical peer relationships, and inclusion in the classroom. As such, Student received a reasonable level of inclusion support.

As discussed further, below, Student's skills did not lend themselves to effective inclusion in the general education classroom for the vast majority of academic activities. Although Parents argue that Student should have received more inclusion services than provided by Redondo Beach in order to receive a FAPE, the record does not show that more inclusion would have solved the underlying problem, that Student was working at a grade level so far removed from his peers that inclusion in core academic instruction did not provide Student with a meaningful benefit. Student received the benefits of mainstreaming in other areas of his educational experience. Student did not prove by a preponderance of the evidence that Student needed more inclusion consultation to make appropriate progress in core academics, or to receive non-academic benefits. Student was not denied a FAPE during the statutory period as a result of insufficient or inadequate inclusion consultation.

## RECREATIONAL THERAPY REIMBURSEMENT

Student contends that Redondo Beach denied him a FAPE by failing to provide him reimbursement for recreational therapy/social skills class at an appropriate hourly rate. Redondo Beach contends that the hourly rate is reasonable and Student simply failed to avail himself of the offered services.

Here, in its prior written notice correspondence of December 6, 2019, Redondo Beach offered to reimburse Parents in an amount not to exceed \$65.00 per week for a social skills/recreational therapy group provided by a non-public agency outside of the regular school day, provided Parents agreed to transport Student at their own expense. The social skills group was an alternative requested by Parents to Student receiving 30 minutes per week of counseling related to social skills by a Redondo Beach counselor. Although Parents claim that \$65.00 per hour was below market, or insufficient to purchase the services for Student, they failed to prove by a preponderance of the evidence that such services could not be purchased for the rate offered by Redondo Beach. There is no credible basis to find that the \$65.00 per hour rate offered by Redondo Beach was insufficient, nor that Parents could not have availed themselves of the offer. Student did not prove Redondo Beach denied Student a FAPE by failing to offer an appropriate hourly rate for the social skills/recreational therapy services offered in the December 6, 2017 prior written notice.

## ISSUE 2: DID REDONDO BEACH DENY STUDENT A FAPE BY FAILING TO OFFER HIM A PROGRAM AND PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT IN THE IEPS DATED FEBRUARY 15, 2018, MAY 25, 2018, AND MAY 23, 2019?

Student contends that Redondo Beach failed to offer him placement in the least restrictive environment in the IEPs dated February 15, 2018, May 25, 2018, and May 23, 2019. The IEP team met in February 2018 but made no changes to Student's IEP, therefore this decision will address only the May 25, 2018 and May 31, 2019 IEPs.

Student argues, based upon the IDEA's strong preference for 'mainstreaming,' there is a presumption that a student cannot be moved to a more restrictive

environment unless the student can receive no educational benefit in the general education setting. Student's closing brief relies upon three decisions which, according to Student, "almost uniformly include an explicit finding that a child is incapable of obtaining any educational benefit whatsoever in the general education setting."

Student cites two Ninth Circuit decisions and a District Court decision, *Poolaw v. Bishop* (9<sup>th</sup> Cir. 1995) 67 F.3d 830, 836-837; *Seattle School District No. 1 v. B.S.* (9<sup>th</sup> Cir. 1996) 82 F.3d 1493, 1500-1501, and *Katherine G. ex. rel. Cynthia G. v. Kentfield School District* (N.D.Cal. 2003) 261 Fed.Supp.2d 1159.

Redondo Beach contends it offered and made available to Student a FAPE in the least restrictive environment with participation in the general educational setting to ensure Student's meaningful educational benefit appropriate in light of his circumstances. According to Redondo Beach, Student's goals could be appropriately implemented within the regular school day with the program offered in Student's IEPs while continuing to provide Student with significant access and interaction with general education peers.

Redondo Beach contends that placement in a special day class for core academics and the remainder of the school day in a general education classroom or settings offered Student a FAPE in the least restrictive environment. Redondo Beach argues that Student needed more one-to-one instruction from a credentialed teacher than he would receive in general education, along with the opportunity for small group work with students at a similar academic level. It argues that Student would obtain sufficient modeling from typically developing peers in non-core general education classes and other general education settings.

In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).)

The IDEA expresses a clear policy preference for inclusion to the maximum extent appropriate as an aspiration for all children with special needs. (See 20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. §§ 300.114 & 300.116.) School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced. The IEP team must consider the educational benefits of full-time placement in a regular classroom, and the non-academic benefits of full-time placement in a regular classroom. It must also consider the effects the presence of the child with a disability has on the teacher and children in a regular classroom, and the cost of placing the child with a disability full-time in a regular classroom. (*Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

If it is determined 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. v. State Bd. of Educ.* (5th Cir.

1989) 874 F.2d 1036, 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.)

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

Student contends that he should be fully included in the general education classroom and that he can make appropriate progress in light of his circumstances in such a setting, rather than in one that is more restrictive. Student did not demonstrate that the nature or severity of Student’s disabilities is such that education in regular classes with the use of supplementary aids and services could be achieved satisfactorily.

In support of his contention that he should be fully included in general education, Student presented the testimony of two retained expert witnesses at hearing, Dr. Mary Falvey and Dr. Kathleen Whitbread. Both experts testified that full inclusion is the gold standard for special education students, and that such inclusion, in their respective opinions, resulted in the best outcomes for all students.

Neither Dr. Falvey, nor Dr. Whitbread, spent more than a few hours with Student. During their respective time with him, they became quickly acquainted with Student,

and then both worked one-on-one with him to attempt to assess his educational needs. Neither witness observed Student in an educational setting, nor in the particular settings offered in Student's May 25, 2018, and May 23, 2019 IEPs. Neither witness interviewed any of Student's service providers or teachers from Redondo Beach for those individuals' input and opinions of Student's educational needs. Student's experts relied on Parents' accounts and information gleaned from IEP documents.

Dr. Falvey and Dr. Whitbread had only a superficial familiarity with Student, his educational needs, his school programs and the programs offered. Their expansive opinions, that essentially all students should receive academic instruction in general education, were not tailored to meeting Student's unique needs. The IDEA requires mainstreaming to the maximum extent appropriate, not simply to the maximum extent. For these reasons, the opinions of Dr. Falvey and Dr. Whitbread regarding Student's needs and the programs to meet those needs were unpersuasive. The weight of the evidence demonstrated that Student's education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily.

In order to determine the least restrictive environment in which a student should be educated under special education law, the four *Rachel H.* factors needs to be evaluated and weighed.

As to the first *Rachel H.* factor, Student's academic progress on goals resulted almost exclusively from one-on-one work with his aide, along with one-to-one instruction in the Learning Center. He functioned, generally, at two grade levels or more below his general education peers in academics. Student's third grade teacher testified that Student was working that year at the first grade level or lower in English language arts, and at approximately the same level in math.

Student did not demonstrate that he benefitted from inclusion in either third or fourth grade core academic curriculum. In general education, Student worked on assignments that bore little relation to the work of his typical peers. In third grade English language arts, typically developing peers worked on subject and predicate while Student worked on nouns. Typical peers were writing three paragraphs or more, and working on editing, topic sentences, adding details, and proper sentences, as well as punctuation, story retelling, resequencing, inferencing, and generalizing. Student could write four sentences from dictation with grade level word spacing in 25 percent of his trials. Student had beginning reading skills, but was unable to operate at a reflective or analytical level, unlike his grade level peers.

Likewise, while typical third grade peers were learning multi-digit addition and subtraction, along with fractions, shapes and possibly some multiplication, Student was working with single-digit addition through skip counting, and struggling with basic subtraction. In fourth grade, Student's math goals included two-digit addition problems. Typical peers worked on multiplication, adding and subtracting 3-digit numbers, including carrying numbers, regrouping, fractions, area and perimeter, and data analysis from charts.

Drs. Falvey and Whitbread opined that even mathematics could be appropriately modified for Student to work alongside typical peers. Neither explained adequately how working on different curriculum in the same general education classroom served to benefit Student academically. Simply put, Student presented no credible evidence that he could obtain appropriate educational benefit working in parallel to his typical peers. Similarly, Student presented no credible evidence that he could obtain an appropriate educational benefit working primarily with an aide in the general education classroom,

rather than with a credentialed special education teacher in the special day class. Student was effectively on an island in general education for academic purposes.

In contrast, the evidence demonstrated that the fourth and fifth grade curriculum demanded greater academic rigor. Instruction moved more quickly to keep pace with state standards. Student did not understand third grade level academics, even though highly modified, leaving little basis for him to obtain an academic benefit from full inclusion in either fourth or fifth grade.

Student's third and fourth grade teachers, and the Learning Center special education teacher, persuasively opined that he could not keep up with typically developing peers in third or fourth grade core academics and was even less likely to do so in fifth grade, and that he obtained minimal academic benefit from the parallel learning environment. Their testimony carried more weight than Student's experts, as providers worked with Student on a daily basis, used a variety of strategies to his keep his attention and provide motivation to engage, and demonstrated a depth of knowledge of his needs and concern for meeting them. Student's elementary school principal, program specialist, and the Learning Center teachers each persuasively described how a special day class would provide such methods of instruction in a setting where Student could work with peers in small groups or one-on-one when needed.

As to the second *Rachel H.* factor, the evidence demonstrated that Student obtained non-academic benefit from inclusion. Typically developing peers modeled language and social skills. Both Parents and Redondo Beach's witnesses were in agreement that Student made significant gains in social skills in third and fourth grade. The evidence showed that peers helped him during group activities in class, that he had

several good friends in the general education classroom, and that some peers sought him out on the playground. Taken as a whole, the persuasive opinions of Student's teachers demonstrated that Student generally worked well with others, attended, and benefitted from inclusion during activities such as full class activities, other than instruction, and in enrichment settings. Student would be appropriately included in portions of the general education school day where he could continue to learn social skills, social language, develop friendships with typically developing peers, as well as non-core academic subjects that demanded less core academic skill and ability.

With regard to the third and fourth *Rachel H.* factors, the evidence showed that Student did not have a negative effect on the teacher and children in a regular classroom. Similarly, there was no evidence that cost was a factor in Redondo Beach's decision against full inclusion in the fourth or fifth grade general education classroom. Student was offered a full-time aide for attention and behavior support throughout the school day, and across all environments.

Balancing the *Rachel H.* factors, it cannot be said that Student would derive appropriate educational benefit from full inclusion in general education. Student did not demonstrate that he "received substantial benefits from regular education and that all of [his] IEP goals could be implemented in a regular classroom with some modification to the curriculum and with the assistance of a part-time aide," as was the case in *Rachel H.*

Student argues that more restrictive programs almost uniformly include an explicit finding that a child is incapable of obtaining any educational benefit whatsoever in the general education setting, and cites to a series of cases in support, including *Poolaw v. Bishop* (9<sup>th</sup> Cir. 1995) 67 F.3d 830, 836-837; *Seattle School District No. 1 v. B.S.*

(9<sup>th</sup> Cir. 1996) 82 F.3d 1493, 1500-1501, and *Katherine G. ex. rel. Cynthia G. v. Kentfield School District* (N.D.Cal. 2003) 261 Fed.Supp.2d 1159. However, Student overstates the conclusions in those cases, and does not address the unique facts driving the decisions.

In *Poolaw*, the Court found that the school district in question had failed to provide a proper placement for a deaf child with a severe communication needs that required immediate placement in the state school for the deaf/blind in order to be taught American Sign Language to communicate. (*Poolaw, supra*, at 837-838.) The Court noted that Student did obtain a non-academic benefit from mainstreaming, but that benefit was outweighed by the lack of academic benefit coupled with the exigency of his immediate need for means of communication. (*Id.* at 837.)

In *Seattle*, the Court found that a child with severe emotional distress was properly placed by her parents in an out of state residential treatment center, and that the district's proposed placement of the child in a general education mainstreaming situation was inappropriate. (*Seattle, supra*, at 1500-1501.) Also, in *Katherine G.*, the Court found that Student's likelihood of receiving no academic benefit trumped her obtaining some non-academic benefit under the *Rachel H.* test. (*Katherine G., supra*, at 1159, 1164.)

In each of these cases, the Court considered whether a full mainstreaming program was appropriate for Student. In two of the three cases, the appropriate placement was in an extremely restrictive setting due to the severity of the particular student's disability. The issue of inclusion was vastly outweighed by immediate, critical needs. In *Katherine G.*, the Court merely reaffirmed the *Rachel H.* four-part test, and found that the student in that case was appropriately placed in a blended program over parents' desire for her to remain fully mainstreamed. Ultimately, each decision simply

reaffirms the *Rachel H.* test, and imposes no requirement that a student obtain no benefit from a general education placement to be considered for a more restrictive placement. Significantly, the one case which parallels the instant case, found that a blended program was appropriate for a child receiving little academic benefit from mainstreaming, despite obtaining non-academic benefits from the placement.

The evidence showed that Student required specialized academic instruction in core curriculum. His progress toward academic goals in third and fourth grade reflected his work with his aide and resource teacher, not on his presence in the general education classroom or on curriculum being taught to typically developing peers. The operation of the Learning Center as a source of essentially one-to-one academic instruction of Student by the resource teacher is arguably more restrictive than the blended program offered by Redondo Beach. Also, under the placement proposed by Redondo Beach, Student retained the opportunity to mainstream with typical peers for nearly half of the school day.

Student did not prove Redondo Beach denied him a FAPE by failing to provide a program in the least restrictive environment.

## CONCLUSIONS AND PREVAILING PARTY

As required by 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.

1. Student did not prove Redondo Beach denied Student a FAPE from August 26, 2017, to August 26, 2019, by failing to provide him with an appropriate program of special education and services, including an appropriate type and

- amount of individual academic instruction, and inclusion consultation, and by failing to provide reimbursement at an appropriate rate for social skills/recreational therapy services. Redondo Beach prevailed on Issue 1.
2. Student did not prove Redondo Beach denied Student a FAPE by failing to offer him a program and placement in the least restrictive environment in the IEPs dated February 15, 2018, May 25, 2018, and May 23, 2019. Redondo Beach prevailed on Issue 2.

## ORDER

All Student's requests for relief are denied.

## RIGHT TO APPEAL THIS DECISION

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

/s/

TED MANN

Administrative Law Judge

Office of Administrative Hearings