

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2021100175

LAKEPORT UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

January 4, 2022

On October 5, 2021, the Office of Administrative Hearings, called OAH, received a due process hearing request from Lakeport Unified School District, naming Student. Administrative Law Judge Rommel P. Cruz heard this matter by videoconference on November 9, 10, 12, 16, 17, and 18, 2021.

Attorney Jennifer Nix represented Lakeport Unified. Director of Special Education Nicole Wells attended all hearing days on Lakeport Unified's behalf.

Mother and Father represented Student and attended all hearing days. Parents were assisted by a Spanish language interpreter. Student briefly attended the hearing on November 9, 2021.

The matter was continued to December 27, 2021, for the parties to submit written closing briefs. The record was closed, and the matter was submitted on December 27, 2021.

ISSUE

Did the April 14, 2021 individualized education program, called IEP, as amended on September 20, 2021, offer Student a free appropriate public education, called FAPE, in the least restrictive environment such that Lakeport Unified may implement the April 14, 2021 IEP, as amended on September 20, 2021, without parental consent?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, 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 IDEA are to ensure:

- all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for 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 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 (2006); Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issue 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, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Here, Lakeport Unified requested the hearing and had the burden of proof as to the issue. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was 15 years old and in 10th grade at the time of hearing. He resided within Lakeport Unified's geographic boundaries at all relevant times and was eligible for special education as a child with an intellectual disability.

Student was born with Down Syndrome, a genetic condition involving an extra chromosome which may cause mild to severe physical and developmental delays. (See Center for Disease Control and Prevention, *Facts about Down Syndrome*, <<https://www.cdc.gov/ncbddd/birthdefects/downsyndrome.html>> [as of December 14, 2021]). Student first qualified for special education and related services at the age of three, under the categories of intellectual disability and speech or language impairment.

Student transitioned to high school in August 2020 for his ninth-grade year. He returned to school for in-person instruction in August 2020, following a period of distance learning due to COVID-19 pandemic-related school closures that began in March 2020.

ISSUE: DID THE APRIL 14, 2021 IEP, AS AMENDED ON SEPTEMBER 20, 2021, CONSTITUTE A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

Lakeport Unified contends the April 14, 2021 IEP, as amended on September 20, 2021, was developed in accordance with the IDEA's procedural requirements and offered Student appropriate measurable goals, instructions, and supports. Lakeport Unified further contends that placement of Student in a special day class for students with moderate to severe disabilities at Kelseyville Unified School District's high school regional program, referred to as the Regional Program, offered Student a FAPE in the least restrictive environment. Student contends the IEP's offer of placement at the Regional Program is not appropriate for Student.

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) and 56363 subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In resolving the issue of whether a school district 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 (*Gregory K.*)). There are two parts to the

legal analysis when a school district seeks to demonstrate that it offered a FAPE. First, the tribunal must determine whether the district complied with the procedures set forth in the IDEA. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 206-207 (*Rowley*).) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) Whether a school district offered a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).)

A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).)

PROCEDURAL REQUIREMENTS

On November 16, 2021, Parents provided written consent to the April 14, 2021 IEP, as amended on September 20, 2021, but disagreed that the IEP offered a FAPE. At the hearing, Parents stated they remained opposed to the IEP's offer of placement at the Regional Program.

Lakeport Unified contends that because Parents provided written consent to the IEP on November 16, 2021, after Lakeport Unified filed its complaint, but disagreed to

the placement offer at the Regional Program, any failures in the IEP unrelated to placement are harmless error. At the hearing, the ALJ denied Lakeport Unified's motion to limit the hearing issue to only placement.

Any deficiency in the April 15, 2021 IEP team's offer of FAPE, as amended on September 20, 2021, beyond the offer of placement, was *not per se* harmless. The FAPE analysis requires a determination of whether the IEP's offer of goals, accommodations, supports, and services met Student's unique needs and was reasonably calculated to enable Student to receive an educational benefit, regardless of parental consent. Only after identifying the necessary goals, accommodations, supports, and services that Student required to receive a FAPE does the question turn to whether the IEP's offer of an educational placement, defined as the combination of facilities, personnel, and equipment, could meet the instructional services specified in Student's IEP. (Cal. Code Regs. tit. 5, § 3042. subd. (a).) Therefore, the appropriateness of an IEP placement cannot be decided unless a determination is made that the goals, accommodations, support, and services offered in the IEP was reasonably calculated to enable Student to receive an educational benefit. (See, 20 U.S.C. § 1412(a)(5)(A)(removal of the child from the regular education environment occurs only when the child cannot be satisfactorily educated in the regular class even with the use of supplemental aids and services). Lakeport Unified's complaint seeks a determination as to whether the entire IEP offered Student FAPE. The parties confirmed the issue at the October 25, 2021 Prehearing Conference. That is the issue decided by this Decision.

The IEP is the centerpiece of the IDEA's education delivery system for disabled children and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032,

56345.) The IEP is the “modus operandi” of the IDEA, that contains a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs. (*School Comm. of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].)

An IEP is a written document for each child with a disability that includes a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1).) 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 result of the most recent evaluation 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).) Information about a child's present levels may derive from a variety of sources, including IEP team members, assessment reports, work samples, and grades. (See, *J.L.N. v. Grossmont Union High School* (S.D. Cal., Sept. 30, 2019, No. 17-CV-2097-L-MDD) 2019 WL 4849172, at p. 8.)

TRIENNIAL ASSESSMENTS

At the beginning of the 2020-2021 school year, Lakeport Unified conducted triennial assessments of Student's academic achievement, health, intellectual development, language and speech development, motor development, social emotional and behavioral functioning, adaptive behavior, and postsecondary transition. Lakeport Unified established at hearing that each of the assessors were qualified to conduct the assessments in the areas in which they assessed Student. The IEP team, including

Parents, reviewed and considered the results of the triennial assessments at an IEP team meeting held on October 6, 2020, and again when developing the April 14, 2021 IEP, as amended on September 20, 2021.

School psychologist Reyna From assessed Student's intellectual development, social emotional functioning, behavior, and adaptive behavior. From had a master's degree in school psychology and was a school psychologist for over three years. From found Student's cognitive functioning fell in the very low range and explained at the hearing that Student's cognitive functioning fell well below the typical functioning of a five-year-old child. From also found Student had extremely poor adaptive skills and difficulty maintaining attention.

Teacher rating scales suggested Student had a high level of maladjustment in the areas of hyperactivity, aggression, atypicality, and functional communication. From defined functional communication as the ability to communicate basic thoughts, knowledge, ideas, and feelings in a way others could understand. From's findings, conclusions and recommendations were contained in a written report dated September 15, 2020.

Special education teacher Carolyn Stillman taught Lakeport Unified's high school special day class. Stillman taught for five years and possessed a mild-to-moderate special education credential. She was familiar with Student, having taught Student during the 2020-2021 and 2021-2022 school years, until on or about September 23, 2021, when Lakeport Unified removed Student from the classroom and placed Student in a different classroom taught by a resource specialist.

Stillman assessed Student's academic achievement and presented her findings in a written report dated September 20, 2020. Stillman found Student's reading, writing, and math abilities fell in the very low range, with standard scores of less than 40.

Occupational therapist Jennifer Warner assessed Student's fine motor and visual motor integration skills and presented her findings and recommendations in a written report dated September 4, 2020. Werner was a licensed occupational therapist serving Lakeport Unified and two other school districts, with 22 years of experience working in the school setting. She provided occupational therapy services to Student since Student was three years old.

Student's fine-motor and visual-motor integration skills assessment standard score fell well below average. Werner concluded that Student's delays in fine-motor and visual-motor integration skills impacted Student's ability to perform age-appropriate activities necessary for his educational progress.

Speech-language pathologist Rona Isherwood assessed Student's communication skills and presented her findings and recommendations in a written report dated September 23, 2020. Isherwood was a credentialed speech-language pathologist for 27 years, with over 20 years of experience conducting assessments and providing speech services to students in the school setting. Isherwood concluded that Student had a severe deficit in the areas of receptive and expressive language compared to same aged peers. Isherwood observed Student's speech to be intelligible at least 80 percent of the time.

MAY 22, 2021 FUNCTIONAL BEHAVIOR ASSESSMENT

Dr. William Henkel, Ph.D., conducted a thorough and comprehensive functional behavior assessment of Student's inappropriate touching and social behaviors. He observed Student and reviewed Student's educational file, disciplinary records, and behavioral data collected by Lakeside Unified's staff. Dr. Henkel also interviewed Mother, Student's special education and general education teachers, classroom aides, Werner, Isherwood, and the school's principal and vice principal. Dr. Henkel presented his findings, conclusions, and recommendations in a written assessment report and positive behavior intervention plan dated May 22, 2021.

Dr. Henkel worked in the field of behavior analysis since 1984 and was board certified as a behavior analyst in 1998. Dr. Henkel had 30 years of experience analyzing behavior in the school setting. In 2013, he co-founded Emerald Behavior and Education Specialists, an agency serving primarily public schools. Emerald Behavior provided consultation services, trainings, functional behavior assessments, and recommendations for positive behavior intervention plans. One of Dr. Henkel's key roles in the agency was conducting functional behavior assessments and developing positive behavior intervention plans.

Dr. Henkel was familiar with Student. He assessed Student in 2017 and 2019. Dr. Henkel testified at hearing. He was knowledgeable, and his testimony was measured, and confident. Based on Dr. Henkel's training, experience, and familiarity with Student, his opinions and recommendations based on his testimony and written report were persuasive and given considerable weight.

Dr. Henkel's May 22, 2021 functional behavior assessment targeted two of Student's problem behaviors. The first behavior was inappropriate touching, defined as Student touching female staff on the breast, grabbing staff around the waist, or aggressive and unwanted hugging. The second behavior was inappropriate social behavior defined as Student placing his hands in his pants, placing objects of others in his pants, verbal requests to kiss staff or peers, exposing his genitals, or gyrating his hips while lying on the floor of the classroom.

Dr. Henkel concluded that Student's targeted behaviors were reinforced by the reaction Student received from staff, and could also be driven by physical reinforcement. Dr. Henkel opined that Student could not discriminate between when and where behaviors such as asking for a kiss, placing his hands in his pants, or removing his pants were acceptable, and therefore, Student required specific training in making those distinctions.

Furthermore, Dr. Henkel opined that without sufficient language or any form of functional communication, Student's only form of communication was behavior, and that problem behaviors would decrease when provided with an effective means of communicating Student's wants and needs. Dr. Henkel also opined that Student's deficit in receptive language worsened his problem behaviors, as Student may not understand the totality of what was being said to him, nor have the ability to figure out that the spoken language of adults is intended to elicit action on his part. Therefore, Dr. Henkel opined that improving Student's receptive and expressive communication skills must be a top priority to reduce unwanted behaviors. Dr. Henkel further opined that Student's successful use of functional language was the "MOST" important skill to reinforce.

NOTICE, PARENTAL PARTICIPATION, AND IEP TEAM MEETINGS WERE PROCEDURALLY COMPLIANT

In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp 205-206.) Among the most important procedural safeguards are those that protect the parent's right to be involved in the development of their child's educational plan. (*Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043-1044.)

The IDEA explicitly requires formal written notice to parents when an educational agency proposes, or refuses, to initiate or change the educational placement of a disabled child. (See 20 U.S.C. Sec. 1415(b)(3); *Union v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527, cert. denied (1994) 513 U.S. 965.) Unless excused in writing, the IEP team must consist of parents or their representative, a regular and special education teacher, a qualified representative of the school district, and an individual who can interpret instructional implications of assessment results. The IEP team may also include individuals who have the knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).)

Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(b) & (c); Ed. Code, §§ 56304, 56341.) A school district is required to conduct not just an IEP team meeting, but a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d at p.1485; *Fuhrmann, supra*, 993 F.2d at p. 1036.) The IEP team shall consider the concerns of the parent for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) & (d)(4)(A)(ii); 34 C.F.R.

§ 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) A parent has meaningfully participated in the development of an IEP when the parent is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra* at p. 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

Lakeport Unified gave Parents proper written notice of the April 14, May 3, May 10, May 27, and September 20, 2021 IEP team meetings. The IEP team initially attempted to convene on April 14, 2021, to develop Student's annual IEP, but the meeting was rescheduled due to Parent's inability to attend due to illness.

On April 27, 2021, Lakeport Unified provided Parents written notice of the May 3, 2021 IEP team meeting. The IEP team reconvened on May 3, 2021, for the limited purpose of discussing Student's April 23, 2021 conduct and reviewing From's manifestation determination assessment report, discussed further below. Parents attended the May 3, 2021 IEP team meeting and were assisted by a Spanish language interpreter.

Lakeport Unified provided Parents with written notice of the May 10 and 27, 2021 IEP team meetings. The IEP team reconvened on May 10 and 27, 2021, to develop Students' annual IEP, identified as the April 14, 2021 IEP. Parents attended each of those meetings.

All required IEP team members attended each meeting in May 2021, including an interpreter to interpret the meetings in the Spanish language, Parents' native language. Among those who attended were Lakeport Unified's Director of Special Education

Nicole Wells, Stillman, From, Werner, Isherwood, a general education teacher, the school principal, and staff from the regional center serving Student. In addition, Dr. Henkel attended and presented his findings and recommendations from his May 22, 2021 functional behavior assessment at the May 27, 2021 IEP team meeting.

At each of the IEP team meetings in May 2021, Lakeport Unified provided Parents with a copy of their procedural safeguards in the Spanish language. Parents meaningfully participated in the IEP team meetings by asking questions and expressing their concerns and disagreements, specifically expressing Parents' opposition to placement at the Regional Program. Parents' requested Student remain in Lakeport Unified. Lakeport Unified considered Parents' concerns and requests.

On June 12, 2021, Lakeport Unified provided Parents with a prior written notice advising Parents of Lakeport Unified's decision to offer Student placement at the Regional Program. Lakeport Unified also offered Parents an opportunity to meet with the IEP team to discuss Lakeport Unified's placement offer. On July 7, 2021, Lakeport Unified provided Parents with a final version of the April 14, 2021 IEP and the FAPE offer translated into Spanish.

The IEP team met again on September 20, 2021, to amend the April 14, 2021 IEP. All required IEP members attended including Wells, From, Isherwood, Werner, Stillman, a general education teacher, and Kelseyville Unified's Director of Special Education, Keely Antoni. Parents attended the meeting, were assisted by a Spanish language interpreter, and meaningfully participated in the IEP team meeting by asking questions and reiterating their concerns and disagreements to placement at the Regional Program.

Lakeport Unified ensured that all required IEP team members attended the meetings and Parents meaningfully participated in the meetings. Accordingly, Lakeport Unified proved the IEP team meetings were proper as to notice and parental participation in accordance with the IDEA's procedural requirements.

THE APRIL 14, 2021 IEP, AS AMENDED ON SEPTEMBER 20, 2021,
FAILED TO ACCURATELY ACCOUNT FOR STUDENT'S
BEHAVIORAL AND COMMUNICATION FUNCTIONING

The April 14, 2021 IEP, as amended on September 20, 2021, contained an appropriate description of Student's present levels of academic and functional performance in all areas except for Student's communication and behavioral functioning. Lakeport Unified committed a procedural violation of the IDEA by failing to accurately account for Student's communication and behavioral functioning which denied Parents of critical information to meaningfully participate in development of the IEP, resulting in a denial of a FAPE.

STUDENT'S PRESENT LEVELS OF PERFORMANCE
APPROPRIATELY ACCOUNTED FOR IN THE APRIL 14, 2021
IEP, AS AMENDED ON SEPTEMBER 20, 2021

The April 14, 2021 IEP, as amended on September 20, 2021, appropriately accounted for Student's present levels of academic performance and several areas of his functional performance. Student was social, in good health, and took pride in being well-dressed. He had a good sense of humor and enjoyed drawing and coloring for staff and peers. He enjoyed dancing, soccer, and basketball. His gross-motor skills were an area of relative strength.

For postsecondary goals, Student reported that he wanted to learn and play soccer for a living. Further, the IEP team determined after consulting with Parents, that Student would continue living with Parents after completing high school.

Student had extremely limited abilities in all academic subject areas. Student could count up to 22 objects and perform addition by manipulating or touching up to four objects. However, Student had difficulty performing subtraction of one to two objects.

Student practiced writing and learning sight words. Student could copy or trace simple sentences with 80 percent accuracy; however, he was unable to write sentences independently. Student could consistently identify approximately 25 site words. Student could not read, therefore, Stillman read kindergarten level books to Student, and Student was asked to demonstrate comprehension by answering oral questions.

Student could copy simple sentences with 80 percent accuracy, but did not do so consistently. His handwriting was improving, as well as his ability to hold a pencil or brush to write, color, and paint.

The IEP team found that when prompted by staff, Student could produce about 25 words or phrases that could be understood. He could produce clear speech of one to three words to make a request, to greet or say goodbye, and answer simple questions 70 percent of the time.

At the May 27, 2021 IEP team meeting, Dr. Henkel shared that language and functional communication was a challenge for Student. He opined that when Student could not effectively communicate, he displayed behaviors to communicate his needs.

THE APRIL 14, 2021 IEP, AS AMENDED ON SEPTEMBER 20, 2021 FAILED TO ACCURATELY ACCOUNT FOR STUDENT'S COMMUNICATION AND BEHAVIORAL FUNCTIONING

The April 14, 2021 IEP, as amended on September 20, 2021, failed provide a statement of Student's severe deficits in receptive and expressive language, and how the deficits affected Student's involvement in his education. Student often displayed noncompliant and aggressive behaviors during the 2020-2021 school year. He refused to work on academic assignments and required frequent prompts from Stillman and classroom aides to follow instructions and complete assignments. He pushed assignments off the desk, threw pencils, shouted "No", placed manipulatives in his pants, and laid on the floor and refused to get up in protest.

Transitioning Student in and out of the classroom was also a challenge. Student often refused to leave the classroom to go to physical education class, recess, and lunch break. He laid on the floor and refused to leave. Transitioning Student to and from occupational and speech therapy services was also difficult as Student would try to elope on the way. It typically took about 15 minutes to get him from the classroom to the therapy office and the same time to transition him back into the classroom.

Student's behaviors worsened during the 2020-2021 school year, and new problem behaviors emerged. Student became possessive of Stillman and the classroom aides. Student would claim an aide as his own, argue with peers over an aide, and insist peers not speak to an aide. Student became more aggressive towards staff and peers. He grabbed others by the arms and hands, wrapped his arms around their legs or waists, and refused to let go. Student also jerked a student by the hood of the student's sweater.

Student's problem behaviors became more disruptive during the 2020-2021 school year. Stillman often stopped class instruction to respond to Student's behaviors, but he did not always respond to her interventions. Stillman evacuated the classroom approximately 10 times during the 2020-2021 school year due to Student's problem behaviors.

Student increasingly touched others without their permission, asked to be kissed, and touched his genitals. Student had 32 incidents of placing his hand on peers or staff without their permission since January 7, 2021. School staff observed 19 incidents at school of Student engaging in inappropriate sexual gestures, comments, and touching in the same period.

On April 23, 2021, Student grabbed Stillman's breast, and sexually touched his genitals as he grabbed Stillman. Student stopped when Stillman protested, but 20 minutes later grabbed an aide by the waist and refused to let go. While grabbing the aide, Student placed his hand in his own pants and sexually touched his genitals. Lakeport Unified sent Student home from school and suspended him for five days. Stillman filed a police report after consulting with her union, adding credibility to her account of the incident, which Student claims was not true.

From assessed Student's April 23, 2021 conduct to determine if the conduct was a manifestation of Student's disability. From's findings and recommendation were presented in a written report dated April 28, 2021. From opined that Student did not have the cognitive ability to comprehend school rules, understand appropriate behavior, and associate consequences to his actions. From concluded that Student's April 23, 2021 conduct was caused by a direct and substantial relationship to his disability. From presented her manifestation review report at an IEP team meeting on May 3, 2021. At

that meeting, Lakeport Unified offered an assessment plan to assess the function of Student's inappropriate sexual and social behaviors. Parents provided written consent to the behavior assessment on May 3, 2021.

At the May 10, 2021 IEP team meeting, Isherwood explained to the team that Student had reached a point of needing to learn functional communication skills to appropriately communicate his wants and needs. Isherwood was responsible for providing Student with individualized speech and language services for the past two and half years. Therefore, she was familiar with Student and understood his unique speech and language needs. Isherwood testified that she tried to convince the team that the IEP should address Student's need in functional communication.

Student's problem behaviors persisted during the 2021-2022 school year. During the first nine weeks of the school year, Lakeport Unified suspended Student for a total of seven days and gave him detention for one day. On August 25, 2021, Lakeport Unified suspended Student for one day for pushing a student.

In September 2021, Student entered a girls bathroom corridor, refused to leave the bathroom corridor when directed, and pushed staff in an attempt to enter further into the bathroom. That same day Student placed his hands in his pants and inappropriately touched himself. As a consequence, Lakeport Unified suspended Student for two days.

In addition, Lakeport Unified suspended Student for one day for grabbing a female student by the wrist and pulling her arm. Staff read to Student social stories and explained to Student that he needed to keep his hands to himself and away from others, and to keep a social distance from others. On September 20, 2021, Lakeport Unified

gave Student detention for attempting to elope, aggressively pulled on staff in an effort to exit the door, then wrapped his legs around the staff and thrust on the staff's leg.

On September 27, 2021, Student looked under the bathroom stall while another student was in the stall. That student was upset and reported the incident. Three days later, Lakeport Unified suspended Student for three days for grabbing another student's shoulder, refusing to let go, and injuring the student. He also grabbed a staff member and only stopped after repeated requests. In addition, Student had an erection and touched himself sexually. On October 13, 2021, Lakeport Unified suspended Student for one day for sexually touching his genitals in physical education class.

Despite the clear evidence of Student's worsening behaviors since entering high school in August 2020, as well as Student's inability to effectively communicate his wants and needs in safe, appropriate ways, Lakeport Unified failed to accurately account for Student's communication deficits and how Student's communication deficits affected his behavior. The April 14, 2021 IEP, as amended on September 20, 2021, merely identified Student's speech intelligibility needs, without providing a statement of Student's severe deficits in receptive and expressive language as identified by Isherwood, and the impact of Student's lack of functional language on his behavior as noted by Dr. Henkel. The failure was a procedural violation that denied Parents of critical information necessary to participate with the rest of the IEP team in developing appropriate goals, supports, and services to meet Student's communication and behavioral needs. The procedural violation also denied Student an educational benefit in the area of communication because of the lack of information and hence, denied Student a FAPE.

THE IEP FAILED TO OFFER APPROPRIATE GOALS TO MEET STUDENT'S MATH, COMMUNICATION AND BEHAVIORAL NEEDS

The IEP must include a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) In addition, the IEP must contain statements of how the child's goals will be measured and the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(III), (IV); 34 C.F.R. § 300.320(a)(3), (4); Ed. Code, § 56345, subd. (a)(3), (4).)

Beginning at the age of 16 or younger, the IEP must include a statement of needed transition services for the child. (Ed. Code, § 56043, subd. (h).) The IEP in effect when a child reaches the age of 16 must include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and where appropriate, independent living skills, and the transition services needed to assist the child in reaching those goals. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII); Ed. Code, §§ 56043, subd. (g)(1), 56345, subd. (a)(8).)

The IEP team considered the triennial assessments, Dr. Henkel's functional behavior assessment, and input from IEP team members and Parents, and determined Student had needs in the areas of transitioning between routines, postsecondary transition, fine-motor skills, speech intelligibility, functional academics, communication,

and behavior. The April 14, 2021 IEP, as amended on September 20, 2021, offered nine annual goals. However, the IEP's offer of a math goal was not measurable, and none of the goals offered appropriately met Student's communication and behavioral needs.

TRANSITION BETWEEN ROUTINES

The IEP offered what was identified in the IEP as a prevocational goal, to improve Student's ability to transition between routines. The prevocational goal required Student to assist with transitions and routines in the classroom with the use of a visual schedule. Student had to demonstrate 80 percent accuracy in four out of five trials to meet the goal. The goal was measurable and appropriately designed to help Student transition from one activity to another.

POSTSECONDARY TRANSITION

The IEP offered two postsecondary goals that were appropriate in light of Student's needs and abilities. One postsecondary goal was designed to help Student learn to play soccer. Student started, but did not complete, assessments such as a Workability coloring book and planning packets to identify his interests. The goal required Student to complete the assessments to further explore his interests.

The other postsecondary goal was to help Student play professional soccer. Student could not independently purchase items, and as a step to helping Student achieve his goal to one day be a professional soccer player, Student would learn to independently purchase items. The goal required Student to independently purchase items at the school cafeteria. The postsecondary transition goals were appropriately designed to meet Student's postsecondary transition needs, and reasonably calculated to enable Student to make progress.

FINE-MOTOR SKILLS

The IEP offered a fine-motor skills goal to improve Student's consistency in copying simple sentences. Student could not consistently copy simple sentences with 80 percent accuracy. The goal was measurable by requiring Student to copy simple sentences in print with 80 percent accuracy with regards to placement of the sentences on the line and using appropriate letter sizes in three out of four trials as measured by work samples. The goal was appropriately designed to meet Student's needs in fine-motor skills to enable Student to make progress.

SPEECH INTELLIGIBILITY

The IEP offered a speech intelligibility goal to help Student speak clearer. Student was required to demonstrate clear speech during speech therapy services or in the classroom, using five of the six strategies listed that included swallowing and clearing his mouth before speaking, speaking loudly and strongly, while sitting up in his seat and looking at the person he was speaking to, and to speak each word slowly and to speak every sound of the word.

The speech intelligibility goal was measurable. Student was required to successfully use five of the six strategies in eight out of ten opportunities to meet the goal, as measured by therapist and teacher observations and data collection. The goal was appropriately tailored to enable Student to improve his ability to speak clearer.

ACADEMICS

The IEP offered two goals to meet Student's academic deficits in the areas of mathematics and language arts, however, only the language arts goal was measurable. The language arts goal as written called for student to write simple sentences by

copying and tracing with 80 percent accuracy in four out of five opportunities. Though the goal as written did not improve on Student's sentence writing skills, as Student could already copy and trace sentences with 80 percent accuracy, Stillman testified that the goal did not intend to ask Student to copy or trace. Instead, Stillman explained that copying and tracing were errors in the written goal, and the intended goal was designed to teach Student to write simple sentences independently, not copy or trace a sentence. The intended goal was explained to Parents at the IEP team meetings, and therefore, the procedural defect did not impede Parents' ability to meaningfully participate in the development of the IEP, nor deprive Student of an educational benefit.

However, the IEP's offer of a math goal was not measurable. As a baseline, Student could add up to four objects using manipulatives or by touch, and struggled to subtract one to two objects. The goal as written required Student to add and subtract with 80 percent accuracy in four out of five trials by manipulating or touching objects to perform addition and subtraction. However, the math goal failed to indicate a target number of objects Student would be expected to add or subtract with 80 percent accuracy beyond what Student could already add or subtract. The math goal as written failed to improve upon Student's present math abilities. Accordingly, the April 14, 2021 IEP, as amended on September 20, 2021, failed to offer an appropriate measurable math goal to meet Student math deficits, denying him an educational benefit, and therefore, a FAPE.

COMMUNICATION AND BEHAVIOR

The April 14, 2021 IEP, as amended on September 20, 2021, failed to offer goals to meet Student's needs in receptive and expressive language, and his inability to effectively communicate his wants and needs in safe, appropriate ways. Student's

behaviors were a significant impediment to his ability to access his education, and the evidence demonstrated that his inability to fully understand directives and express his wants and needs effectively were significant causes of his problem behaviors. Student had difficulty fully understanding what was spoken to him and could not communicate his wants and needs effectively. Student's deficits in receptive and expressive language were directly linked to his problem behaviors, as his language deficits impeded his ability to appropriately respond to directives and express his wants and needs in ways that were safe and appropriate. As a result, he displayed inappropriate behaviors to communicate.

Student's noncompliance, disruptive, and inappropriate touching and social behaviors were ways Student communicated and the cause of numerous suspensions and missed educational instruction. Isherwood described functional communication as communication through speaking, gestures, body language, facial expression, tone of voice, and behavior, with less focus on articulation and speech intelligibility, and more focus on the purpose of the communication. Based on her experience with Student, Isherwood persuasively opined that Student had to both learn to functionally communicate in general, and to learn not to communicate through inappropriate behavior, and therefore, Student required an IEP that allowed him to work on functional communication throughout the school day.

Dr. Henkel persuasively opined that Student's most important need was to have more functional language and that without sufficient language or a form of communication, Student only had his behaviors to communicate his wants and needs. Dr. Henkel opined he was not surprised Student touched people and grabbed things because Student had no way of saying what he wanted.

Lakeport Unified acknowledges that the April 14, 2021 IEP, as amended on September 20, 2021, did not offer a specific goal in the area of functional communication. Lakeport Unified argued it did not offer a functional communication goal because Student could effectively communicate, even though he communicated through inappropriate behavioral communications. Lakeport Unified further contends the IEP supported Student's functional communication needs through the IEP goals that involved the use of a visual schedule, responding to simple instructions, purchasing items independently, and reducing inappropriate behaviors.

Lakeport Unified's contentions were unpersuasive. The speech intelligibility goal was limited to helping Student speak clearer, not to learn appropriate communication of his wants and needs.

Further, neither of the two behavior goals offered in the IEP was designed to improve and measure Student's ability to successfully use functional language to communicate his wants and needs to reduce his problem behaviors. The first behavior goal sought to improve Student's ability to follow directives. Student had to accurately follow a directive or prompt by the second directive with 80 percent accuracy in four out of five trials to successfully meet the goal.

The second behavior goal aimed to help Student stop or decrease his inappropriate behaviors at school. Specifically, the goal required Student to refrain from inappropriately touching himself or others, and engaging in inappropriate social behaviors, including commenting on kissing staff or others. Student would be supported by the use of social stories and activities, as well as redirection from staff. However, neither of the two behavior goals involved Student using appropriate functional communication to reduce his problem behaviors.

In addition, the goals utilizing a visual schedule to improve Student's transition between routines, and post-secondary goal to teach Student to purchase items did not target and measure Student's deficits in the receptive and expressive language. Furthermore, neither goal was designed to meet, nor measure, Student's inability to use appropriate functional communication to reduce his problem behaviors. None of the goals offered in the IEP were designed to meet Student's expressive language and functional communication needs.

The IEP also failed to offer a goal designed to meet Student's receptive language needs. Isherwood found Student displayed significant deficits in receptive language. Dr. Henkel shared the same concern and concluded that Student's deficit in receptive language made Student's behaviors worse. Dr. Henkel opined that Student's behavioral problems may result from Student's inability to understand the totality of what was being said to, or asked of, him. However, the IEP failed to offer a goal to meet Student's severe deficit in receptive language.

The evidence established that Student required an IEP that offered goals to meet his receptive and expressive language deficits and designed to improve Student's receptive and expressive communication skills to reduce Student's unwanted behaviors. The April 14, 2021 IEP, as amended on September 20, 2021, did not. The lack of goals, supports, and services to improve Student's ability to understand directives and to teach Student appropriate functional communication skills instead of engaging in inappropriate behaviors to communicate his wants and needs were critical failures in the IEP that deprived Student of an educational benefit, especially since the problem behaviors led to numerous school suspensions. Accordingly, Lakeport Unified failed to meet its burden of proving the April 14, 2021 IEP, as amended on September 20, 2021,

offered Student goals to meet his math, communication, and behavioral needs. The procedural failures denied Student an educational benefit, resulting in a denial of a FAPE.

SUBSTANTIVE REQUIREMENTS

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Rowley, supra*, 458 U.S. at pp. 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.) A child's unique needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

California law defines special education as instruction designed to meet the unique needs of the pupil coupled with related services as needed to enable the pupil to benefit from instruction. (Ed. Code, § 56031.) Related services include 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.) In California, related services are called designated instruction and services, and must be provided as needed to assist an individual with exceptional needs to benefit from special education. (Ed. Code, § 56363, subd. (a).)

LAKEPORT UNIFIED FAILED TO OFFER A COMMUNICATION DEVICE TO MEET STUDENT'S COMMUNICATION AND BEHAVIORAL NEEDS

Whenever a child's behavior impedes his learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but implementing regulations of the IDEA do not require the team to use any particular method, strategy, or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).)

Assistive technology means any item, piece of equipment or product system used to increase, maintain, or improve the functional capabilities of a child with a disability. (20 U.S.C. § 1401(1).) Schools must use assistive technology devices and services if needed to maximize accessibility for a child with a disability. (20 U.S.C. § 1400(c)(5)(H).) An augmentative alternative communication device may be considered an assistive technology device if used to increase, maintain, or improve the functional capabilities of a child with a disability, and determined by the IEP team to be necessary for the child to receive a FAPE. (71 Fed. Reg. 46547 (Aug. 14, 2006).)

Dr. Henkel persuasively opined that Student required an augmentative communication device to communicate. Dr. Henkel recommended that Student be allowed to say or use his augmentative communication device to communicate what he wanted when Student engaged in inappropriate behavior. Dr. Henkel recommended

that staff not decipher and meet Student's needs when he engaged in the target behaviors. Instead, Student should be taught that appropriate communication is the way his wants are answered.

However, the April 14, 2021 IEP, as amended on September 20, 2021, failed to offer an augmentative communication device as an accommodation to support the behavior intervention plan for Student to effectively communicate his wants and needs to reduce his problem behaviors. The behavior intervention plan offered in the IEP properly identified Student's problem behaviors and offered appropriate replacement behaviors and teaching strategies, which included Student's use of an augmentative communication device, to reduce Student's problem behaviors.

The behavior intervention plan appropriately described and offered a reasonable hypothesis for the function of the Student's problem behaviors. The plan described Student's problem behaviors as:

- blurting out loud or making loud noises,
- leaving his seat and wandering around the classroom,
- intentionally dropping objects to the floor,
- throwing objects,
- doing the opposite of what he is directed to do,
- touching off-limit items,
- sitting on the floor and refusing to move,
- putting his hands on others,
- taking people's belongings, or
- any actions that interrupts the flow of the classroom instruction.

The plan hypothesized that Student engaged in the target behaviors to gain the attention of, and trigger strong reactions from, staff and peers, to avoid tasks, and self-gratification and stimulation.

The behavior intervention plan offered appropriate functionally equivalent replacement behaviors to teach Student. The plan called for Student to replace the target behaviors with functionally equivalent behaviors such as using words to communicate his feelings and wants without disrupting the classroom or disobeying adult directions. The behavior intervention plan also called for Student to communicate for assistance when frustrated or in need of help with an assignment. Other replacement behaviors included seeking approval and attention from adults for complying with directions and attempting an academic task, and asking for a "high-five" or other sanctioned physical contact.

The plan offered appropriate teaching strategies to help Student learn the replacement behaviors. The proposed teaching strategies included:

- redirection when Student made a mistake,
- praising him for following directions,
- promoting self-correction when he made a mistake,
- providing constructive feedback,
- asking Student to request a "high five" or other sanctioned physical contact,
- having him use a belt when at school,
- continuing one-to-one aide support throughout the school day,
- using a picture schedule of daily activities, and
- a photo choice board.

The behavior intervention plan also incorporated Dr. Henkel's functional behavior assessment report dated May 22, 2021. Dr. Henkel's report offered a more detailed description of some of the strategies listed in the plan, and an additional recommendation for Student to have access to an augmentative communication device.

Lakeport Unified's contention that the accommodations, such as the use of the visual schedule, and assistive technology offered in the IEP supported Student's functional communication needs was not persuasive. The IEP accommodations included providing Student clearly defined limits; cues and prompts; and reminders of school and classroom rules. The IEP also offered Student frequent breaks, positive reinforcement, visual schedules for daily activities, and getting Student's attention before speaking to him. In addition, the IEP offered Student altered formatted assignments and tasks, short instructions, materials broken down into manageable parts, and out-of-level materials in his general education class. Lastly, the IEP accommodations included basing Student's grades on his individual progress and effort, and offering Student auditory aides. However, none of the accommodations offered in the IEP were designed to help Student use appropriate functional communication rather than engaging in problem behaviors. The visual schedule offered by the IEP was limited to supporting Student's difficulty with transitioning between routines, not functional communication.

Similarly, neither the program modifications, nor the additional supports offered in the IEP were adequate to meet Student's communication and behavioral needs. The IEP offered Student the use of curriculum and materials, such as textbooks or workbooks, that were in line with Student's academic and functional abilities. The IEP also offered one hour each month of consultation between Student, staff, and a

behavior specialist, daily adult supervision of Student throughout the school day, and implementation of the IEP's behavior intervention plan. However, neither the modified curriculum, consultations with a behavior specialist, the daily adult supervision, nor the mere implementation of the behavior intervention plan, absent a communication device, could help Student use appropriate functional communication rather than engage in problem behaviors.

The IEP failed to offer an augmentative communication device to support the IEP's behavior intervention plan to increase and improve Student's functional communication to reduce his problem behaviors. Accordingly, the April 14, 2021 IEP, as amended on September 20, 2021, failed to offer Student a FAPE by failing to offer an augmentative communication device to support Student's communication and behavioral needs to enable Student to benefit from special education and make appropriate progress.

LAKEPORT UNIFIED FAILED TO OFFER APPROPRIATE RELATED SERVICES TO MEET STUDENT'S COMMUNICATION AND BEHAVIORAL NEEDS

The IEP's offer of specialized academic instruction, occupational therapy services, and transition services to meet Student's academic, fine-motor skills, and postsecondary needs, as well as his difficulty transitioning between routines were appropriate. However, the IEP failed to offer appropriate related services to address Student's communication and behavioral needs.

The IEP offered 325 minutes of daily specialized academic instruction in a group setting, 90 minutes each month of individual occupational therapy services, to be delivered 30 minutes each week, and 60 minutes each month of group transition services for each of Student's postsecondary transition goals, for a total of 120 minutes a month of transition services to be delivered in the classroom. The IEP's offer of specialized instruction, occupational therapy services, and transition services were appropriate as to frequency, duration, and setting to meet Student's academic, occupational therapy, transition, and postsecondary needs, and reasonably calculated to enable Student to make appropriate progress in light of Student's circumstances.

However, the IEP's offer of intensive individual services by a trained behavior aide and speech and language services were inadequate to meet Student's receptive and expressive language, and behavioral needs. The IEP offered 240 minutes of daily intensive individual services through a trained behavior aide. Though the frequency and duration of the trained behavior aide service was appropriate to provide Student daily supervision and general support, a trained behavior aide had no IEP goal to implement that improved Student's use of functional communication to reduce his problem behaviors, and therefore the aide service alone was inadequate to support Student's communication and behavioral needs.

Furthermore, the IEP's offer of 90 minutes a month of individual and group speech and language services only served to meet Student's speech intelligibility needs as testified by Isherwood, not Student's broader receptive and expressive language deficits. The IEP failed to offer any minutes of related services to address Student's

receptive and expressive language deficits, and to help Student acquire the skill and knowledge to use appropriate functional communication to reduce his problem behaviors.

The IEP failed to offer Student the required related services to meet his receptive and expressive language and behavioral needs. Accordingly, the April 14, 2021 IEP, as amended on September 20, 2021, failed to offer Student a FAPE by failing to offer appropriate related services to meet Student's communication and behavioral needs to enable Student to benefit from special education and make appropriate progress.

PLACEMENT IN THE REGIONAL PROGRAM

Lakeport Unified contends placement at the Regional Program offered Student a FAPE in least restrictive environment. However, as discussed above, the IEP lacked measurable goals to meet Student's needs in the areas of receptive and expressive language. The IEP also lacked an offer of appropriate supports and services to address Student's needs in functional communication to reduce problem behaviors. The IEP offer also failed to specify the necessary personnel, equipment, supports and services required to help Student meet those goals. Thus, without appropriate goals, supports and related services, the evidence failed to establish that placement in the Regional Program offered Student a FAPE in the least restrictive environment. (Cal. Code Regs. tit. 5, § 3042. subd. (a).)

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

cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1.) In California, a specific educational placement is defined as the unique combination of facilities, personnel, location or equipment necessary to provide instructional services to a special education student as specified in the student's IEP. (Cal. Code Regs. tit. 5, § 3042. subd. (a).)

The Ninth Circuit stated a four-factor evaluation to determine whether a placement is in the least restrictive environment. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*)). The four factors are:

1. the educational benefits of placement full-time in a regular class;
2. the non-academic benefits of interaction with children who were not disabled
3. the effect the child will have on the teacher and children in the regular class; and
4. the costs of mainstreaming the student.

(*Ibid.*) If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education* (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; and special classes. (Ed. Code, § 56361.) However, a school district is not required to offer a program preferred by a student or parent. (*Gregory K., supra*, 811 F.2d at p. 1314.)

The April 14, 2021 IEP, as amended on September 20, 2021, offered placement in the Regional Program with Student spending 76 percent of his school day outside the general education setting. Lakeport Unified's IEP team members opined in the IEP team meetings and in hearing, that placement in the Regional Program would meet Student academic and functional needs in the least restrictive environment.

THE REGIONAL PROGRAM COULD MEET STUDENT'S ACADEMIC AND FUNCTIONAL NEEDS IN THE LEAST RESTRICTIVE ENVIRONMENT

Lakeport proved that the general education setting was not appropriate for Student under the four factors of *Rachel H.* As to the first *Rachel H.* factor, the evidence established that Lakeport Unified's special day class serving students with mild to moderate disabilities was not meeting Student's needs. Student spent most of his time isolated from his peers, as the class lessons were too advanced for him to participate in whole group instruction. On average, his classmates were reading at a fourth-grade level and working on sixth-grade level math. Student could not read independently and could only perform simple additions and subtractions. Therefore, Student spent his class time isolated with an aide, working on curriculum specifically tailored to his abilities.

As to the second *Rachel H.* factor, Student's interactions with nondisabled peers at the public high school only occurred during physical education class and breaks. However, even those interactions with nondisabled peers were limited to brief cordial greetings due to his communication deficits. Thus, the general education setting was not benefitting Student regarding this factor.

As to the third *Rachel H.* factor, Student's problem behaviors during the 2021-2022 school year were alarming, resulting in seven days of suspension in just the first 35 days of school. His problem behaviors impeded his ability to learn and impeded the learning of his peers. Class lessons were often stopped to respond to Student's problem behaviors. Furthermore, Stillman had to evacuate the classroom due to Student's behaviors at least five times during the first six and half weeks of the 2021-2022 school year. The evidence supported a finding that this factor was critical to the IEP team's decision that a smaller, more restrictive setting than the regular education environment was more appropriate. Neither party offered evidence as to the fourth *Rachel H.* factor relating to cost, nor was cost a factor in the ultimate outcome of this Decision.

Initially, the facts demonstrated that the Regional Program could potentially support Student's academic and functional needs, while offering Student mainstream opportunities to the maximum extent appropriate. Kelseyville Unified's Director of Special Education, Keely Antoni, testified and described the Regional Program. The Regional Program was located at Kelseyville High School, a public comprehensive campus serving both disabled and nondisabled students. The Regional Program served students with moderate to severe disabilities from throughout the county, from ninth grade through adult transition.

The Regional Program had on average 10 to 15 students in the class and was adequately staffed by a moderate-to-severe credentialed special education teacher and four classroom aides. Stillman credibly opined that a moderate-to-severe credentialed teacher is better trained than those without the credential at serving students more impacted by their disability who require a higher need of attention and support, such as

Student. In addition, the classroom aides were currently receiving behavioral training in deescalating problem behaviors through communication, without the use of force. The training was expected to be completed by mid-December 2021.

Furthermore, the April 14, 2021 IEP as amended on September 20, 2021, offered Student a trained behavior aide throughout the school day to support Student's behaviors and to provide supervision for Student's safety. The Regional Program also had a credentialed school psychologist, speech-language pathologist, and occupational therapist available on-site.

The Regional Program would teach Student daily living and job skills suitable for his needs, such as cooking, budgeting, and purchasing items for groceries. The classroom had a full kitchen, washer, and dryer. In addition, the class had a mock store where students practiced buying items and counting money, then progressed to shopping at a community store with adult support. The adult support would decrease as the student became more independent. Furthermore, the program offered job coaching and training for its students to acquire employable skills.

The Regional Program would allow Student to participate in whole group instruction by providing Student with the same level of functional academic instruction and life skill lessons as his classmates. In addition, Student would have access to mainstreaming opportunities and nondisabled peers during physical education class, recess, and lunch breaks.

The evidence did not support Student's contentions that the Regional Program could not safely meet Student's needs. Student failed to offer any credible evidence to corroborate Student's claim that students were mistreated at the Regional Program. A

family friend testified about concerns at the Regional Program. However, the friend's child had not attended the Regional Program for more than 13 years, and the friend did not offer any testimony about more recent experiences she or her child had with the Regional Program. Accordingly, the family friend's testimony was not persuasive.

In addition, Mother and Father testified, and neither offered any persuasive testimony or evidence validating their concerns that the Regional Program was unsafe for Student by only having one teacher assigned to the class, or that the school site was too close to a busy road. Furthermore, Mother's testimony about the Regional Program's failure to properly supervise Student when Student attend the program for a summer when Student was three years old was too distant in time, and therefore, not persuasive.

LAKEPORT UNIFIED FAILED TO PROVE THE APRIL 14, 2021
IEP, AS AMENDED ON SEPTEMBER 20, 2021, OFFERED
STUDENT AN APPROPRIATE PLACEMENT BECAUSE THE
IEP'S GOALS, SUPPORTS AND SERVICES WERE DEFICIENT

Despite what might have otherwise been an appropriate educational environment for Student in the Regional Program, Lakeport Unified failed to meet its burden of proving the April 14, 2021 IEP, as amended on September 20, 2021, offered Student a FAPE. An overview of the Regional Program as a placement suggested the program possessed an adequate combination of facilities, personnel, location and equipment to potentially meet Student's academic and functional needs. However, the IEP team's offer of placement was predicated on an offer of appropriate goals, supports, and services required for Student to receive a FAPE. (Cal. Code Regs, tit. 5, § 3042, subd. (a).)

Without appropriate goals, supports and services, as discussed above, Lakeport Unified did not meet its burden that the offer of placement in the Regional Program in conjunction with the rest of the IEP offer was a FAPE. Therefore, Lakeport Unified may not implement the April 14, 2021 IEP, as amended on September 20, 2021, without parental consent.

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. This Decision finds that the April 14, 2021 IEP, as amended on September 20, 2021, did not offer Student a FAPE in the least restrictive environment. Accordingly, Lakeport Unified may not implement the April 14, 2021 IEP, as amended on September 20, 2021, without parental consent. Student prevailed on the only issue.

ORDER

Lakeport Unified may not implement the April 14, 2021 IEP, as amended on September 20, 2021, without parental consent.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

/s/

Rommel P. Cruz

Administrative Law Judge

Office of Administrative Hearings