

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2022080541  
CASE NO. 2022080167

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THE CONSOLIDATED MATTERS INVOLVING  
  
PARENT ON BEHALF OF STUDENT, AND  
  
FOLSOM-CORDOVA UNIFIED SCHOOL DISTRICT.

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DECISION

December 16, 2022

On August 4, 2022, Folsom-Cordova Unified School District, called Folsom-Cordova, filed with the Office of Administrative Hearings, called OAH, a due process hearing request naming Student as respondent. On August 18, 2022, Parent on behalf of Student filed a due process hearing request naming Folsom-Cordova. On August 22, 2022, parties' joint motion to consolidate was granted. Student's case was designated the primary case for scheduling timelines. On September 23, 2022, parties' joint motion to continue was granted. Administrative Law Judge Tiffany Gilmartin heard this matter by videoconference on October 11, 12, 13, 14, 19, 20, 21, and 24, 2022.

Robert Burgermeister, Sheila Bayne and Diana Renteria represented Student on different days throughout the due process hearing. Parent attended all days. Student's sister and advocate also attended the hearing.

Elizabeth Rho-Ng and Denise Lee represented Folsom-Cordova. Hunt Lin, Special Education Program Coordinator attended all hearing days on Folsom-Cordova's behalf.

At the parties' request the matter was continued to November 21, 2022, for written closing briefs. The record was closed, and the matter was submitted on November 21, 2022.

## CLARIFYING SCRIVENER'S ERROR IN ORDER FOLLOWING PREHEARING CONFERENCE

Student filed for due process on August 18, 2022. On September 16, 2022, OAH granted in part Folsom-Cordova's motion to dismiss and motion to strike based on the settlement agreement. That order narrowed Student's case to two issues and limited the time period at issue. These issues were discussed at length during the Prehearing Conference convened on September 30, 2022. In the September 30, 2022, Order Following Prehearing Conference, the undersigned ALJ identified Student's issue number one as pertaining to the 2022-2023 school year.

On the first day of hearing, the ALJ questioned the parties as to whether the Order Following Prehearing Conference limiting the school year at issue to the 2022-2023 school year was a scrivener's error. Counsel for both parties were heard. Student agreed that he intended to challenge the 2021-2022 school year. Folsom-Cordova, after taking an opportunity to review the pleadings, also agreed Student's issue number one was for

school year 2021-2022. After hearing from all parties, the undersigned determined that the school year for Student's issue number one was 2021-2022. This was clarified on the record on October 12, 2022.

## ISSUES

In this Decision a free appropriate public education is referred to as a FAPE. An individualized education program is referred to as an IEP. Based on the evidence proffered it was more logical to analyze Folsom-Cordova's Issue and Student's Issue 2 first followed by Student's Issue 1a-g.

1. Did Folsom-Cordova deny Student a FAPE during the 2021-2022 school year, or from July 1, 2022 through August 18, 2022, by:
  - a. Failing to conduct a functional behavior assessment;
  - b. Failing to offer an appropriate behavior intervention plan;
  - c. Failing to offer supports and services in the areas of behavior, speech and language, occupational therapy, and adapted physical education;
  - d. Failing to offer appropriate intensive individual services specifically a one-to-one aide;
  - e. Failing to offer accurate, ambitious, measurable goals in speech and language, occupational therapy, and adapted physical education;
  - f. Failing to address regression;
  - g. Failing to offer an appropriate placement in the least restrictive environment?

2. Did Folsom-Cordova deny Student a FAPE by failing to offer sufficient programs and supports needed to enable Student to receive educational benefit specifically in the areas of behavior intervention services, speech and language, occupational therapy, physical therapy, and adapted physical education in the IEP developed during the March 24, 2022, IEP team meeting and via subsequent amendments?

## FOLSOM-CORDOVA ISSUE

1. Did Folsom-Cordova's March 24, 2022, IEP as amended in May 2022, offer Student a FAPE so that Folsom-Cordova may implement it without parental consent?

## 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 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; Ed. Code, §§ 56501, 56502, and 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, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) In this consolidated case, Student had the burden of proof on Student's issues, and Folsom-Cordova had the burden of proof on its 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 10 years old and in fifth grade at the time of hearing. Student resided within the Folsom-Cordova's geographic boundaries at all relevant times. Student was eligible for special education under the category of intellectual disability with a secondary eligibility of autism.

#### Student's needs included

- pre-academics and functional academics,
- independent living skills,
- social, behavior,
- receptive and expressive language,
- sensory processing,
- attention,

- transitions,
- adaptive physical education, and
- gross motor skills.

Student had a seizure emergency plan, struggled with toileting, and spoke in one-to-two-word utterances. As Student's maladaptive behaviors increased, he demonstrated difficulty with de-escalation. Student's behaviors included flipping desks, kicking, hitting, and biting. These behaviors became so problematic that during the 2021-2022 school year the classroom was evacuated to protect other students from his outbursts on several occasions.

## EFFECT OF SETTLEMENT AGREEMENT BETWEEN PARTIES

Parties entered into a settlement agreement on August 16, 2021, that resolved past disputes, and established the program that Folsom-Cordova would provide Student for the 2021-2022 school year. Pursuant to the agreement, Student was placed in a special day class for students with mild to moderate disabilities. The agreement specified Student would receive

- two 30-minute individual speech sessions per week,
- 40 minutes weekly of individual occupational therapy,
- two 30-minute monthly sessions of adaptive PE,
- a one-to-one instructional assistant throughout the school day, and
- roundtrip transportation.

Folsom-Cordova was to provide the services in the settlement agreement instead of implementing Student's February 22, 2021 IEP. Folsom-Cordova's obligations to Student for the 2021-2022 school year were contractually negotiated, rather than

decided by an IEP team, and as part of the settlement agreement, Parent waived all claims against Folsom-Cordova arising during the 2021-2022 school year through June 30, 2022, including the extended school year. Hunt Lin, the special education program coordinator for Folsom-Cordova, drafted the agreement that Parent signed on Student's behalf.

DISTRICT ISSUE 3: DID FOLSOM-CORDOVA'S MARCH 24, 2022 IEP OFFER AS AMENDED IN MAY 2022, OFFER STUDENT A FAPE SO THAT FOLSOM-CORDOVA MAY IMPLEMENT WITHOUT PARENTAL CONSENT?

STUDENT ISSUE 2: DID FOLSOM-CORDOVA DENY STUDENT A FAPE BY FAILING TO OFFER SUFFICIENT PROGRAMS AND SUPPORTS NEEDED TO ENABLE STUDENT TO RECEIVE EDUCATIONAL BENEFITS, SPECIFICALLY, IN THE AREAS OF BEHAVIOR INTERVENTION SERVICES, SPEECH AND LANGUAGE, AND OCCUPATIONAL THERAPY, PHYSICAL THERAPY, AND ADAPTIVE PHYSICAL EDUCATION IN THE MARCH 24, 2022 IEP AND VIA SUBSEQUENT AMENDMENTS?

Folsom-Cordova contends its March 24, 2022, IEP offer as amended in May 2022, legally complied with all procedural and substantive IDEA requirements, and requests that it be permitted to implement that IEP despite lack of parental consent.

Student asserts Folsom-Cordova's March 24, 2022, IEP offer denies Student a FAPE because it fails to offer a program with sufficient supports to enable Student to receive educational benefits.

Placement was central to this case. Student alleged in his pleadings and argued in his closing brief that the appropriate placement was a general education setting with a one-to-one aide. At hearing, Student questioned witnesses on whether a mild to moderate or an autism-based special day both with a one-to-one aide would be appropriate for Student. The questions regarding the appropriateness of an autism-specific special day class were inconsistent with Student's issue. Despite the moving goal posts of Student's apparent placement contention, Student maintains the March 2022 IEP did not offer Student a FAPE and should not be implemented without parental consent.

To obtain an Order that the March 24, 2022 IEP as amended may be implemented without parental consent, Folsom-Cordova had the burden of proving that the services offered in the March 24, 2022 IEP as amended in May was appropriate at the time the offers were made and that they were appropriate at the time of hearing. Student's arguments as stated in Issue 1a-g that he was denied a FAPE during the 2022-2023 school year were considered when reaching a decision whether Folsom-Cordova's offer constituted a FAPE and may implement it over parental objection.

The legal analysis of a school district's IDEA compliance consists of two parts. First, the tribunal must determine whether the district has complied with the IDEA procedures. (*Board of Education of the Hendrick Hudson Central School District v. Rowley*, (1982) 458 U.S. 176, 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid*, *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000].)



Procedural inadequacies such as denying meaningful parental participation in the IEP formulation process deny student a FAPE. (*Amanda J. v. Clarke County Sch. Dist.* (9th Cir. 2001) 67 F.3d 877, 892.)

The IEP team meeting must include

- one or both of the student's parents or their representative;
- a regular education teacher if a student is, or may be, participating in the regular education environment;
- a special education teacher;
- a school district representative who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about available resources; and
- an individual who can interpret assessment results and its instructional implications. (34 C.F.R. § 300.321(a) (2007).)

At the school district or parent's discretion, the meeting may also include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a) (2007).) Whenever appropriate, the disabled child should also be present. (34 C.F.R. § 300.321(a) (2007).)

Among the most important procedural safeguards are those that protect the parents' 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.) Additionally, the

parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when

- he or she is informed of the child's problems,
- attends the IEP meeting,
- expresses disagreement regarding the IEP team's conclusions, and
- requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 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].)

The IEP document for each disabled child must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2007).) It must also contain a statement of measurable annual goals. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2007).) An IEP must further include a statement of the special education, related services, and supplementary aids and services, based on peer-reviewed research to the extent practicable; and program modifications or supports that will be provided to the student to advance in attaining the goals, make progress on the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4) (2007); Ed. Code, § 56345, subd. (a)(4).)

Folsom-Cordova held an IEP team meeting on March 24, 2022. Present during the meeting were

- Parent,
- Parent's advocate,
- Student's sister,
- the school principal,
- the program specialist,
- Student's special education teacher,
- a school psychologist,
- Student's speech and language pathologist,
- his occupational therapist,
- a behavior specialist,
- the school nurse,
- Student's adapted physical education teacher,
- a general education teacher, and
- a neutral facilitator.

All required IEP team members were present at the IEP team meeting.

Parent expressed her desire for Student to be in a general education setting with a one-to-one aide. Parent reported Student had previously done well in a general education setting with modified schoolwork. Moreover, Parent wanted additional adult support to work with Student on his behaviors. Student's advocate disagreed with some of Student's goals, specifically his name writing goal. Student's advocate was supportive of the behavior intervention plan introduced during the March 24, 2022 IEP team meeting and wanted it implemented to support Student.

In developing the March 24, 2022 IEP team offer, Folsom-Cordova complied with the procedural IDEA and state law requirements. Folsom-Cordova was flexible to Parent's scheduling concerns. An invitation to the March 24, 2022 IEP team meeting was sent to all participants on March 17, 2022 after Hunt Lin, program coordinator for Folsom-Cordova Unified School District, confirmed with Parent on February 9, 2022 that a team meeting the week of March 21, 2022 would work for her schedule. Parent requested Parent's advocate, and Student's sister be also included in the meeting and signed the invitation on March 17, 2022. Folsom-Cordova provided Parent an appropriate IEP team meeting notice and procedural safeguards.

Student's March 24, 2022, IEP document included a statement of Student's present levels of academic and functional performance, including how Student's disability affects his involvement and progress in the general education curriculum, annual goals, included related services and supplementary aids and services, program modifications and supports offered to Student to support goal attainment, delineated Student's level of interaction with non-disabled peers, extended school year provisions, and made a clear FAPE offer.

An amended copy of the March 24, 2022 IEP was provided to Parent along with a prior written notice on May 31, 2022. The prior written notice letter amended the IEP to complete the baseline for Student's toileting goal and corrected the service minutes to conform with the shortened extended school year school day.

Student alleged an incomplete copy of March 24, 2022 IEP team meeting document was provided. At the hearing, Parent testified she was not provided copies of the notes pages of the IEP team document following the March 24, 2022 IEP team meeting. Parent was asked if she had reviewed the complete copy of the March 24,

2022 IEP including the notes. Parent first testified she had not reviewed the notes, then expressed skepticism she even received the notes, and when questioned further she alleged she received the IEP just not the notes pages of the IEP. Parent never raised the issue of the missing notes until confronted by opposing counsel during due process hearing. Parent's testimony was not persuasive. Conversely, Jennifer Wickenheiser, Student's case manager at the time of the March 24, 2022 IEP team meeting, testified with clear recall that she handed Parent a complete copy of the IEP team document, she further testified she also provided an electronic copy of Student's IEP document to Parent's advocate on May 5, 2022. Wickenheiser's clear and definitive recall of delivering the IEP including the notes via two means was persuasive. Accordingly, the evidence established that Parent was provided a complete copy of the March 24, 2022 IEP document, including the IEP team meeting notes.

## DEVELOPMENT OF GOALS

An annual IEP must contain a statement of measurable annual goals related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special

education program. (*Letter to Butler*, U.S. Dept. of Education, Office of Special Education and Rehabilitative Services Mar. 25, 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

Student's March 24, 2022, IEP identified his areas of need as

- pre-academics and functional academics,
- independent living,
- social,
- behavior,
- speech,
- receptive and expressive language,
- sensory processing,
- attention,
- transitions,
- adaptive physical education, and
- gross motor.

Wickenheiser, who was also Student's fourth grade teacher, provided a substantive overview of Student's present academic levels, his behavior issues, his speech and occupational therapy deficiencies. She detailed his struggles to perform basic academic activities such as counting to 100, complying with requests to do non-preferred tasks, and how his behavior impedes his learning. Her testimony persuasively demonstrated she was familiar with Student and his needs. Student's other service providers, such as his speech and language, adapted physical education teacher, and occupational therapist, also demonstrated they were familiar with Student and his needs. The evidence established that Student's IEP team accurately identified his needs.

The March 24, 2022 IEP offer of special education and related services contained 10 draft goals. Specifically, two behavior goals addressed tantrum behaviors and non-compliance. One goal addressed gross motor control and adapted physical education. In English Language Arts, Student would work on recognizing 12 basic sight words, and in functional academics would write his first and last name and identify coins and bills by name and value. The functional math goal included counting with touch points. Student had a self-help toileting goal and a goal to work on using both hands to zip his jacket. The IEP included a sentence expansion goal to increase Student's sentences to 4-to-5 word utterances, and an intelligibility goal. There were also goals addressing Student's fine motor skills and following directions.

The preponderance of the evidence established the 10 goals in Student's March 24, 2022 IEP were based on Student's present levels of performance, Student's progress on his 2021 IEP goals, the service providers' review of Student's 2020 triennial assessment report, and the service providers own observations, logs, and experience working with Student. Parent and her advocate were equal participants in the development of goals at the March 24, 2022 IEP team meeting. Both Parent and the advocate were given the opportunity to, and did, provide input into Student's present levels and goals. At hearing, Parent did not identify any specific issue or concerns she had with any of Student's goals.

## BEHAVIOR INTERVENTION PLAN AND BEHAVIOR GOALS

Folsom-Cordova developed a behavior intervention plan for Student. The behavior plan was developed by Robyn Grippa, behavior specialist at Folsom-Cordova, who was assigned to Student's school to support positive behavior in all students. The behavior intervention plan was intended to support Student in meeting his two behavior

goals addressing tantrums and non-compliant behavior. Grippa further participated in the preparation of the March 24, 2022 IEP, including present levels of performance and behavior goals.

Grippa, a board-certified behavior analyst, testified credibly that Student's behavior goals were appropriate because they were based on needs identified during her observations and consultations with Wickenheiser, Student's classroom teacher for 2021-2022 school year. Grippa observed Student throughout the day on many occasions. She witnessed him exhibiting maladaptive behaviors and identified when the behaviors were more likely to be present. Grippa testified credibly she provided support, coaching, and mentoring to Wickenheiser and Student's support aides. Lin, who was responsible for supervising all special education staff, corroborated Grippa's responsibility to work with all students, faculty and staff on behavior at her assigned site. Grippa collaborated with Wickenheiser on Student's behavior goal, though she did not write it, and provided the IEP team with her observations of Student's deteriorating behavior and escalating reactions.

Student did not challenge the appropriateness of Student's behavior goal or behavior intervention plan. Student challenged the behavior services. That question will be addressed later in this decision. Additionally, Student did not call a behavior expert to contradict Grippa's persuasive opinion. The evidence established that Student's behavior goals and intervention plan is appropriate.

Student's first behavior goal addressed tantrums. Student's baseline demonstrated he engaged in tantrums approximately 4.3 instances per day with a duration of up to 35 minutes per instance. Student's behavior goal included working on prevention,



reinforcement, and reactive strategies embedded in his behavior plan would reduce his tantrums to one or less instances per day with a maximum duration of five minutes over a two consecutive week period.

Student's second behavior goal addressed non-compliant behavior. Student's baseline demonstrated he engaged in an average of two instances of non-compliant behavior per day. Student's new goal would include working on prevention, reinforcement, and reactive strategies to reduce his non-compliant behavior to two or less occurrences per week over a two consecutive week period. Both Grippa and Wickenheiser testified persuasively that Student's behavior goals were designed to meet his behavior needs that would allow him to make progress in a general curriculum.

## GROSS MOTOR AND PARTICIPATION GOAL

Student had one gross motor and participation goal. Student's adaptive physical education teacher, Laurie Towne participated in the preparation of the March 24, 2022 IEP. Towne held an adapted physical education authorization as well as a Master of Arts in teaching. Towne also contributed to Student's present levels of performance and the one adapted physical education goal. Towne noted Student participated in Towne's adapted physical education class, and was usually able to jog, gallop, and at times jump. Towne also conducted Student's triennial adapted physical education assessment on February 11, 2020. She established she was familiar with Student's adapted physical education needs.

Student's gross motor and participation goal would have him participate in a variety of activities and skills, with or alongside his peers. Student frequently did not want to participate in activities with other students. He had seldom initiated play with

his peers and would frequently refuse tasks. His needs required the regular physical education curriculum to be modified for games to be played at a slower pace and learned skills broken into smaller segments.

Towne testified the gross motor and participation goal was based on her observations of Student, his triennial adapted physical education assessment, and areas of need such as age-appropriate peer play. Student did not challenge the appropriateness of Student's adapted physical education goal. Towne persuasively demonstrated knowledge of Student and his needs. The adapted physical education goal was measurable, identified the appropriate teacher to work with Student on it, and would allow Student to make progress in the general education curriculum.

## FUNCTIONAL ACADEMIC GOALS – READING, WRITING AND MATH

Wickenheiser shared Student's academic present levels with the March 24, 2022 IEP team. Student recognized his letters and was working toward counting to 100. He could utilize touch-dot math number between zero and five. The team determined Student required four functional academic goals. The first addressed Student's ability to identify only four basic sight words. The goal required Student by March 2023 to recognize 12 basic sight words at 60 percent accuracy.

In writing, Student was offered a writing goal addressing his inability to independently write his first and last name. In March 2022, Student could write his first and last name without prompting only 10 percent of the time. The writing goal required Student to write his first and last name without verbal prompting 60 percent of the time by March 2023.

In math, Student accurately counted and identified touch points on numbers zero through five with three verbal prompts at 40 percent accuracy. Student's 2023 goal included utilizing double touch points on numbers six through nine with 80 percent accuracy and less than three verbal prompts on two out of four occasions.

Another math goal was a functional goal of money identification. Student was unable to identify the various currency or how they were to be used. To assist with his deficit in this area, by March 2023 Student was to be able to identify a penny, nickel, dime, quarter and dollar bills by name and value with 60 percent accuracy with less than three verbal prompts on three out of four occasions.

At hearing, Wickenheiser explained the academic goals were based on Student's assessments, current data, and observations in her classroom. The goals were appropriate because they addressed areas of need necessary for Student to continue to make progress in literacy and functional life skills. The academic goals addressed Student's unique learning needs at the time of the March 24, 2022 IEP team meeting. Wickenheiser persuasively explained why Student required these goals and how Student had made progress on, but not met, his academic goals the year prior.

## SELF-HELP TOILETING GOAL

Student required a toileting goal to ensure he did not soil himself during the school day. Wickenheiser drafted this goal for Student. She drafted a goal with five steps towards independent toileting to assist Student with his toileting needs, which included accessing the five-step process on three of four occasions at 80 percent accuracy with three or less verbal prompts.

Student provided no persuasive documentary evidence or testimony that Student's toileting goal was not appropriate. Student argued in his closing brief that Folsom-Cordova convened an additional meeting to discuss Student's toileting goal and she was not included. Student failed to establish an additional meeting was held to discuss Student's toileting goal. Wickenheiser testified credibly that Student's baseline for his toileting goal was not complete at the time of the March 24, 2022 IEP, and Wickenheiser completed the baseline and sent it to Parent for review as part of the May 31, 2022 IEP amendment. Student's argument that the substance of Student's toileting goal was changed without Parent's input is unpersuasive.

## SPEECH AND LANGUAGE GOALS

Student was offered two speech and language goals in the March 24, 2022 IEP. Anne Jones, Student's speech-language pathologist for the 2021-2022 school year, participated in updating Student's present levels of performance during the IEP team meeting. Jones reviewed Student's triennial speech and language assessment conducted on February 25, 2020 prior to drafting Student's IEP goals.

Student raised an issue about Jones' testimony and referenced a goal from the 2021-2022 school year in his closing brief. Specifically, Student argued Jones stated Student was not intelligible when Student expanded two-word sentences. The evidence does not support this argument. Jones persuasively testified Student struggled to speak beyond simple utterances. Further, as to the goal Student argued Jones agreed was not appropriate, this goal was not at issue in this case as it was from the 2021-2022 school year.

Jones testified Student's primary challenge was intelligibility and his secondary challenge was expanded sentence structure. Jones drafted two goals for Student to address his deficits and to help assist him in personal safety of self-advocacy. The first goal addressed Student's sentence expression. Jones testified Student struggled with sentences beyond simple utterances. In a language sample from January 2022, Student's mean length of utterance was rated at 3.44 words and intelligibility at 82 percent. Meanwhile a sample in February 2022 found Student's mean length of utterance was 3.88 and intelligibility was 76 percent. Jones opined that both Student's mean length of utterance and intelligibility impaired his ability to interact with his peers and adults. To address Student's needs, the sentence expansion goal Jones drafted aimed to increase Student's mean length utterance to four to five words by March 2023.

Jones also drafted a goal to increase Student's intelligibility in structured conversational tasks. The goal sought to encourage Student to slow his rate of speech and over-articulate multi-syllabic words until he was able to naturally utilize pausing points in conversation. By March 2023 Student would be able to utilize these three strategies to increase intelligibility by 85 percent across three probing sessions.

## OCCUPATIONAL THERAPY GOALS

Student required two occupational therapy goals. Student's occupational therapist, Mary Schaefer, contributed to Student's present levels during the March 24, 2022 IEP team meeting. Schaefer maintained a service log of each occupational therapy session with Student. This log demonstrated that Student made progress on Student's 2021 occupational therapy goals. Schaefer testified persuasively that she was familiar with Student's fine motor needs through reviewing his February 25, 2020 occupational therapy assessment and her own data and observation. During the March 24, 2022 IEP team

meeting, Schaefer was able to clarify questions for Parent regarding Student. Student's first fine motor goal included bilateral coordination. Student struggled with pulling a zipper. Schaefer wrote the goal to address Student's fine motor deficits by having Student zip his jacket independently with no more than one prompt on three out of four opportunities in a two-week period.

At Student's request the due process hearing was continued to October 24, 2022 to allow Student's selected experts, including occupational therapist JanDee Goodis, to testify. Goodis's first and only observation of Student was on Saturday, October 22, 2022 by videoconference, where she spent an hour with Student and his family. Most of her time was spent speaking to Parent regarding Folsom-Cordova's placement offer, not occupational therapy goals or services. Goodis's testimony was evasive, biased, and ultimately not persuasive. Goodis had no familiarity with the Folsom-Cordova program. She had never observed Folsom-Cordova's occupational therapy services, spoken with Student's occupational therapist, or his teacher. Moreover, despite the lack of familiarity with the Folsom-Cordova program, Goodis proffered an opinion on his services, goals, placement, and the adequacy of Folsom-Cordova's offer. Student's closing brief was silent to her testimony.

Folsom-Cordova demonstrated all of Student's goals as written into the March 24, 2022 IEP were measurable and included an objective criteria of measurement. objective criteria. Each goal indicated

- the setting in which Student was to perform the skill,
- how the skill would be measured,
- the length of time or number of times the skill was to be performed and
- the measurement tools.

The goals were designed to meet Student's individual needs and allow him to make progress in the general education curriculum. Folsom-Cordova's witnesses testified convincingly that the goals targeted all of Student's areas of educational need and were reasonably calculated to be achievable within a 12-month period. Student did not put on any credible evidence that the IEP team had failed to identify an area of need, or that the annual goals in the March 24, 2022 IEP were deficient in any way.

## SUPPLEMENTAL AIDS, PROGRAM MODIFICATIONS AND SERVICES

The IEP document created by the IEP team must include a statement of the special education and related services that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include: a projected start date for services and modifications; and, the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).)

The IEP team offered Student numerous related services to support Student throughout his school day. These services included 1860 minutes of specialized academic instruction, twice a week, for 30 minutes each session, individual speech and language services. Student also received 40 minutes weekly of occupational therapy services in an individual and group setting. Student received 30 minutes, twice monthly, of adapted physical education support in a group setting. The IEP team also provided 30 minutes, twice monthly, of behavior intervention services, to support Student and staff in implementing his behavior intervention plan. The IEP team agreed Student

would be offered a one-to-one aide to assist Student throughout the day with behavior intervention support, on task behaviors, seizure monitoring, toileting support, and academic support to allow him to access his education.

## APPROPRIATE BEHAVIOR INTERVENTION SERVICES

Folsom-Cordova contends it provided Student with appropriate behavior intervention services. The March 24, 2022 IEP offered Student two 30 minute sessions per month of behavior intervention services to support the fully developed behavior intervention plan it developed for Student. Student argued Folsom-Cordova failed to offer a behavior intervention plan in the March 22, 2022 IEP. Specifically, Student argued Student's behavior intervention plan did not support Student's maladaptive behaviors. Folsom-Cordova presented the behavior intervention plan to Parent at the March 24, 2022 IEP team meeting. Student's advocate requested the behavior intervention plan be implemented to support Student. Parent never consented to Student's March 24, 2022 IEP so Folsom-Cordova was prevented from implementing the behavior intervention plan. Student's argument that Folsom-Cordova's behavior intervention plan was not appropriate is unpersuasive.

In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324; Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)



The IDEA requires that in the case of a child whose behavior impedes his or her learning or that of others, a student's IEP team, while developing an IEP, is required to consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. (20 U.S.C. § 1414 (d)(3)(B)(i) (1999); see also 34 C.F.R. §§ 300.346, 300.121 (1999); 64 Fed. Reg. 12,618-12,626 (1999)). The IDEA only explicitly requires school districts to conduct a functional behavior assessment when Student's conduct is a manifestation of disability. (See 34 CFR 300.530 (f)(1)(i) and 300.530 (d)(1)(i).)

Here, Folsom-Cordova assigned a trained behaviorist to Student's school site to support positive behavior for all students. Grippa visited Wickenheiser's class frequently to provide behavior support to all students at the school site. Grippa had experience with students in mild-to-moderate classrooms, moderate-to-severe classrooms, and autism classrooms. Tantrums, aggression, non-compliance were Student's primary maladaptive behaviors and the primary and secondary functions of his behavior were avoidance and access to preferred items. Grippa's responsibilities included providing behavior support in the classrooms, referred to as push-in behavior support. There she would observe all students and help develop behavior intervention plans as necessary.

Grippa observed Student exhibiting negative behaviors such as flipping desks, pushing over bins of material, and throwing objects. As a result, she developed a behavior intervention plan from her observations and data taken through the normal course of her workday. As she was assigned to Student's school, Grippa was able to observe Wickenheiser's classroom at various periods during the day to get a full understanding of Student's behaviors. In the proposed behavior intervention plan presented to the March 24, 2022 IEP team, Grippa noted Student's behavior escalated during structured tasks. She noted Student struggled with any academic tasks. When Student's behaviors

began to escalate, Student would turn his body away from his teacher or aide, swipe materials away, or try to walk away. Grippa coached Wickenheiser and Student's aides on teaching and consequence strategies. For example, if Student had a tantrum on the playground, Student and the aide would remain on the playground until his tantrum subsided and he could enter the classroom calmly. Grippa identified the triggering behaviors, the risk behaviors, and behaviors that were dangerous to other students. Grippa testified to observing other students being scared by Student.

The behavior intervention plan was shared with Parent during the March 24, 2022 IEP team meeting. At this same meeting, Parent raised concern about Student's on-going behavior. After reviewing the behavior intervention plan Student's advocate requested the behavior intervention plan be implemented. The behavior intervention plan identified Student's antecedent behavior, desired behavior, problem behavior, and alternative behavior. The behavior plan included event setting strategies to better contain Student's antecedent behaviors, and should Student's behaviors continue to escalate, strategies for his classroom teacher and aide to make his inappropriate behavior more inefficient and ineffective.

## APPROPRIATE OCCUPATIONAL THERAPY SERVICES

Folsom-Cordova contends the March 24, 2022 IEP offered Student appropriate occupational therapy services. Student contends Folsom-Cordova denied him a FAPE for failing to offer sufficient occupational therapy services. Student's closing brief contained two sentences about occupational therapy and both sentences were related to Student's 2021 goals. Moreover, as discussed above, Student's expert occupational therapist was found not credible.

In the March 24, 2022 IEP, Folsom-Cordova offered 40 minutes per week of occupational therapy delivered both individually and in group. The services were offered as both individual and group to provide Student an opportunity to engage in peer appropriate learning while working on his occupational therapy goals. Schaefer had provided occupational therapy to Student during the 2021-2022 school year, and reviewed Student's relevant records including his prior IEPs, his February 2020 occupational therapy assessment, and contributed to Student's present levels of performance. Schaefer was familiar with Student and testified persuasively and convincingly that the occupational therapy services offered were appropriate and addressed Student's fine motor needs and goals. The occupational therapy services offered were sufficient to enable Student to make progress on his fine motor goals.

#### APPROPRIATE PHYSICAL THERAPY SERVICES

Folsom-Cordova established Student did not require physical therapy to access his education. Physical therapy means the art and science of physical or corrective rehabilitation or of physical or corrective treatment of any bodily or mental condition of any person. (Bus & Prof. Code § 2620(a)). Student has gross and fine motor needs. Folsom-Cordova addressed these needs through occupational therapy and adapted physical education services. Student argued Student had an independent need for physical therapy services. Student presented no evidence to support this contention. Parent's testimony was also silent to the issue of physical therapy services.

#### APPROPRIATE ADAPTED PHYSICAL EDUCATION SERVICES

Folsom-Cordova offered Student adapted physical education services appropriate to provide Student access to State physical education curriculum and

participation in physical activities with peers. Folsom-Cordova offered Student two 30-minute sessions of adapted physical education services, two times per month, of push-in services for support in physical education and to work on his individual goals. His adapted physical education teacher testified persuasively the adapted physical education services allowed Student to access his education by providing Student more support in learning new athletic skills, game play at a slower pace, and support in peer interactions.

## APPROPRIATE INTENSIVE INDIVIDUAL SERVICES

Folsom-Cordova offered Student a one-to-one aide to support Student in accessing his education, behavior support, seizure monitoring, and personal care. Folsom-Cordova offered the one-to-one aide for 372 minutes per day. Folsom-Cordova demonstrated Student's aide support was sufficient to meet his needs, make progress on his goals, and access his education. Much of Student's contention about Student's one-to-one aide revolved around the assignment of Parent's preferred one-to-one aide. Student did not cite to any law or evidence that would require Folsom-Cordova to assign Parent's preferred aide.

## SPECIALIZED ACADEMIC INSTRUCTION

To further support Student's academic needs, Folsom-Cordova offered Student 372 minutes per day for 1860 minutes weekly of specialized academic instruction for teachers and staff to work with Student in a moderate to severe program. Wickenheiser persuasively demonstrated 1860 minutes weekly would appropriately support Student due to his processing deficits, delayed academic skills, and difficulty executing non-preferred tasks.

Folsom-Cordova demonstrated the March 24, 2022 IEP provided Student appropriate related services to allow Student to access his curriculum, make progress towards his goals, and engage in peer interaction.

The March 24, 2022 IEP also considered supplemental aids and services and offered Student sensory breaks to minimize fatigue, a visual schedule, structured choices, additional processing time, minimize visual stimulation, and technological assistance such as a name stamp, calculator, text-to-speech software, and audio books. The March 24, 2022 IEP provided numerous program modifications including shortening assignments to focus on key concepts, use of a pass-fail grading system, use of an alternative curriculum, discussed below, and a bathroom schedule.

Folsom-Cordova offered extended school year in a four-week program of shortened days to ensure Student maintained progress on his goals and did not regress over the summer months. Student's program consisted of

- 225 minutes daily of specialized academic instruction,
- 30 minutes weekly of speech and language,
- two 30-minute sessions monthly to support Student's behavior intervention plan, and
- 225 minutes daily of intensive individual services in the form of a one-to-one aide.

This offer was appropriately designed to prevent regression of Student's skills over the summer break.

## PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT

Folsom-Cordova's placement offer in the March 24, 2022 IEP was a special day class for moderate-to-severe students. Folsom-Cordova contends that the placement offer was appropriate, but Student contends that the moderate-to-severe classroom was not the least restrictive environment for Student. Placement was a moving target for Student. Student's complaint argued the appropriate placement for Student was a general education classroom with a one-to-one aide. Student's closing brief argued Parent requested a mild-to-moderate placement. Parent testified to both a general education and an autism special day class placement.

A school district must ensure that an educational program is designed following a number of general procedural requirements so that the student is placed in the least restrictive environment:

- The placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment;
- Placement is determined annually, is based on the child's IEP and is as close as possible to the child's home;
- Unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
- In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

- A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

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

To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors:

- The educational benefits of placement full-time in a regular class;
- The non-academic benefits of such placement;
- The effect the student has on the teacher and children in the regular class; and
- The costs of mainstreaming the student.

(*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401.)

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.*, *supra*, 874 F.2d at p. 1050.) Mainstreaming is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

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.)

After Student's needs were identified, annual goals were written, and services offered, the March 24, 2022 IEP team discussed Student's placement. The IEP offered Student placement in a moderate to severe special day class for 90 percent of Student's school day outside of regular education. The IEP team determined Student required a placement that had a smaller student to teacher ratio, offered a modified curriculum, and embedded classroom programs to best access his education.



The Ninth Circuit established a four-part test that provides guidance on the question of whether a placement is in the least restrictive environment. The four factors are first, the educational benefits of placement full time in a regular class, and second, the non-academic benefits of such placement. The third factor is the effect the child will have on the teacher and children in the regular class, and fourth, the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].)

Whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is an individualized, fact specific inquiry. (*Daniel R.R. v. State Bd. of Educ.*, *supra*, 874 F.2d at p. 1048.) 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 Board of Ed.*, *supra*, 874 F.2d at p. 1050.)

Folsom-Cordova established placement in a moderate-to-severe classroom was the least restrictive environment for Student in light of the continuum of program options as required under *Rachel H.* Student struggled significantly in his mild-to-moderate special day class where he had a one-to-one aide assigned to him for the entire day.

The moderate-to-severe program

- utilizes an alternative curriculum that is outside of grade level curriculum,
- provides a higher rate of staffing,
- more individualized work,
- more functional skill development, and
- smaller groups.

Conversely, Parent's preferred mild-to-moderate program accesses the general education curriculum, but at a slower pace, has a higher rate of students per teacher, and focuses on academic development of grade-level skills.

Sherri Plumb, program specialist at Folsom-Cordova, shared the continuum of placement options for Student. Plumb was responsible for being familiar with all special education programs across Folsom-Cordova and the level of support they provided. Plumb testified she arranged an opportunity for Parent to tour potential moderate-to-severe special day class sites after the IEP team meeting. Plumb emailed Parent on May 17, 2022 to arrange a tour of two programs near the family's residence. Parent requested to observe an additional site and Plumb arranged for that site as well. Plumb credibly testified about the differences in the mild-to-moderate and moderate-to-severe programs.

Student was a fourth grader placed in Wickenheiser's kindergarten through third grade mild-to-moderate special day class. Still, Student struggled in Wickenheiser's class. Wickenheiser frequently needed to rely on chips or tokens to encourage compliance from Student with basic classroom activities such as sitting down. Despite being older than his classmates, Wickenheiser told the IEP team that Student's performance was significantly lower than his younger peers. Student struggled with sight words, toileting, and lacked

independent skills to engage in age-appropriate play with his peers. The evidence supported Folsom-Cordova's assertion Student could not be satisfactorily educated in a regular education environment or mild-to-moderate special day class. Student's academic abilities were pre-kindergarten level. He was unable to access the curriculum in his mild-to-moderate classroom. He struggled to write his name, recognize basic site words, and count beyond five utilizing touch points as a support. Student was unable to do fourth grade level work even with supportive services and interventions.

Student would receive little non-academic benefit from a general education placement. Student's developmental disability impacted his relationships with other children. He did not initiate play with his peers. He preferred solitary tasks. His erratic behavior frightened other students. Folsom-Cordova established it attempted to ameliorate his behavior by utilizing the school site behaviorist's support without success.

Both Wickenheiser and Elisabeth Anderson, Student's current resource specialist program teacher testified Student was unable to access the general education curriculum even with significant modifications. Student was placed in Anderson's resource classroom for the duration of the due process complaint as part of the stay put provision in the August 16, 2021 settlement agreement between Folsom-Cordova and Parent in the event of a dispute. Anderson testified Student might greet her on some days when he entered the classroom, he was sometimes understandable, and she has witnessed him screaming and yelling.

As to the third prong of *Rachel H.*, the effect the child will have on the teacher and children in the regular class. Student had a significantly adverse effect on his teacher and the classroom as a whole. Wickenheiser noticed Student's behavior significantly deteriorated around Thanksgiving 2021. Student's behavior proved to be a

great disruption to other children in the classroom and he demanded a significant amount of time from Wickenheiser and his one-to-one aide. Moreover, his increasingly volatile behavior frightened his classmates. His behavior included

- hitting teachers,
- headbutting adults,
- punching a fellow student,
- pulling another student's hair,
- throwing his shoes and scissors across the room, and
- wiping feces on his school aide.

Finally, Folsom-Cordova established that the costs of mainstreaming Student were not a factor here. The March 24, 2022 IEP offered Student a full-time aide in the moderate-to-severe classroom, which was the same support Student contends would enable him to attend a general education classroom. Applying the *Rachel H.* factors to the facts, Student could not have been satisfactorily educated in a general education classroom with a one-to-one aide. Therefore, the least restrictive environment analysis requires a determination of whether Student was to be mainstreamed to the maximum extent that is appropriate per *Daniel R.R.*

In addition to a one-to-one aide, supplemental aides and services could not overcome Student's significant delays to make the grade level curriculum in special education classes accessible. Student's academic abilities were pre-kindergarten level. He was unable to access the curriculum in his mild/moderate classroom. He struggled to write his name, recognize basic site words, and count beyond five utilizing touch points as a support. Student was unable to do fourth grade level work even with supportive services and interventions. Moreover, he was not a benign presence in the

classroom as his erratic behavior frightened other students. Folsom-Cordova established it attempted to ameliorate his behavior by utilizing the school site behaviorist's support without success.

Meanwhile, Wickenheiser, testified further to how Student struggled with his academics such as sight words and simple addition. Student's academic needs exceeded what she could provide in her mild-to-moderate special day class. She opined that Student's behavior, size, and explosiveness rendered his attendance in a general education classroom even with aide support inappropriate. She testified that he was, in her words, too big and too strong not to be a danger to himself in a general education classroom.

Student proffered Dr. Theresa Edwards as an expert witness to discuss placement. Edwards was a licensed educational psychologist, with 25 years' experience in public schools. However, upon further examination of Edwards' professional background, her last four years of experience were primarily related to overseeing counseling services rather than working with or assessing Students.

Edwards testified she met Student for the first time on October 22, 2022, the Saturday prior to her Monday, October 24, 2022 testimony, where she observed him via videoconference. Approximately half of her observation period was spent speaking with Parent about her dissatisfaction with Student's current offer. Edwards did not observe Student at school, speak with his teachers, or have any familiarity with the Folsom-Cordova programs. She did not conduct any assessments of Student or observe him away from Parent. Edwards testified Student was often non-responsive to her questions. Edwards's testimony lacked any specific focus or intent. She provided no testimony to persuasively challenge Folsom-Cordova's offer of placement or the appropriateness of

the services offered in the March 24, 2022 IEP. Further, Student made no mention of Edwards's testimony in his closing brief. Edwards's testimony was largely meaningless and was given little weight.

The moderate-to-severe special day class Folsom-Cordova offered would be taught by Teresa Lawson, or another similarly qualified and credentialed special education teacher. Lawson has spent 26 years in special day classes, first as an instructional assistant for 16 years and since 2011 as a teacher. She was described by Lin as the special education teacher he relies on to assist in training other moderate-to-severe special day class teachers. In a moderate-to-severe special day class Folsom-Cordova uses Unique Curriculum, an alternative curriculum that teaches functional and adaptive living skills. In Lawson's current moderate-to-severe special day class there were 12 students and six adults, for a student-to-teacher ratio of two-to-one. Some students had one-to-one aides as well. Lawson testified she was experienced at implementing accommodations like those Student had in his IEP. She was also experienced in working with students who were intellectually disabled or had a diagnosis of autism.

Placement is the primary issue in this case. Student argues his needs can be met in a general education classroom with a one-to-one aide. However, Student is failing in his current placement. Student's placement in a mild-to-moderate special day class by the parties' August 16, 2021 settlement agreement had the effect of a trial of how Student could perform in a less restrictive environment with a one-to-one aide. Even with a one-to-one aide, Student struggled in a mild-to-moderate program. Unable to access grade-level curriculum, Student lashed out, his behavior deteriorated,

and he became a threat to himself and others in the classroom. All evidence taken demonstrates Student performed poorly as he struggled to appropriately interact with his peers and behave appropriately.

Folsom-Cordova met its burden of proving that the March 24, 2022 IEP, as amended in May 2022, offered Student a FAPE. Folsom-Cordova proved the March 24, 2022 IEP was appropriate at the time of offer and remains appropriate for Student today. It meets Student's needs, is reasonably calculated to provide Student educational benefit in light of his circumstances, and it offers placement in the least restrictive environment. Folsom-Cordova may implement the March 24, 2022 IEP over parental objection.

STUDENT ISSUE 1 a-g: DID FOLSOM-CORDOVA DENY STUDENT A FAPE DURING THE 2021-2022 SCHOOL YEAR FROM JULY 1, 2022 THROUGH AUGUST 18, 2022?

Student alleges Folsom-Cordova denied Student a FAPE during the 2021-2022 school year because Folsom-Cordova failed

- to conduct a functional behavior assessment,
- provide an appropriate behavior intervention plan,
- offer supports and services in the areas of behavior, speech, occupational therapy, adaptive physical education,
- offer a one-to-one aide,
- offer accurate, ambitious and measurable goals in speech and language,
- occupational therapy, adaptive physical education, regression, and
- offer an appropriate placement in the least restrictive environment.

The 2021-2022 school year ended for Folsom-Cordova on May 26, 2022. Folsom-Cordova's extended school year ran from June 6, 2022 to July 1, 2022. As part of the settlement agreement Parent expressly waived any claims against Folsom-Cordova for any FAPE denials, or any disputes on goals, services, and placement during the 2021-2022 school year and extended school year. The term of the settlement agreement ran until June 30, 2022. As discussed above, Student did not waive the right to challenge whether the March 24, 2022 IEP as amended by the May 2022 IEP did not offer Student a FAPE.

For the first time, in his closing brief, Student argues that the entire 2022-2023 school year is also at issue, despite clarifying the timeline as the 2021-2022 school year through August 18, 2022 on the record multiple times. Student's arguments to consider time beyond August 18, 2022 were not considered. Additionally, nothing in this Decision prevents Student from litigating the 2022-2023 school year after August 22, 2022; however, it is outside the scope of the current hearing and decision.

The 2022-2023 school year started for Folsom-Cordova on August 9, 2022. All of Student's claims for school year 2021-2022 prior to July 1, 2022 are barred by the terms of the settlement agreement. The decision also analyzed whether Student met his burden to demonstrate Folsom-Cordova denied him a FAPE from July 1, 2022 until August 22, 2022.

Student argues Folsom-Cordova failed to conduct a functional behavior assessment of Student prior to changing his placement. A functional behavior assessment is required when a child is removed from their placement due to problem behaviors. (20 U.S.C. §1415(k)(1)(D)(ii).) Student conflates the requirement to conduct an FBA following a disciplinary change of placement with any proposed placement



change. Student fundamentally misinterprets this legal requirement. Further, reassessment shall occur at least once every three years, unless the parent and the local education agency agree, in writing, that reassessment is needed. (Ed Code §56381(a)(2).) At hearing Folsom-Cordova proved it developed an appropriate IEP that offered Student a FAPE. Despite the offer of new assessments, Student did not meet his burden that Student required a functional behavior assessment.

Student alleges Folsom-Cordova failed to offer Student an appropriate behavior intervention plan. As discussed in Issue 3 above, Student's March 24, 2022 IEP offered a behavior intervention plan. The behavior intervention plan was developed by a board-certified behavior analyst. The behavior intervention plan was reviewed by Parent at the March 24, 2022 IEP team meeting. Student's advocate requested it be implemented to help address Student's behavior issues. As discussed above, the plan

- identified Student's antecedent behavior, desired behavior, problem behavior, and alternative behavior,
- provided strategies to better identify the antecedent behavior to avoid the maladaptive behavior and replace with desired behavior,
- contained de-escalation strategies, and strategies for his classroom teacher and aide.

Student failed to meet his burden that Folsom-Cordova did not offer an appropriate behavior plan.

Student alleged in his complaint, and Issue 1c is limited to, that Folsom-Cordova failed to offer supports and services in the areas of behavior, speech and language, occupational therapy, and adaptive physical education. As discussed above in Issue 3, the March 24, 2022 IEP offered Student behavior intervention services, speech and

language services, occupational therapy and adapted physical education. In his closing brief, Student argues that these supports and services were indeed offered, but not sufficient, which is not the issue alleged or argued at hearing. Student failed to meet his burden on Issue 1c.

Student alleges Folsom-Cordova failed to provide Student with a one-to-one aide. The August 16, 2021 settlement agreement provided for a one-to-one aide. Student's March 24, 2022 IEP offer as amended in May 2022 offered a one-to-one aide. Parent testified she wanted to designate a specific person as his aide. She further testified she believed Student's aide was sometimes used as a classroom aide. Lin, Wickenheiser, Arnold, and Student's service providers all testified Student had a one-to-one aide. Student further cited no law that would require Folsom-Cordova to provide a designated person rather than the service of a one-to-one aide. Moreover, Student, in fact, received the services which he alleges he did not. Student failed to meet his burden on Issue 1d.

Student alleges Folsom-Cordova failed to offer accurate, ambitious, measurable goals in speech and language, occupational therapy, and adapted physical education. The terms of the settlement agreement barred Student from challenging whether Student received a FAPE during the 2021-2022 school year through June 30, 2022. As discussed above, the goals offered in Folsom-Cordova's March 22, 2022 IEP were appropriate, ambitious, and measurable. Student provided no persuasive evidence to demonstrate that the goals were not appropriate. Moreover, Student alleged in his closing brief he received his education through a virtual platform, where all evidence to the contrary, Student was educated in person. Student failed to meet his burden on Issue 1.

Student alleged Folsom-Cordova failed to address regression in Student during the 2021-2022 school year. Student argued he had regressed since August 2021. Student, per the settlement agreement, was to receive regression services through a nonpublic agency during the period in question. OAH does not have jurisdiction to enforce a settlement agreement. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223. F3d 1026, 1030.) The California Department of Education is the appropriate agency to address enforcement of settlement agreements.

Student failed to meet his burden of proof to demonstrate Folsom-Cordova failed to offer Student a FAPE during the 2021-2022 school year and from July 1, 2022 through August 18, 2022.

## 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.

### ISSUE 1a:

Folsom-Cordova did not deny Student a FAPE during the 2021-2022 school year, or from July 1, 2022 through August 18, 2022, by failing to conduct a functional behavior assessment.

Folsom-Cordova prevailed on Issue 1a.

#### ISSUE 1b:

Folsom-Cordova did not deny Student a FAPE during the 2021-2022 school year, or from July 1, 2022 through August 18, 2022, by failing to offer an appropriate behavior intervention plan.

Folsom-Cordova prevailed on Issue 1b.

#### ISSUE 1c:

Folsom-Cordova did not deny Student a FAPE during the 2021-2022 school year, or from July 1, 2022 through August 18, 2022, by failing to offer supports and services in the areas of behavior, speech and language, occupational therapy, and adaptive physical education.

Folsom-Cordova prevailed on Issue 1c.

#### ISSUE 1d:

Folsom-Cordova did not deny Student a FAPE during the 2021-2022 school year, or from July 1, 2022 through August 18, 2022, by failing to offer appropriate intensive individual services in the form of a one-to-one aide.

Folsom-Cordova prevailed on Issue 1d.

#### ISSUE 1e:

Folsom-Cordova did not deny Student a FAPE during the 2021-2022 school year, or from July 1, 2022 through August 18, 2022, by failing to offer accurate, ambitious, measurable goals in speech and language, occupational therapy, and adaptive physical education.

Folsom-Cordova prevailed on Issue 1e.

#### ISSUE 1f:

Folsom-Cordova did not deny Student a FAPE during the 2021-2022 school year, or from July 1, 2022 through August 18, 2022, by failing to address regression.

Folsom-Cordova prevailed on Issue 1f.

#### ISSUE 1g:

Folsom-Cordova did not deny Student a FAPE during the 2021-2022 school year, or from July 1, 2022 through August 18, 2022, by failing to offer an appropriate placement in the least restrictive environment.

Folsom-Cordova prevailed on Issue 1g.

#### ISSUE 2:

Folsom-Cordova did not deny Student a FAPE by failing to offer sufficient programs and supports needed to enable Student to receive educational benefit,

specifically in the areas of behavior intervention services, speech and language, and occupational therapy, physical therapy, and adapted physical education in the March 24, 2022 IEP and subsequent amendments.

Folsom-Cordova prevailed on Issue 2.

### ISSUE 3:

Folsom-Cordova's March 24, 2022 IEP offer as amended in May 2022, offered Student a FAPE.

Folsom-Cordova prevailed on Issue 3.

### ORDER

1. All relief sought by Student is denied.
2. Folsom-Cordova may implement the March 24, 2022 IEP 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.

Tiffany Gilmartin

Administrative Law Judge

Office of Administrative Hearings