

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022010022

FALLBROOK UNION ELEMENTARY SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

July 28, 2022

On January 3, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Fallbrook Union Elementary School District, naming Student. The due process hearing was continued on January 12, 2022. Administrative Law Judge Alexa Hohensee heard this matter by videoconference on May 17, 18, 19 and 20, 2022.

Jonathan Read and Madisyn Ukrainetz, Attorneys at Law, represented Fallbrook. Leonard Rodriguez attended all hearing days on Fallbrook's behalf, and Stephanie Blinco-Martinez attended all hearing days on Fallbrook's behalf after testifying on the first day. Parents represented Student and attended all hearing days on Student's behalf.

At the parties' request the matter was continued to June 30, 2022, for written closing briefs. The record was closed, and the matter was submitted on June 30, 2022.

ISSUES

In this Decision, a free appropriate public education will be called a FAPE. An individualized education program will be called an IEP.

1. Did Student's IEP, developed on November 3, 8, and 17, 2021, offer a FAPE in the least restrictive environment?

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).) Here, Fallbrook filed the complaint and had the burden of proof. 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 eleven years old and in fifth grade at the time of hearing. Student resided with Parents within Fallbrook's geographic boundaries at all relevant times. Student was eligible for special education under the categories of orthopedic impairment and other health impairment. Her primary qualifying disabilities were Leigh's Syndrome and cerebral palsy. Leigh's Syndrome was a progressive disease that caused cell breakdown and affected the functioning of all parts of Student's body. Cerebral palsy caused weak muscles and limited Student's control over her muscles and movement.

ISSUE 1: DID STUDENT'S IEP DEVELOPED ON NOVEMBER 3, 8 AND 17, 2021 OFFER STUDENT A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT?

Fallbrook contends that the IEP developed on November 3, 8 and 17, 2021, and called the November 17, 2021 IEP in this Decision, offered Student a FAPE in the least restrictive environment. Fallbrook contends that its triennial evaluation of Student identified all of Student's areas of educational need, for which appropriate goals were written, and that the special education, related services, accommodations and supports, and placement offered in the November 17, 2021 IEP were reasonably calculated to enable Student to make progress appropriate to her circumstances. Specifically, Fallbrook contends it appropriately addressed Student's need for health care support by offering a registered nurse or licensed vocational nurse on campus and available within five minutes, and a one-to-one trained health care technician to accompany Student throughout the day and during transportation to and from school.

Student contends that she needed a registered nurse or licensed vocational nurse with her at all times, at school and during transportation. Student also contends the triennial multidisciplinary assessment report prepared by Fallbrook's assessors failed to identify Student's needs adequately or accurately. Student specifically contends that because much of the triennial assessment took place at the end of the 2020-2021 school year when Student was attending school online, the information obtained by the assessors was insufficient and inaccurate regarding Student's needs when attending school in-person.

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 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. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. ____ [137 S.Ct. 988, 1000].)

STUDENT'S TRIENNIAL ASSESSMENT

When developing a student's IEP, the IEP team must consider certain information. This includes the strengths of the student, the concerns of the parents for enhancing the education of the student, the results of the most recent assessment of the student, and the academic, developmental and functional needs of the Student. (Ed. Code, § 56341.1, subd. (a).) Specifically, the team must consider the results of any reassessment of the Student completed by the school district. (Ed. Code, § 56341.1, subd. (d)(2).)

Fallbrook conducted a multidisciplinary assessment of Student for the triennial review of her IEP. The assessment included

- health,
- psychoeducational,

- academic achievement,
- language and speech,
- occupational therapy,
- adapted physical education, and
- physical therapy components.

The assessment began in May 2021, during the 2020-2021 school year when Student was in fourth grade and attending classes virtually. The assessment continued into the 2021-2022 school year and ended in November 2021. Student began attending school in-person in September 2021, although she was often kept at home to avoid exposure to COVID-19. COVID-19 is an airborne virus that can cause flu-like symptoms and death, and to which Student was particularly vulnerable due to a weakened immune system.

Fallbrook established that each component of the multidisciplinary assessment was carefully and properly completed to render accurate and valid results. Each of the assessors was qualified to conduct the assessments and interpret the results. They were familiar with Student and Student's disabilities, chose their assessment instruments and procedures based upon their knowledge of Student, and were trained and knowledgeable in them.

The assessors used multiple assessments and a variety of assessment tools including records review, observation, interview, and standardized and non-standardized instruments to evaluate Student in the areas of

- health and development,
- academic achievement,
- communication development,

- assistive technology,
- social emotional and behavioral functioning,
- adaptive behavior, and
- fine and gross motor ability.

The assessment instruments chosen were designed to gather information on Student's functional, developmental, and academic levels to guide Student's IEP team in determining Student's special education eligibility and designing an educational program to meet her needs. Each assessor was aware of the progressive nature of Leigh's disease and the limitations imposed by that disease and cerebral palsy, as well as Student's history of academic delays, communication difficulties, and attention deficits. They chose assessment instruments or assessment strategies appropriate in light of Student's disabilities to ensure accurate results.

The assessments were not racially, sexually, or culturally biased, were given in Student's primary language of English, administered in accordance with instructions, and were valid for the purpose for which they were used. Student had poor vision and difficulty pointing or responding verbally, particularly when tired, which sometimes affected her test results. The assessors noted in the multidisciplinary assessment report where modifications were required for these reasons, and how modifications may have impacted the results. None of the assessors relied upon a single measure or criterion, and together, the components of the multidisciplinary assessment were sufficiently comprehensive to identify all of Student's educational needs, whether or not linked to Student's disabilities.

The test instruments used were technically sound, and as a whole demonstrated the effect of cognitive, behavioral, physical, and developmental factors on Student's functioning. The assessment results were valid, and provided useful information regarding Student's

- health and development,
- social communication,
- social emotional functioning,
- behavioral functioning,
- adaptive behavior,
- academic achievement,
- cognitive processing,
- motor abilities, and
- use of assistive technology.

The assessment results demonstrated that Student had overall low to below-average cognitive abilities. Student had made progress in some academic areas, but still needed academic intervention in reading, writing and math. Student had limited breath control for speaking and could be difficult to understand. She made friends easily, and was very social, but had delayed social skills. Student had very limited body control and strength, and depended on adults for every aspect of daily living.

The multidisciplinary assessment report included the assessors' conclusions that Student needed special education and related services, and their basis for making that determination. The multidisciplinary report contained information from multiple assessors on observations of Student in a variety of online, school and test settings, and the relationship of Student's behavior to academics and social functioning. The

assessors reported the relationship of Student's behavior to her academic and social functioning, and educationally relevant health, development, and medical findings, including Student's diagnoses of cerebral palsy and Leigh's Syndrome. Parents reported a history of abuse and trauma prior to Student's adoption one year earlier in Fall 2020. The assessments reported no concerns with environmental, cultural, or economic disadvantage.

At or before the November 3, 2021 IEP team meeting, Parents were timely provided with the multidisciplinary assessment report that explained all of the assessments, the results, and included recommendations for Student's education. The report was discussed at the November 3, 8 and 17, 2021 IEP team meetings, that were attended by all necessary people and in which Parent fully participated.

HEALTH AND DEVELOPMENT

Registered nurse and credentialed school nurse Kitty McNeil conducted a health and development assessment. Nurse McNeil reported that Leigh's Syndrome was a complex and rare mitochondrial disorder. Leigh's Syndrome caused breakdown of the mitochondria, or the energy source, of cells throughout the body. It was a degenerative neurological condition, and signs and symptoms usually progressed rapidly. Because there is no cure for Leigh's Syndrome, management of Student's health condition focused on addressing symptoms and keeping her comfortable.

Student had a gastrostomy tube in her abdomen, called a G-tube, asthma, and poor vision even when wearing glasses. Student could verbally express her wants and needs, and point at objects, but her abilities were dependent upon her limited energy level and breath control. She could use an eye-gaze device to construct sentences and

communicate when she lacked the energy to speak. She attended school in a wheelchair and had limited ability to move, stretch, or control her limbs. For the most part, Student depended upon adult assistance for all physical needs.

Student had to be repositioned in her wheelchair every two hours to protect skin integrity. She had to be lifted out of her chair for toileting and was at increased risk of injury during transfer because she did not have full control of her limbs and could not assist in the transfer. Student was over 50 pounds and needed two to three adults to assist in the transfer. Student was fed through her G-tube and needed her nose and mouth cleared by suctioning. She took several medications at school daily and had prescriptions in the event of a severe asthma attack or seizure. Student had not had a severe asthma attack or seizure at school.

Student had a team of treating physicians, nine of whom had written prescriptions or orders for the school district, which Nurse McNeil summarized in her report. Many of the orders required clarification because they did not contain sufficient information or contained incorrect information. Nurse McNeil testified that it was not unusual for parents to write letters for a doctor's signature, but the orders for Student frequently needed multiple corrections or clarifications. For example, one doctor wrote that Student needed a cough assist machine and chest physiotherapy at school when Student had a cough, runny nose, and congestion for over four hours, but those were not symptoms of Leigh's Syndrome and all students with such symptoms would be sent home sick. Doctors' letters concerning Student being fed through her G-tube were conflicting, and because Nurse McNeil could not get clarification, Student's father went to school each day at lunch to feed Student. At the time that Nurse McNeil completed

the health and development assessment report, on October 26, 2021, Parent had not consented for Nurse McNeil or any other school staff to communicate with any of Student's prescribing providers for clarification of doctors' orders.

Nurse McNeil testified at hearing with a professional demeanor, answered questions readily and thoroughly, and demonstrated good memory and familiarity with Student and her medical conditions. Her testimony was credible and persuasive. Nurse McNeil explained that she frequently speaks with doctors to clarify and get a better understanding of student needs addressed by doctors' orders. Both independent expert Howard Taras, MD, and Student's treating physician Richard Haas, MD, similarly testified that doctors frequently speak with school nurses to clarify doctors' orders. All three testified consistently and persuasively that it is important for treating physicians and school nurses to communicate when there are school orders to ensure that the student's IEP team has a good understanding of the student's health care needs.

Parent testified at hearing and appeared open and sincere in describing Student's needs as she saw them. Parent was not asked, and did not explain, why she would not consent to allow Nurse McNeil to communicate with any of Student's doctors. Parent's testimony did not contradict any of the results of Fallbrook's health assessment. Parent did not identify any health or developmental issues that were not included in the health and development portion of the multidisciplinary report.

Student's treating physician Dr. Haas testified at hearing. He was professional in demeanor and familiar with Student's health needs. His testimony did not contradict the results of Fallbrook's health assessment, and he did not identify any health or developmental issues that were not included in the multidisciplinary assessment.

Nurse McNeil recommended communication between the school nurse and prescribing providers to clarify orders, and to help Student's health care team understand the school environment and school health options. She recommended that Student receive health services at school from trained paraprofessionals, called health care technicians, under the supervision of a licensed vocational nurse or registered nurse. Disruption to Student's educational time could be minimized by having as many procedures as possible done in the classroom, and behind a barrier to protect Student's dignity. A Hoyer lift, which is a mechanical lift that uses a sling, was recommended to make transfers to and from Student's wheelchair. The Hoyer lift helped to ensure the safety of both Student and the adults transferring her.

The health and development portion of Fallbrook's multidisciplinary assessment identified all Student's health and developmental needs in the school environment, summarized her present levels in those areas, and provided Student's IEP team with accurate and helpful information for developing Student's educational program.

COGNITIVE, SOCIAL EMOTIONAL AND BEHAVIORAL FUNCTIONING

School psychologist Courtney Strickland conducted a psychoeducational assessment of Student's cognitive ability, social emotional functioning, and behavior. Student's cognitive abilities were assessed using alternative measures rather than an intelligence quotient test. Student had good short-term and long-term memory, which was helpful in learning and applying new concepts. However, her processing of visual information was below average, and her processing of auditory information was well below average, which meant that Student struggled to understand and recall both what she read and heard.

Based upon responses from Parent to a developmental questionnaire, Student was delayed in several developmental areas. Student's physical abilities and self-help skills were less than that of a one-year-old, and her social emotional functioning was at the four-year-old level. Her communication skills were below average, at the seven-year-old level.

Student's teachers rated her behavior. Student was at risk for learning problems, study skills difficulties and poor functional communication. Student had anxiety, was sometimes argumentative and defiant at home, and was at risk for internalizing problems and depression. Student's teachers reported that Student had friends at school and appeared happy. They had no concerns with Student's social emotional functioning in the school setting, which was consistent with Strickland's observations.

Strickland observed Student at the end of the 2020-2021 school year when Student was attending school online, and again at the beginning of the 2021-2022 school year after Student began attending Darcie Oppenheimer's fifth grade general education classroom in-person. Student was easily distracted and frequently off task, although she enjoyed participating in class discussions and answering teacher questions with the assistance of a one-to-one health care technician. The one-to-one health care technician not only monitored Student's health, but helped Student focus, prompted Student's responses, acted as a scribe, and relayed what Student said if Student's voice was too soft to be heard by others.

Strickland concluded that Student's cognitive strength was memory, but her cognitive weakness was in processing information. Strickland reported that Student was happier with, and more attentive to, learning with her classmates in-person, and should do better academically and socially in fifth grade than she did in fourth grade because

Student was physically in a classroom. Student was often off-task and benefitted from adult assistance for redirection and assistance in participating in class activities. Strickland recommended that Student be placed in a well-structured learning environment that was carefully planned for her and consistent in terms of physical arrangement, schedule of activities, and expected behavior.

The cognitive, social emotional functioning, and behavioral portion of Fallbrook's multidisciplinary assessment accurately identified Student's cognitive, social emotional and behavior needs related to the school environment. The assessment summarized Student's present levels in those areas and provided Student's IEP team with accurate and helpful information for developing Student's educational program.

ACADEMIC ACHIEVEMENT ASSESSMENT

Kriselle Aragon, a credentialed special education teacher and Student's case manager at Fallbrook, assessed Student's academic achievement. She did not administer timed tests, as Student required additional time to answer questions or point to answers due to her disabilities.

In reading, Student had average ability to sound out words, but was well below average in recognizing sight words, applying phonetic skills and in reading comprehension. Student had difficulty providing missing words in a sentence and answering questions about what she read.

In writing, Student demonstrated skills in the average range for producing meaningful single sentences to support a visual prompt, but was below average in filling

in missing pieces of a story. She was well below average in spelling words spoken to her. Student had great thoughts when tasked with written work but needed an aide to write for her.

In math, Student was well below average in all categories. She had difficulty performing math calculations and solving practical math problems by applying math concepts. Student enjoyed answering addition and subtraction problems but had difficulty as the problems grew harder and with multiplication.

Aragon recommended that Student receive remedial reading intervention to build literacy and vocabulary skills, and to expand her phonological processing skills. She also recommended Student listen to audio of the material she was reading, so that she could listen while following the text of lessons. To build writing skills, Aragon recommended writing intervention focused on spelling and creation of more complex sentences, with a scribe to assist her. Aragon also recommended a variety of interventions in math, focusing on both calculation and solving practical problems.

The academic achievement portion of Fallbrook's multidisciplinary assessment accurately portrayed Student's academic skills in reading, writing and math. It identified all Student's academic needs in the school environment, summarized her present levels in those areas, and provided Student's IEP team with accurate and helpful information for developing Student's educational program.

SPEECH AND LANGUAGE ASSESSMENT

Student's speech and language assessment was conducted by Zoe De Venture, a licensed speech-language pathologist who had provided Student with speech therapy two times per week since Fall 2020.

During a classroom observation in June 2021, while Student attended online and was muted, Student appeared to follow the lesson with the assistance of her in-home nurse. After Student returned to school in Fall 2021, De Venture observed Student in-person in her general education classroom where Student sat with other students and participated in a classroom discussion, although Student's speech was fatigued.

Student had no vocal abnormality, but her speech accuracy depended on whether Student had the muscle strength for breath control and speech on a particular day or time. During speech testing, Student required a break after 40 minutes. Student preferred speech to a communication device, but was often difficult to understand. Intelligibility ranged from 70 percent according to Aragon, and 30 percent according to De Venture. Because verbal communication fatigued Student, she spoke just a few words or very slowly to get her point across. Student understood grade level material receptively, but her limited communication ability impacted her expressive language. De Venture concluded that Student's greatest area of need was articulation for basic functional communication.

De Venture incorporated the results of a 2017 augmentative and alternative communication assessment in the speech and language assessment. During trials of several communication devices, Student was limited by deficits in coordinated muscle control, and she functioned better using low-tech devices, such as pointing to icons or

choices on a page. She used an eye scan device to activate left and right switches, but became frustrated with the time and effort it took to navigate icons on that device. Student preferred verbal communication.

No evidence, expert or otherwise, contradicted De Venture's opinions or the results of her assessment report. The speech and language portion of Fallbrook's multidisciplinary assessment accurately portrayed Student's speech and language needs. It identified all Student's functional communication needs in the school environment, summarized her present levels in those areas, and provided Student's IEP team with accurate and helpful information for developing Student's educational program.

GROSS MOTOR/ADAPTED PHYSICAL EDUCATION ASSESSMENT

Credentialed physical education teacher and adapted physical education specialist Kelly Pittman assessed Student's gross motor abilities. Pittman had worked with Student since 2017 by modifying Student's physical education program to allow her to access California's physical education standards.

Pittman, unable to administer standardized assessments of Student's gross motor abilities due to Student's disabilities, relied primarily on observations and records review. Student demonstrated limited gross motor movement and required assistance to stretch or join in school-based games. Pittman observed over the years that the progressive nature of Leigh's Syndrome resulted in a decrease in Student's ability to manipulate her arms, which she used in school-based activities and for communication, such as pointing to a correct answer. Pittman recommended continued adapted physical education for Student to access in-school physical education.

No evidence, expert or otherwise, contradicted Pittman's opinions or the results of her assessment report. The gross motor/adapted physical education portion of Fallbrook's multidisciplinary assessment accurately portrayed Student's gross motor needs for access to physical education. It identified all Student's needs for accessing California's physical education curriculum, summarized her present levels in those areas, and provided Student's IEP team with accurate and helpful information for developing Student's educational program.

OCCUPATIONAL THERAPY ASSESSMENT

Courtney Sahagun, a registered occupational therapist, assessed Student's fine motor abilities. Sahagun had provided consultation to Student's teachers and related services providers since the 2018-2019 school year on adaptations and strategies to allow Student to access her educational setting and promote growth in academics.

Sahagun did not administer standardized assessments due to Student's physical limitations, but had Student demonstrate what she could do or verbalize answers. Student could cross her midline with her dominant hand and the assistance of an aide. Student could lift items weighing less than half a pound from her lap with a pincer grasp. She could grip a pencil or crayon using an egg-shaped grip cushion but needed hand-over-hand assistance from her aide to make a mark on paper due to a lack of strength and control. Student was unable to maintain an upright position in her wheelchair without support. Sahagun concluded that Student was dependent upon adult assistance for all school-related self-help needs and recommended continued occupational therapy consultation to provide Student's educational team with adaptations and strategies for Student to access her education.

No other occupational therapist was called to contradict Sahagun's opinions or the results of Sahagun's assessment report. The occupational therapy portion of Fallbrook's multidisciplinary assessment accurately identified all Student's fine motor needs in the school environment, summarized her present levels in those areas, and provided Student's IEP team with accurate and helpful information for developing Student's educational program.

PHYSICAL THERAPY ASSESSMENT

Normini Briones, DPT, a licensed physical therapist and doctor of physical therapy with over 16 years of experience, assessed Student's gross motor physical therapy needs. Unlike adapted physical therapist Pittman, who looked at Student's gross motor abilities for purposes of accessing California's physical education curriculum, Dr. Briones assessed Student's ability to access the school environment. Dr. Briones had consulted with Student's teachers and service providers for over two years prior to the assessment under previous IEPs.

Dr. Briones evaluated Student's ability for movement, locomotion, transfer, and to change position for access to school motor activities. She used observation, interviews with teachers and Parents, and record review to complete a motor component checklist. Student required adult assistance and adaptive equipment in performing all activities of daily living, such as feeding, toileting, wheelchair mobility and positioning. Student's disability caused involuntary movements that contributed to a lack of coordination, making her unable to maintain active motion against gravity. Student tired easily. She could participate in physical activities for a maximum of about 10 minutes without a break, although her tolerance varied daily. Student required adaptive equipment in the

classroom, including an adaptive table to hold enlarged assignments and a mobile holder for her eye-gaze communication device. She also required an adapted toilet and changing table.

Dr. Briones recommended continued use of the adaptive equipment already in place, and consistent with McNeil's recommendations, also suggested a Hoyer lift to transfer Student from her wheelchair to the toilet and changing table. As part of the assessment, Dr. Briones arranged a demonstration of the Hoyer lift for Fallbrook staff and Parents. At Parents' request, Dr. Briones arranged for representatives of California Children's Services, who served Student in the home, to attend the demonstration. During the demonstration, Parent caught a bar that slipped and would have hit Student in the head while Dr. Briones was taking questions from those in attendance. The Hoyer lift had a soft sling to avoid skin abrasion, but Student was wary of the feeling of swinging from one place to the next. Dr. Briones opined that the bar would not slip during a routine transfer if the staff members effecting the transfer were specifically instructed about the bar and able to focus on the mechanism, and that Student could be introduced slowly to the lift and made comfortable with the feeling of moving through space. Several Fallbrook staff members had been injured attempting to lift Student for transfers, as Student was getting older and heavier, and California Children's Services was exploring use of a Hoyer lift in the home.

Dr. Briones recommended that Student's teachers and staff continue to receive consultation services from an occupational therapist to address any access or movement issues that might come up in the school environment. Dr. Briones did not recommend direct occupational services because Student relied on adult assistance for all functions of daily living and could access the school environment with that assistance.

No other physical therapist was called to contradict Dr. Briones's opinions or the results of Dr. Briones's assessment report. The physical therapy portion of Fallbrook's multidisciplinary assessment accurately portrayed Student's gross motor abilities for access to the school environment. It identified all of Student's gross motor needs throughout the school day, summarized her present levels in those areas, and provided Student's IEP team with accurate and helpful information for developing Student's educational program.

DOCTORS' ORDERS AND INDEPENDENT MEDICAL ASSESSMENT

As part of the assessment process, and as a matter of best practice, Nurse McNeil wanted to clarify doctors' letters received by Fallbrook, particularly two that referenced school staff. Fallbrook wanted an independent medical expert to speak with Student's doctors and review Student's file to assist in understanding the recommendations that impacted Student's educational program.

To meet the needs of medically fragile students, school districts may seek an independent medical reevaluation of the student to resolve conflicting and incomplete information about the student's condition. (*Shelby S. v. Conroe Independent School District* (5th Cir. 2006) 454 F.3d 450, *cert. denied* (2007) 549 U.S. 1111.)

A letter dated October 5, 2020, by Student's palliative physician Krishelle Marc-Aurele, stated that Student required certain health care during the school day. This included

- four medications,
- two G-tube feedings,
- monitoring for choking,
- two adults to assist with transferring Student to the toilet,

- constant assessment for respiratory distress,
- nebulized medications and manual chest therapy if Student was short of breath,
- adult supervision to prevent injury, and
- repositioning of limbs.

Dr. Marc-Aurele's letter stated that Student required a licensed vocational nurse available to her within five minutes throughout the school day to

- monitor for choking,
- assist with toileting,
- provide breathing treatments,
- replace the G-tube,
- attend to leaking tube feeds,
- repositioning limbs, and
- assess if Student was having respiratory distress.

This letter was confusing because all the activities listed could be done by a trained health care technician, except for replacing a G-tube, which was not an emergency situation and was usually done at a hospital. If a G-tube came out, which was a rare event, even a school nurse would simply apply gauze and pressure to the G-tube opening until the student could be transferred to a hospital for tube re-insertion.

The second letter, dated November 16, 2020, was from Student's mitochondrial specialist Dr. Haas. That letter was received in Fall 2020 when students were returning to in-person classes and cautioned that Student might need to attend school online to avoid the of infection that was common during the winter months. Dr. Haas added that it would be helpful to Student if she had a one-to-one licensed vocational nurse to

provide Student's medicines and care. As with Dr. Marc-Aurele's letter, no explanation was given for recommending that a nurse complete tasks usually delegated to a trained paraprofessional in the school setting.

Nurse McNeil requested Parent's permission to contact Drs. Marc-Aurele and Haas, but Parents refused. Parents repeatedly altered Fallbrook's requests for authorization for exchange of information. Parents' revisions so limited contact with Student's physicians as to effectively render the authorizations void.

Fallbrook offered to fund an independent assessment by Dr. Howard Taras. Fallbrook was hopeful that Parents would consent to a neutral review of Student's health care needs by a nationally recognized expert in conjunction with its own assessment of Student. Dr. Taras was on the faculty of the Pediatrics Department of the University of California, San Diego, and a medical consultant to more than 60 school districts in California. Dr. Taras had practiced in school health for over 30 years, assisting medically fragile students to access education. In 2019, Dr. Taras was awarded the Milton Senn Award for distinguished national service in the field of school health by the American Academy of Pediatrics.

Parents consented to the assessment by Dr. Taras in May 2021 and Aragon prepared an exchange of information form to permit Dr. Taras to contact Dr. Marc-Aurele and Dr. Haas. Parent signed the exchange of information form on May 26, 2021. However, Parent altered the document to remove any reference to Fallbrook and to state that Dr. Taras could communicate with Drs. Marc-Aurele and Haas but could not view any medical records. This prevented Dr. Taras from reviewing any underlying documentation upon which the other doctors based their opinions and prevented him from disclosing his own opinions to Fallbrook. The alteration essentially

nullified the purpose of a neutral evaluation, and Fallbrook correctly interpreted it as a lack of consent for Dr. Taras to obtain necessary information from Student's treating physicians. Accordingly, Dr. Taras was limited to reviewing documents already in Fallbrook's possession for his assessment.

On August 25, 2021, Dr. Taras wrote a summary of Student's health care needs taken from Student records and an interview of Nurse McNeil. He cautioned Nurse McNeil against implementing any doctors' orders that could not be clarified. He also explained that physicians were not familiar with school resources and should not be prescribing the personnel to be assigned to a student. Rather, medical doctors were responsible for

- describing the health care needs that must be met during the school day,
- the signs of distress that need to be watched for,
- how quickly a response was required when those signs were detected, and
- the response required.

The school district was responsible for assigning staff capable of addressing those needs within the designated response time.

On September 9, 2021, after the start of the 2021-2022 school year, Fallbrook sent Parents another authorization for exchange of information form that would allow Dr. Taras to communicate with Dr. Marc-Aurele and Fallbrook staff about the level of Student's health care needs at school. Parent signed and returned the form on October 26, 2021, with a handwritten note to limit the exchange to information needed to support Student in school.

On October 26, 2021, Dr. Taras sent Dr. Marc-Aurele a letter describing the medications and services described in letters received by Fallbrook from Student's developmental pediatrician, cardiologist, neurologist, rehab medicine doctor, metabolic medicine doctor, pediatric GI surgeon, gastroenterology and nutrition doctor, pulmonologist, and orthopedic surgeon, and that he would contact her to discuss Student's health care needs as they impacted her education. The doctors' letters prescribed

- clearing of mucus from airways,
- for signs of asthma attack,
- joint stabilizers to be worn and removed periodically for comfort,
- repositioning every two hours to prevent pressure sores,
- assistance for toileting needs,
- feeding through a G-tube, and
- monitoring of whether Student was too hot or too cold.

Dr. Taras informed Dr. Marc-Aurele that Student was doing well in school with a one-to-one paraprofessional to care for her health care needs and a registered nurse at Student's school site. Dr. Marc-Aurele did not return Dr. Taras's calls.

In the interim, Fallbrook staff arranged a three-way call between Dr. Marc-Aurele, Parent, and Nurse McNeil to clarify Dr. Marc-Aurele's letter of October 5, 2020. Parent requested, and Nurse McNeil provided, a list of Fallbrook's questions in advance. However, Parent subsequently canceled the call and it was not rescheduled.

NOVEMBER 3, 2021 IEP TEAM MEETING

ALL IEP TEAM MEMBERS WERE PRESENT AND PARTICIPATED

When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

The IDEA requires that certain members participate in any IEP team meeting, unless excused by the Parent. This includes at least one parent or their representative, a regular education teacher if a student is, or may be, participating in regular education. There must also be a district representative qualified to provide or supervise specially designed instruction, and who is knowledgeable about the general education curriculum and available resources. A person who can interpret the instructional implications of assessments results must also be present, as well as other appropriate individuals at the discretion of the parties. (34 C.F.R. § 300.321(a); Ed. Code, §§ 56341, subd. (b), 56342.5.)

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].)

Student's November 17, 2021 IEP was developed over three days, on November 3, 8, and 17.

All mandatory IEP team members attended each of the IEP meetings. Parent attended all three meetings, accompanied on November 3, 2021 by Student's advocate and representatives of one of Student's home care agencies. Fallbrook team members included

- Student's general education teacher,
- her special education teacher Aragon,
- psychologist Strickland,
- administrator Blinco-Martinez,
- speech pathologist De Venture,
- occupational therapist Sahagun,
- Nurse McNeil,
- adapted physical education teacher Pittman, and
- physical therapist Dr. Briones.

Dr. Taras attended the November 3, 8 and 17, 2021 meetings. Each assessor was qualified to interpret the instructional implications of their assessment result.

Parent expressed her concerns, which included that Student would miss general education time by asking to see the school nurse, that Student needed to be checked for skin breakdown, and that Student needed advance notice and preparation for staff changes. Several paraprofessionals had been injured while transferring Student for

toileting and changed assignments, and Parent stated that due to past trauma Student had to be carefully introduced to new personnel working with her. At the November 3, 2021 IEP team meeting, Parent was informed of Student's problems, expressed when she disagreed with the IEP team's conclusions, and requested revisions in the IEP. In particular, Parent requested that Fallbrook assign a full-time nurse to accompany Student throughout the school day and on the bus to and from school. Student's advocate had never met Student but supported Parent in advocating for a one-to-one nurse.

In summary, all necessary members attended the November 3, 2021 IEP team, and Parent meaningfully participated in decisions made during the development of Student's educational program.

The team reviewed the educational implications of Dr. Taras' conclusions and recommendations from his records review and interview with Nurse McNeil. Dr. Taras had not yet spoken to Dr. Marc-Aurele, but reviewed Student's health care needs with the team. Dr. Taras explained why it was unsafe for Parents to refuse to allow direct communication between Nurse McNeil and Student's doctors. He strongly encouraged Parent to authorize Nurse McNeil to contact prescribing physicians to ensure that everyone had complete information and worked in a collaborative manner to meet Student's health care needs while at school.

Aragon informed the team that she scheduled Student's academics in the morning, as Student fatigued as the day progressed. Aragon reported that Student's avoidance of nonpreferred tasks by asking to leave the classroom to see the school nurse diminished with one-to-one paraprofessional assistance throughout the day. At

Parent's request, the IEP team agreed to track how often Student went to the nurse's office. Parent was also assured that Student could verbalize when she felt anxious and could speak with her teacher or the school counselor when she had anxiety.

The team adjourned the meeting after hearing Parent's concerns and reports from Dr. Taras and Aragon. Team members agreed to continue the meeting to November 8, 2021, to review the multidisciplinary report.

DR. TARA'S CONVERSATION WITH DR. MARC-AURELE

Dr. Taras finally spoke with Dr. Marc-Aurele on November 4, 2021. Dr. Marc-Aurele had not prescribed the majority of Student's medical orders and did not have a detailed understanding of what the school was supposed to provide for Student. During the conversation, it became apparent to Dr. Taras that Dr. Marc-Aurele was not well-informed on Student's full range of health care needs or how they could be addressed at school. For example, Dr. Marc-Aurele believed that Parent was going to the school at lunch to feed Student because there was not a nurse available on campus, not because the school had been unable to clarify feeding orders from the prescribing doctor. When questioned by Dr. Taras, Dr. Marc-Aurele could not identify any health issues that might occur during the school day that could not be handled by a trained paraprofessional, with a school nurse on campus to provide a higher level of care as needed.

NOVEMBER 8, 2021 IEP TEAM MEETING

Fallbrook continued the annual IEP team meeting on November 8, 2021. It was attended by the same Fallbrook team members, and by Parent and Dr. Taras.

Dr. Taras shared the content of his November 4, 2021 call with Dr. Marc-Aurele. He explained to the team that other doctors had prescribed the majority of Student's medical orders and Dr. Marc-Aurele did not have a complete picture of what services and accommodations the school needed to provide for Student. Dr. Taras opined that Student did not need a one-to-one nurse at school, as a trained health care technician could perform the tasks described in the doctors' letters. Parent asked Fallbrook to hire Student's home care nurse for continuity. Dr. Taras explained that other agencies that supported disabled children, such as the Regional Center, often provided nurses in the home either for services not needed at school or for services which, at school, could be addressed by a trained health care technician.

Assessors Strickland, De Venture, Sahagun, Pittman, and Dr. Briones shared the results of their assessments and made their recommendations to the IEP team. In response to a question by Parent, Ms. De Venture explained that the eye gaze device for communication was still the easiest for Student to access, but acknowledged that as Student's eye muscles deteriorated, new communication technologies would need to be tested. Parent expressed her concern that Fallbrook staff did not know how to use the Hoyer lift, but Dr. Briones assured Parent that staff would be trained on the Hoyer lift, and that some staff were already familiar with it from use with other students.

After the assessors reports were finished, the team discussed the assessors' recommendations. Fallbrook provided Parent with ample opportunity to express concerns, ask questions, and participate in the discussion of Student's abilities, present levels of performance, and educationally related needs. This meeting was continued to a later date for completion of the IEP.

NOVEMBER 17, 2021 IEP TEAM MEETING

Fallbrook convened a third IEP team meeting to complete the triennial review of Student's IEP on November 17, 2021. The same Fallbrook members were in attendance, as well as Parent and Dr. Taras.

At that meeting, the IEP team found Student remained eligible for special education under the primary category of other health impairment and a secondary category of orthopedic impairment.

Dr. Taras reported to the team on his recommendations for Student's health care support. Dr. Taras explained that without a call from the school nurse to clarify doctors' letters, prescribing physicians did not understand the nature of the school environment, or the nuances the school health staff grappled with when implementing orders in the school setting. He stated that because Dr. Marc-Aurele did not know Student's full range of health care needs or how they could be implemented in the school, her recommendations were not well informed. He commented that Dr. Marc-Aurele thought Parent was going to school at lunch to feed Student because there was nobody available to assist Student with feeding through her G-tube, although Student's health care technician could be trained on that once the doctors' orders were clarified. Dr. Marc-Aurele did not understand that Fallbrook was not currently implementing the G-tube orders because Nurse McNeil was not able to get clarification on conflicting orders.

Dr. Taras reported that Dr. Marc-Aurele could not identify any health issues that might occur in the classroom that could not be handled by a trained paraprofessional throughout the day, with a school nurse on campus to provide a higher level of care as

needed. Dr. Taras strongly recommended that the school arrange to communicate with Student's doctors, to ensure that everyone knew what signs to look for, what response was required, how quickly the response was required, and what level of training was required to implement that response. He reiterated his opinion that Student's health care needs could be met by a one-to-one trained health care technician accompanying Student at school and on the school bus, with a school nurse available on campus to provide a higher level of care on an as-needed basis.

Dr. Taras testified at hearing. He was a very well qualified pediatrician, who was familiar with all of the medications and procedures referenced in Student's doctors' orders. He answered questions in a very thorough and informative manner. He made a credible witness and provided very persuasive testimony. He opined that all of the services Student required at school could be provided by a trained one-to-one paraprofessional, with a nurse on campus to handle unexpected emergencies. He similarly opined that a trained paraprofessional could meet Student's health care needs during transportation. A trained paraprofessional could administer such medications as an inhaler, apply pressure to a leaking or dislocated G-tube, and even provide CPR until emergency personnel responded in the event of an acute crisis. He explained that Student had a licensed vocational nurse with her when she was at home, but that Student's needs at home were different and more intense, and a one-to-one licensed vocational nurse or registered nurse was not necessary for Student's health care needs at school. Dr. Taras's testimony was logical, well-reasoned and given great weight.

Over the course of the IEP team meetings on November 3, 8 and 17, 2021, the IEP team considered Student's strengths, Parent's concerns for enhancing Student's education, the results of assessments by Fallbrook and Dr. Taras, Student's academic, developmental and functional needs, and whether Student required assistive

technology. (See Ed. Code, § 56341.1, subds. (a) and (b).) They also considered behaviors that impeded Student's learning, such as task avoidance and inattention, and considered the use of positive behavioral interventions and other strategies to address those behaviors. (*Ibid.*) The team used all of this information to develop Student's educational program.

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).)

The November 17, 2021 IEP team identified Student's areas of need as reading, reading comprehension, writing, mathematics, behavior, gross motor, and speech and language, and wrote proposed annual goals to address those needs. Goal 1 required Student to use her left hand to cross her mid-line to retrieve a small item with minimal assistance. Goal 2 required Student to use her augmentative and alternative

communication device to request, comment and answer questions. At Goal 3, Student would write a logical self-generated seven to ten word sentence using her eye gaze device. Goal 4 required Student to read 10 beginning blend words, and Goal 5 required her to orally answer implicit and explicit questions about a fifth grade narrative paragraph. Per Goal 6, Student would calculate multi-digit multiplication problems with the assistance of a multiplication chart. Goal 7 required Student to decrease the number of times in the school day that she was off-topic through the use of positive reinforcement. Each goal designated the appropriate teacher or service provider and special education staff to work on it with Student and track her progress.

The IEP team adopted the proposed goals. The goals as written into the November 17, 2021 IEP were measurable, and included objective criteria, evaluation procedures, and schedules for determining on an annual basis whether the goals were achieved. 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 resulting from her multiple disabilities, and to allow Student to make progress in the general curriculum. Fallbrook 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 November 17, 2021 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 November 17, 2021 IEP team considered supplementary aids and services, and offered Student

- access to a universal cuff to hold a spoon or other tool or utensil,
- flexible seating to ensure auditory and visual access,
- extra time for oral responses,
- verbal and visual clues for increased voice volume,
- large print for printed materials,
- reading material read aloud or using a text to speech device,
- her paraprofessional to write for Student,
- a numbers table and multiplication table for math,
- extended or extra time on assignments and tests.

Student fatigued easily, spoke quietly and needed large print, math supports and prompts to complete classroom assignments. The supplementary aids and services in the November 17, 2021 IEP appropriately accommodated Student's access to the curriculum and activities in all educationally-related settings.

The IEP team also offered Student a plethora of program modifications as support for Student or school personnel assisting Student throughout the school day. These included consultation between the speech pathologist and Student's teachers and providers for 15 minutes per month, and for another 420 minutes per year to assist staff with implementation of Student's eye gaze system, and the eye gaze system itself which could be wheeled along with Student's wheelchair. Support for school personnel included consultation between the physical therapist and Student's teachers and service providers for 15 minutes per month on accessibility, adaptive equipment use, and daily use of the Hoyer lift to effect transfers. Fallbrook IEP team members agreed that Student would be offered a one-to-one health care technician, trained to address Student's health care needs, to assist Student throughout the school day. The IEP offered a one-to-one health care technician on the school bus and the most direct bus route to minimize travel time. Fallbrook offered a licensed vocational nurse or registered nurse on campus, capable of responding to emergencies within five minutes and to supervise Student's health support staff. The IEP team offered Student consultation with the school psychologist for 15 minutes per month. The IEP also offered

- adaptive toilet seating equipment,
- a changing table,
- positive behavior reinforcements,
- simplified assignment and test directions,
- social distancing and ventilation when indoors,
- extra time to prepare before lunch and recess, and
- special attention to teaching hand hygiene.

The accommodations addressed Student's need for health care support, assistance with all activities of daily living, and minimization of fatigue, throughout the school day and during transportation to and from school. They provided regular support for Student's teachers and service providers in how to address Student's ongoing needs as Student progressed or when problems were encountered. The program modifications and other supports were appropriate to support Student and the school personnel who worked with Student.

Fallbrook offered Student adapted physical education services appropriate to provide Student access to State physical education curriculum and participation in physical activities with peers. Adapted physical education services consisted of direct service twice per week for 30 minutes with consultation and collaboration with Student's teachers and staff on using physical education equipment to support Student's gross motor goals. Combined with the support of the collaboration between the physical therapist and Student's IEP team, and the occupational therapist and Student's IEP team, the adapted physical education services also addressed Student's gross motor needs in all school settings. Direct physical therapy and occupational therapy services were not offered and inappropriate in the school setting, as they required an expenditure of energy that would render Student exhausted and unable to learn, rather than ensuring Student's participation in and understanding of classroom instruction.

Fallbrook offered appropriate speech and language services and supports allowing her to access her curriculum, make progress toward goals, and engage in peer interaction. Fallbrook offered 90 minutes per month of group speech therapy, in the general education classroom or on the playground. Fallbrook also offered 90 minutes

per month of individual speech sessions outside of the classroom to address articulation and practice communication using her eye gaze device. By supporting Student's preference for verbal communication, and facilitating her use of the eye gaze device when fatigued, Student would become more independent. The speech and language services would also help Student to work towards common core English Arts standards by articulating what she had read and producing longer and more complex written work.

To further support Student's academic needs, Fallbrook offered 450 minutes per week of specialized academic instruction for teachers and staff to work with Student on her annual goals of reading blended words, writing more complex paragraphs, and solving math problems. The specialized academic instruction would be provided for approximately 90 minutes per day, which Aragon persuasively demonstrated at hearing appropriately supported Student due to her processing deficits, delayed academic skills, and physical difficulty in responding to instruction.

Fallbrook offered extended school year services in a four week program of shortened days to ensure that Student maintained progress on her goals and did not regress over the summer months. The program consisted of 1200 minutes of weekly academic instruction, 30 minutes of weekly speech services, 20 minutes of weekly adapted physical education, and transportation. This offer of services was appropriately designed to prevent regression of Student's skills over the summer break between school years.

At every step in the IEP development process, Parent was provided with ample opportunity to express concerns, ask questions, and participate in the development of Student's educational program. Parent contributed to the discussion of each component of the IEP and continued to advocate for Student to be assigned a one-to-one nurse, preferably Student's in-home nurse.

STUDENT DID NOT REQUIRE A SCHOOL NURSE

Student contends that she needed a one-to-one nurse with her at all times during the school day and transportation, in the event of an emergency such as a seizure or inability to breathe. Fallbrook contends that Student's health care needs could be met by a health care technician trained by Nurse McNeil to provide for Student's health care needs throughout the school day and during transportation.

Federal regulations implementing the IDEA expressly permit school health services to be provided by either a qualified school nurse or other qualified persons. (34 C.F.R. § 300.34(c)(13), see also *Analysis and Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Regs. 46,541 (Aug. 14, 2006).) Districts must consult state law when selecting personnel to provide a particular health service to a student. (*American Nurses Assn v. Torlakson* (2013) 57 Cal. 4th 570, 579 (*Torlakson*).)

In California, designated school personnel other than a school nurse may administer certain medications to students. (Ed. Code, § 49423; tit. 5, Cal. Code Regs., § 604.) Special education students who require specialized physical health care services during the school day may be assisted by designated school personnel trained in the administration of specialized physical health care under the supervision of a school

nurse, for services that are routine for the student, pose little potential harm for the student, are performed with predictable outcomes, and that do not require a nursing assessment, interpretation or decision making by a school nurse. (Ed. Code, § 49423.5, subd. (a)(2).) Specialized physical health care services include catheterization, gastric tube feeding, suctioning, or other services that require medically related training. (Ed. Code, § 49423.5, subd. (d).) In *Torlakson*, the California Supreme Court noted that lay family members and even students themselves often administer certain medications and declined to find that only a nurse could provide such services to students at school.

An educational agency formulating a special education program for a disabled pupil is not required to furnish every special service necessary to maximize the child's potential. (*Rowley, supra*, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir.2006) 464 F. 3d 1025, 1033.) To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program and not on the family's preferred alternative. (*Gregory K., supra*, 811 F.2d at p. 1314.) An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F. Supp.2d 127, 139 [IDEA does not provide for an education designed according to the parent's desires], citing *Rowley, supra*, 458 U.S. at p. 207.) Nor does the IDEA require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at pp. 198-200.) If the school district's program meets the substantive *Rowley* factors, then that district provided a FAPE, even

if the child's parents preferred another program and even if the parents' preferred program would have resulted in greater educational benefit. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.)

Dr. Marc-Aurele's October 5, 2020 letter to Fallbrook stated that Student needed assistance during the school day to administer medications, feed student with a pump, assist her with toileting, assess her for respiratory distress, ensure proper limb positioning, provide nebulized medications and manual chest therapy when Student is short of breath, and that a licensed vocational nurse should be available to Student within five minutes to

- monitor for choking,
- assist with toileting,
- provide breathing treatments,
- replace a G-tube,
- attend to G-tube leaks,
- reposition limbs, and
- assess for respiratory distress.

Dr. Haas's November 16, 2020 letter stated that a one-to-one nurse would be helpful to meet Student's health care needs at school.

Neither of these letters support Student's contention that she needed a one-to-one nurse to meet her health care needs. Dr. Marc-Aurele wrote that a licensed vocational nurse should be available to Student within five minutes, and Dr. Haas wrote that a licensed vocational nurse would be helpful, but neither letter states that a nurse

must be at Student's side for the entire school day or during transportation. Fallbrook was not required to design a program based on Parents' preference for a one-to-one licensed vocational nurse, or to hire Student's in-home nurse.

Nurse McNeil, Dr. Taras, and even Dr. Haas, testified that a licensed vocational nurse was not necessary to perform most of the health care services needed by Student. They testified consistently that the proper way to treat a dislocated G-tube was to apply pressure with gauze to prevent leakage or further harm to the wound and have Parents take Student to the hospital for a re-insertion procedure. Neither a nurse nor a lay person would be expected to re-insert a G-tube, but either could apply the appropriate pressure in the interim. Nurse McNeil testified convincingly that if Student was so sick that she had a fever and could not breathe, she would be sent home like any other Student, and would not be administered breathing treatments and manual chest compressions during the school day by the school nurse or a health care technician. The remaining health services could be provided by a trained health care technician.

Testimony by Nurse McNeil and Dr. Taras established that the health care services required by Student were routine for her. Student's health care needs during the school day, such as suctioning and positioning of limbs, involved simple procedures that posed little potential harm to Student and had predictable outcomes. The health care technicians would be trained to assess for such signs as choking or breathing difficulty, and the school nurse or emergency services were immediately available for assessment, interpretation or decision making involving a higher level of care. Student had been receiving one-to-one health care technician services during the school day

since her return to in-person classes in Fall 2020 and by all reports was doing very well. Although Student liked visiting the school nurse, and was taken to the school nurse on request, Student had not experienced any health care emergencies at school.

Fallbrook established that Student's health care needs could be met by a trained one-to-one health care technician during the school day and during transportation, with an on-campus licensed vocational nurse available to Student in five minutes. Student's licensed vocational nurse witness testified that the school nurse at Student's home school was on call with a walkie-talkie during lunch or breaks, and could get anywhere on campus in less than five minutes. Dr. Taras testified that if Student needed a nurse or doctor's care while on the bus, the health care technician could call 911, and perform CPR if necessary, and emergency services would arrive within five minutes.

The Supreme Court of California has noted that the personnel providing health care services varies from school to school in California, from non-licensed personnel to registered nurses. (*Torlakson, supra*, 57 Cal.4th at p. 577.) In a case challenging the need for a one-to-one nurse at school, the U.S. Supreme Court acknowledged evidence that clean intermittent catheterization was not always performed by a nurse, and that the services provided in school such as help with food at lunchtime, positioning the student, oxygen supplemental positioning, suctioning, observing the student for respiratory distress, and manually pumping an air bag attached to the student's tracheotomy tube when the student's ventilator was being maintained, were performed by someone familiar with the student and his ventilator, and not by a school nurse. (*Cedar Rapids Community School District v. Garret F.* (1999) 526 U.S. 66, 74.) Although these statements are nonbinding dicta, they are consistent with testimony that a school nurse is not required for the same and similar health care services needed by Student.

At hearing, Dr. Haas changed his opinion and stated that Student needed a licensed vocational nurse throughout the school day to meet Student's needs, although he had only opined that it would be helpful in his November 2020 letter to Fallbrook. His testimony was not persuasive, as he did not know what other health services were available at Student's school to meet her needs, and acknowledged under cross-examination that a trained lay person could perform many if not all of the health care services required by Student. More importantly, Fallbrook did not have this opinion when the IEP team developed the November 17, 2021 IEP, and could not take it into consideration when designing Student's education program.

Fallbrook was not responsible for providing medical services that needed a higher level of care than is appropriate in a school setting, such as re-insertion of a dislodged G-tube or intensive care for a child with prolonged fever and severe respiratory symptoms from illness who should not be in school.

Accordingly, the November 17, 2021 IEP offered Student sufficient health services to meet Student's health care needs during the school day and transportation.

In summary, applying the *Rowley* standard, as restated and affirmed in *Endrew F.*, the weight of the evidence established that the supplemental aids, program modifications, and special education and related services offered in the November 17 2021 IEP were designed to meet Student's unique needs and were reasonably calculated to provide Student with educational benefit appropriate in light of her circumstances.

PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT

Lastly, 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 were offered, the November 17, 2021 IEP team discussed Student's placement. The IEP offered Student placement in a resource program at her home school consisting of specialized academic instruction and individualized speech services provided outside the classroom, for a total of 31 percent of Student's school day outside of regular education. Fallbrook offered the general education classroom, with push-in group speech services and adapted physical education, for a total of 69 percent of her school day in regular education. Student would receive the one-to-one support of a health care technician for Student's health care and attentional needs in both settings. The IEP team determined that Student did not need to be taken out of the general education classroom except for specialized academic instruction and individual speech services.

The IEP was carefully constructed to support Student's integration into the general education classroom, and to provide her with maximum exposure to her peers.

Here, it is undisputed that Student could not have been satisfactorily educated exclusively in a regular education environment. Student demonstrated well below average academic skills and processing deficits that significantly interfered with her ability to learn grade level curriculum without specialized academic instruction. Therefore, the question became whether Student received mainstreaming to the maximum extent appropriate. (*Daniel R.R., supra*, 874 F.2d at p. 1050.) Here, the evidence demonstrated that the November 17, 2021 IEP offer of special education classrooms for core academics, with placement in general education for enrichment classes and physical education, was the least restrictive environment for Student.

Student received instruction in reading, writing and math in Aragon's learning resources center at her own level and her own pace, with one-to-one or small group instruction. For the majority of the school day, Student attended general education classes with push-in speech services that supported Student's understanding of classroom lessons and her participation in classroom discussions. Student received adapted physical education in a regular general education class, with modifications that enabled her to participate with typical peers in activities geared towards California physical education standards. Student was supported through the school day with a one-to-one health care technician who not only attended to Student's health care needs, but redirected her attention, prompted her participation, was a scribe for Student, and helped Student respond to the teacher and peers.

The November 17, 2021 IEP placement offer complied with all procedural requirements. The placement decision was made during the annual IEP review by a

group of knowledgeable team members. Class selection was made after a detailed discussion of Student's needs, consideration of potential harmful effects on Student, and the supports necessary to place Student in the least restrictive environment. Fallbrook offered Student placement in the same school she would have attended if she did not have a disability. Lastly, the IEP team carefully reviewed Student's accommodations before recommending removal from age-appropriate general education classrooms and minimized the time Student spent outside of general education.

In summary, Fallbrook established that the November 17, 2021 IEP made an appropriate offer of special education placement and related services in the least restrictive environment for Student.

STUDENT'S CONTENTIONS

Student contends that Fallbrook's assessors did not have sufficient information on Student to accurately identify her educational needs because the assessments began in April and May 2021, when Student was attending school online and completed in Fall 2021 before Student had attended many classes in person. This argument fails for several reasons.

Student did not put on credible or persuasive evidence that any of Student's educational needs were unidentified. Student offered no persuasive evidence to counter the expert and persuasive opinions of Oppenheimer, Aragon, Blinco-Martinez, Strickland, De Venture, Pittman, Sahagun, and Dr. Briones that Student's educational needs had been identified and the special education and related services in the November 17, 2021 IEP met those needs. In fact, the weight of the evidence showed that Student was learning and doing well in her current educational program, which was very similar to the one offered. Neither Parent, Student's former school nurse, or

treating physician were educators, and each lacked the education, training, experience, or current information on Student's academic and non-academic performance to persuasively opine on Student's educational needs as of November 17, 2021. Student's kindergarten teacher, also a family friend, testified that Student had satisfactorily attended school in the past with a one-to-one paraprofessional to assist her, and opined that Student's current teachers would get to know Student's needs and strengths, which did not contradict the opinions of any Fallbrook witnesses.

Parents clearly disagreed that a one-to-one health care technician trained by Nurse McNeil could meet Student's health care needs during the school day and transportation. However, Student did not present any evidence that the multidisciplinary assessment failed to identify or address all of Student's educational needs.

The assessors did not rely solely on evidence gathered during Student's attendance online. Student came to her home school campus to be tested by multiple assessors, and most of the assessors had either worked directly with Student, such as De Venture and Pittman, or observed Student in person in the classroom during consultations and collaboration with Student's teachers, such as Aragon, Sahagun and Dr. Briones. Student did not offer any evidence that the assessment results were inaccurate, incomplete, or invalid.

Moreover, while Student argued that Fallbrook assessors did not know Student well enough because she attended school virtually for two years, every witness Student called had not seen Student in over two years, yet purported to know and testify about Student's educational needs. Student urged that the opinion of Dr. Haas that Student required a one-to-one nurse with her at all times be considered accurate and persuasive, even though he had not seen her in person for over two years and was

relying primarily on Parent report to determine her level of care. Although Dr. Haas was very experienced and knowledgeable about Student's medical condition, his testimony was undermined by his lack of knowledge concerning Student's needs at school or available school resources, which was the result of his inability to consult with Nurse McNeil.

Student contends that Student may have been too fatigued to accurately perform during in-person testing by the assessors. However, Student presented no evidence of an unidentified area of need or poor performance. Student was capable of verbalizing when she was too tired to continue testing, and each assessor testified that Student appeared to be giving her best effort during testing. There was no evidence to support Student's argument that Student was having difficulty breathing during testing that went undetected by the assessors. That is speculation by Student without a basis in fact.

Student's argument that her inability to see the test materials impacted her assessment performance was speculative. Each assessor described modifications made to the testing process to accommodate Student's poor eyesight, such as using enlarged print, and having Student point to enlarged pictures rather than circling responses. The multidisciplinary report indicated where results were not obtained in exact conformance with the publisher's testing instructions. More importantly, Student spoke with assessors during testing and could verbalize if she could not see test materials.

Student also contends that the health portion of the multidisciplinary assessment was incomplete because Nurse McNeil did not contact Student's prescribing doctors to clarify doctors' orders. Parents refused to give Fallbrook permission for Nurse McNeil to contact Student's prescribing physicians, and Fallbrook cannot be faulted for any lack of information that might have been obtained had Parents allowed such communication.

Student contends that Student required direct occupational therapy and physical therapy at school. However, Student did not call an occupational therapist or physical therapist to contradict the informed opinions of Sahagun and Dr. Briones, which were persuasive and established that Student did not need these services to access her education or educational environment.

Student contends that Fallbrook has not implemented some of the services offered in Student's current IEP, such as making a box of sensory objects available to Student, training Parent on Student's eye-gaze device, and transporting Student's electric wheelchair. However, implementation of an IEP is not an issue in this due process matter.

In summary, Fallbrook proved by the weight of the evidence that the IEP developed on November 3, 8 and 17, 2021 offered Student a FAPE in the least restrictive environment.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

ISSUE 1:

Student's IEP, developed on November 3, 8, and 17, 2021, offered Student a FAPE in the least restrictive environment.

Fallbrook prevailed on Issue 1, the sole issue.

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/

ALEXA HOHENSEE

Administrative Law Judge

Office of Administrative Hearings