

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2022050318

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HANFORD ELEMENTARY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

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DECISION

August 16, 2022

On May 9, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Hanford Elementary School District naming Student. By Order dated June 2, 2022, the matter was continued. Administrative Law Judge June Lehrman heard this matter via videoconference on June 21, June 22, June 23, and July 6, 2022.

Deborah Ettinger, Attorney at Law, represented Hanford. Karen McConnell, Assistant Superintendent of Special Services attended all hearing days on Hanford's behalf.

Mother represented Student and attended all hearing days on Student's behalf.

The matter was continued to August 1, 2022 for written closing briefs. The record was closed, and the matter was submitted on August 1, 2022.

## ISSUES

1. May Hanford implement Student's February 28, 2022, individual educational program, called an IEP, without Parent 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.) All subsequent references to the Code of Federal Regulations are to the 2006 edition. The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

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

The IDEA affords parents 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

free appropriate public education, referred to as 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).) Hanford 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 eight years old and about to enter third grade at the time of hearing. Student resided within Hanford's geographic boundaries at all relevant times. Student was eligible for special education under the eligibility categories of autism and intellectual disability. Student's IEP placement at the time of hearing was in a special day class with 60 daily minutes of mainstreaming.

#### ISSUE 1: MAY HANFORD IMPLEMENT STUDENT'S FEBRUARY 25, 2022, INDIVIDUAL EDUCATIONAL PROGRAM, CALLED AN IEP, WITHOUT PARENT CONSENT?

Hanford contends that the IEP dated February 25, 2022, March 18, 2022, and April 26, 2022 offered Student a FAPE in the least restrictive environment, and that the offer should be implemented despite the lack of parental consent. Specifically, Hanford contends that it offered Student FAPE in the least restrictive environment by offering 40 minutes daily additional mainstreaming in the general education environment, for English Language Arts, over and above the pre-existing 60 daily mainstreaming minutes Student had already been receiving in Math, pursuant to her last agreed upon and

implemented IEP. Student asserts that Hanford did not offer a sufficient level of supplemental aids or services, specifically a one-to-one aide, to reasonably permit Student to receive academic benefit from the additional mainstreaming and therefore the offer was not appropriate.

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 individualized education program, referred to as 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].)

An IEP is a written document for each child with a disability that includes:

- a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and
- a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in

the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.)

When appropriate, the IEP should include short-term objectives that are based on

- the child's present levels of academic achievement and functional performance,
- a description of how the child's progress toward meeting the annual goals will be measured,
- when periodic reports of the child's progress will be issued to the parent, and a
- statement of the special education and related services to be provided to the child.

(20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(iii); Ed. Code, § 56345, subd. (a)(3).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(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, as well as 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 need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

If the parent refuses all services in the IEP after having consented to those services in the past, the local educational agency shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).)

## PROCEDURAL COMPLIANCE

The legal analysis of a school district's compliance with the IDEA consists of two parts. First, the tribunal must determine whether the district has complied with the procedures in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-207, [73 L.Ed. 2d 690] (*Rowley*).) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

Procedurally, 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) (2006); 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 team is required to 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 representative of the school district 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. (34 C.F.R. § 300.321(a).)

The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) Finally, whenever appropriate, the child with the disability should be present. (34 C.F.R. § 300.321(a).)

Here, in developing the IEP offer that is at issue, with an important exception, Hanford complied with the procedural requirements of IDEA and California law. Hanford provided Parents with notice and an opportunity to participate in the development of Student's IEP. The IEP team was comprised of the necessary participants. The IEP met the procedural requirements of IDEA and California law because it included a statement of Student's present levels of performance and contained goals, and an education program that included related services, and delineated Student's level of interaction with non-disabled peers.

Parent contends that Hanford's strong disagreement with the family's perceptions of Student's unique needs established a denial of parental participation. But disagreement does not establish any denial of the family's procedural rights to be heard and have their views considered. Mother attended, expressed disagreement, and requested revisions at three IEP meetings on February 25, 2022, March 18, 2022, and April 28, 2022, each lasting several hours. Hanford's rejection of Mother's request for aide services during mainstreaming did not mean the IEP team did not consider Mother's concerns.

Hanford modified its offer in certain other respects to attempt to accommodate the family's concerns. For example, the Hanford members of the team originally wanted to increase Student's mainstreaming into general education by a larger number of minutes, but then compromised down to 40 additional minutes per day in order to partially allay Mother's concerns. And, although Hanford rejected Mother's request for an aide during mainstreaming, Hanford offered one week of aide services to assist in Student's transition into third grade. District school psychologist Leslie Marain facilitated the IEP meetings and credibly established that she worked hard to ensure Parents could express themselves. Thus the IEP team, including Mother, discussed Student's needs at length.

However, after the April 28, 2022, IEP team meeting, credible evidence existed concerning a heated telephone exchange between Karen McConnell, Assistant Superintendent of Special Services and the family's Regional Center advocate, Kara Pacheco who had attended that meeting at Parents' invitation. The telephone conversation amounted to a denial of parental participation in the IEP process. Assistant Superintendent McConnell obtained her bachelor's degree in 1992 and her master's degree in 1997. She obtained a multiple subject clear credential in 1993 and an



administrative credential in 2003. McConnell has held positions of responsibility including teacher, assistant principal, principal, Director of Special Services and Assistant Superintendent over the course of her almost 30-year career. McConnell did not attend the IEP meetings, but was informed by Hanford IEP team members that Pacheco had not acted in a "collaborative" manner at the IEP meeting, had been "argumentative" and "did not understand assessments." After the April IEP team meeting, McConnell telephoned Pacheco at Pacheco's place of work concerning her role at the IEP meeting. At hearing, McConnell asserted that McConnell behaved respectfully and professionally towards Pacheco during the call. She denied raising her voice or telling Pacheco that Pacheco was a "hindrance" to the IEP process.

Pacheco was a Service Coordinator for the Central Valley Regional Center since 2017. She graduated with a bachelor's degree in 2009, when she began her career. Prior to joining the Regional Center she worked with individuals with intellectual and developmental disabilities, and as an applied behavioral analysis caseworker. As a Regional Center Service Coordinator, her job duties comprised connecting families with Regional Center services and advocating for their interests. She had served as Student's Regional Center Service Coordinator since 2018 when Student was three years old. At or around that time, Parents adopted Student and her two siblings after the children were removed by the authorities from an abusive home.

Pacheco's detailed recounting of the phone call with McConnell, which clearly upset her at the time, was more thorough, more detailed, and more consistent with the chronology of events than McConnell's and was thus more credible. For example, McConnell recalled that the conversation occurred after a mediation, but the evidence firmly established that the mediation had occurred in June and the call preceded it. Thus, the chronology of events supported Pacheco's recollection of when the call

occurred, and that it was not part of a mediation but rather that the call occurred pursuant to and as part of the IEP development process. According to Pacheco's detailed and thorough recollection, McConnell called Pacheco at Pacheco's workplace. McConnell began the call respectfully but escalated in tone as McConnell started to question Pacheco's expertise. McConnell questioned Pacheco's expertise, education and knowledge, but Pacheco declined to respond to these questions. McConnell asked Pacheco to share information concerning Student that Pacheco considered confidential, and Pacheco refused to disclose without parental consent. McConnell then called Pacheco a "hindrance" to the IEP process. The conversation became an argument. Pacheco felt McConnell's demeanor was derogatory toward her and amounted to harassment and intimidation. Pacheco ended the call and reported the events to her supervisor.

Pacheco's credible testimony supported an inference that McConnell's purpose in making the call was to attempt to discourage the Regional Center advocate from expressing the family's disagreement with Hanford's IEP offer. Interference with Parent's right to express disagreement amounted to a procedural violation. Pacheco had worked with Student since her adoption, and Parents invited Pacheco to the April 28, 2022, IEP team meeting as their advocate. McConnell, a professional with over 30 years' experience in a position of much greater responsibility, attempted to discourage Pacheco from expressing the family's viewpoint. McConnell's behavior violated the IDEA by interfering with Parents' ability to express their opinions and participate meaningfully at the IEP team meeting. It also interfered with Parent's right to invite, at their discretion individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate. Moreover, the law explicitly states that the determination of the knowledge or special expertise of any individual described must be

made by the party who invited the individual to be a member of the IEP Team. [34 C.F.R. §§ 300.321(a) and (c) .) Here, that determination of Pacheco's knowledge and expertise had been made by Parents as was their right. For these reasons, any attempt to discourage or silence Pacheco from expressing the family's dissent to the IEP offer runs contrary to both the letter and spirit of the law. Because the evidence supports an inference that McConnell's purpose in calling Pacheco at her workplace was to discourage her participation in the development of the IEP, Hanford failed to meet its burden of proving its compliance with the procedural requirements of the IDEA.

### UNIQUE NEEDS AND EDUCATIONAL BENEFIT

After determining whether the district has complied with the procedures set forth in the IDEA, 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.

The development of the IEP by Hanford did not meet the procedural requirements, and therefore does not provide Student a FAPE. However, even if this procedural violation had not occurred, Hanford did not meet its burden of proof by a preponderance of the evidence that the IEP offered Student a FAPE.

Hanford's offer was for Student's 2022-23 third grade year. It offered placement in a special day class, with mainstreaming for 60 minutes five days per week for Math, mainstreaming two days per week during District-wide physical education, and mainstreaming 40 minutes during English language arts instruction five days per week. The IEP also offered resource support pushed-in to the general education mainstream

classes, twice per week for 30 minutes. The IEP also offered aide support for the first week of third grade only, to help Student transition. The IEP also offered counselling. The only program accommodations and supports offered were

1. graphic organizers or other outlines to organize thoughts for writing assignments,
2. tests to be given in paper/pencil form rather than on a laptop, and
3. daily during reading instruction, re-phrasing/follow up reading comprehension questions to determine understanding.

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

School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).)

In *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404, the court 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:

1. the educational benefits of placement full time in a regular class;
2. the non-academic benefits of such placement;

3. the effect the child will have on the teacher and children in the regular class; and
4. 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.)

Hanford failed to establish the least restrictive environment analysis that additional mainstreaming was appropriate in light of the continuum of program options. As detailed below, Hanford did not prove that its offer would confer educational benefits on Student. Thus, Hanford failed to establish the first *Rachel H.* factor. Hanford also did not prove the non-academic or socialization aspects of additional mainstreaming would overcome the inference that, without appropriate supports, Student might not succeed in additional general education mainstreaming. Thus, Hanford also failed to establish the second *Rachel H.* factor concerning non-academic benefits. The third and fourth *Rachel H.* factors, concerning impacts to the classroom or costs, do not shift the analysis.

Hanford offered no evidence of the fourth factor, costs. As to the third factor, Student would not have had a negative effect on the general education classroom. But Student's benign presence in the classroom cannot outweigh the evidence that both the academic and nonacademic benefits weighed against placing her in additional general education mainstreaming without appropriate supports.

Here, there was no dispute that placement full-time in general education was not appropriate. Thus, 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. Hanford failed to carry its burden of proof that the IEP, and specifically the offer of the additional 40 minutes daily mainstreaming in English, was appropriate.

The evidence about Student's academic abilities was conflicting. District's overall impression was of a child with minimal challenges who was doing grade level work in second grade and required only mild interventions to succeed. The triennial assessment conducted prior to the IEP meetings revealed that Student had no below average academic scores and was performing at grade level. Hanford disagreed with Parent's contention that Student needed an aide to be successful in mainstreaming "as she currently mainstreams without an aide in math without issue."

On the other hand, the family's impression, including three close relatives who all had substantial experience as general education teachers, was that Student is distractable, often lost in thought, unable to complete tasks, and is academically behind grade level in both math and English language arts. Many homework worksheets evidenced Student's academic struggles and conflicted with Hanford's academic assessment results and with its teachers' narratives of Student's successes.

The family's impression was borne out by a video of Student attempting to complete homework, which showed her very distracted, off task, vocalizing, mouthing objects, fidgeting and not focused. It was also borne out by Student's behavior at the hearing, where she appeared as a witness. Her behavior was

- distracted,
- fidgeting,
- mouthing objects,
- vocalizing,
- exhibiting very variable understanding of what she was being asked, and
- extremely slow in attempting to answer questions posed to her.

Hanford argues that its case was bolstered by Student's demeanor on the witness stand, where she made eye contact, was personable, displayed intelligence and answered some questions quickly and correctly. Overall however, the family's impression of Student's unique needs, was much more clearly established by Student's demeanor at hearing.

There is no explanation for the stark difference in how Student presented to the family and on the witness stand to the ALJ, versus how she presented to Hanford in its assessment and classroom performance. However, the controversy over which impression of Student is correct need not be resolved here. Student did not have the burden to prove that the family's impression was correct. Hanford had the burden of proving that it accurately portrayed, and its IEP appropriately addressed, Student's needs. Student's evidence raised sufficient doubt about these essential questions that Hanford's burden of proof was not met. The evidence established sufficient doubt as to whether the general education third grade would be too challenging for Student,

without appropriate support, and as to what that level of appropriate support should be. Thus, Hanford, who had the burden of proof, failed to establish that its mainstreaming offer was appropriate in light of the continuum of program options.

Hanford argues that even if Student were indeed behind grade level, additional mainstreaming would still nevertheless be appropriate due to the socialization opportunities provided by interactions with general education students. However, the IEP did not so state, and no conversation about mainstreaming Student if she were academically delayed was ever discussed at any IEP team meeting for Student. Because no such conversation occurred at any IEP meeting, it would constitute a procedural failure to premise an IEP offer on a different set of present levels than was ever discussed. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320 [IEP must contain 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].) Thus, Hanford's shift in emphasis to this alternate argument, was not persuasive, given that the IEP offer of mainstreaming at one hour 40 minutes per day was premised on Student academic successes, as to which it did not carry its burden of proof.

## ACCOMMODATIONS WERE NOT APPROPRIATE

An IEP "must include" a statement of the supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, and a



statement of the program modifications or supports for school personnel that will be provided to enable the child to advance toward attaining annual goals, and to be involved in and make progress in the general education curriculum. (34 C.F.R. § 300.320(a)(4).)

The term “supplementary aids and services” means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with the least restrictive environment mandate. (20 U.S.C. § 1401 (33).)

The IEP failed to identify accommodations and supports that Hanford acknowledged Student needed to access her educational program. Thus, Hanford’s own evidence establishes that its offer was not FAPE.

The IEP and the triennial assessment on which it was based are both replete with information about Student’s needs for redirection in order to attend to her classwork. Both the special day class and general education teachers shared that Student required redirection in the classroom. Student fidgeted with her whiteboard, expo marker, and hairband during classroom instruction. Student became distracted when people entered the classroom. Student required redirections to remain on task when completing her independent math assignment and when working in a small group with her teacher in the special day class. She became distracted while completing her work.

Student needed to be redirected when she made random off-topic comments. Student spoke out of context, fidgeted, and engaged in off-topic conversation. Student needed reminders and redirection. She could

- become distracted,
- doodle,
- fidget,
- tap,
- fail to engage with her work partner,
- fail to attend,
- make random comments,
- get disengaged, and
- stare at her paper.

Student's challenges included the need for check-ins and redirections in her classroom, the fact that she did not always pay attention to directions, might follow her own thoughts and needed redirection to focus. Student needed reminders in terms of whether her sentences made sense and required teacher support to generate writing. She could become distracted or off topic. Her areas of challenge included introducing appropriate topics of conversation, not using repetitive or redundant information, not interrupting, and asking for clarification when confused. These needs were documented extensively in the assessment report and the IEP and were undisputed.

Hanford asserts that Student was "easily redirected" and would respond to one redirection. If she needed help, she would ask for help and the general education teacher would assist her. The general education teacher roamed around the room looking for how her students were doing. While Student might speak out of context,

blurting out whatever was on her mind, this was not uncommon for second graders. Hanford argues that Student was easily redirected and responded to one prompt and compared to her peers she needed even less redirection than some others. Hanford contends that Student's off-task behavior did not impact her education because she got back to work right away when redirected. Hanford had no concerns about Student's inconsistent eye contact, distraction or redirection, because daydreaming and losing focus are common to all second graders and were typical.

The ease with which Student responded does not diminish the fact that Student needed redirections as an accommodation to access her education, therefore as a required element of FAPE. Boa Moua, the school psychologist who conducted the triennial assessment, considered Student's challenges to be mild because she was easily redirectable. Moua specifically testified that Hanford had accommodations in place to redirect Student to do her work, and that this was on an as-needed basis by the general education teacher. The fact that Student became distracted, off task, vocalizing, mouthing objects, fidgeting, and losing focus, according to Moa, did not affect her educational progress because it was Hanford's job to accommodate and redirect her. However, although Student required an accommodation of redirection to access her educational program, the accommodation is not offered anywhere in the IEP at issue. Hanford contends general education teachers would address Student's need for accommodation as part of "differentiated instruction" in the general education setting. For example, Hanford contends that there are "embedded supports" in the general education environment that include a "check-in/check-out system" and "brain breaks." Special education teacher Samantha Wolfe opined that if, for example, Student were to need more time to complete schoolwork due to her distractibility, extended time is simply good teaching practice but does not need to be in an IEP. If Student needed

extended time, teachers could give it to her as needed. Or, according to Wolfe, the IEP team could reconvene to address this on the accommodations page in the future.

Thus, Hanford contends that there was no need for these accommodations to be explicitly mentioned in the IEP. This argument fails. An IEP must contain a clear written, enforceable offer. A school district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519,1526.) An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decision based on it. (*Id.*) In *Union*, the Ninth Circuit observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Ibid.*)

Here, there was no mention of prompting or redirection, nor whose responsibility it was to implement this, in the offer of supplementary aids and services. There was therefore no parental right to insist upon implementation of these services. A school district's obligation to develop and appropriate IEP does not change regardless of whether the instruction the student needs is part of the district general education program or best teaching practice. (*Letter to Chambers*, United States Department of Education Office of Special Education Programs, (May 9, 2012) 112 LRP 374775 ["The IEP Team is responsible for determining what special education and related services are needed to address the unique needs of the individual child with a disability. The fact that some of those services may also be considered "best teaching practices" or "part of the district's regular education program" does not preclude those services from meeting

the definition of “special education” or “related services” and being included in the child’s IEP.”)] For this reason, the accommodations Hanford offered were not appropriate to constitute FAPE.

Moreover, the triennial assessment report concluded with several recommendations. Other than a graphic organizer, none of these recommendations were reflected in the formal offer of FAPE that Hanford has itself put at issue here. The assessment recommended that instructions should be repeated to ensure comprehension. Another recommendation was to check for Student’s understanding and allow Student to repeat instruction back to the teacher to ensure she understood the instruction. Another was to “continue to provide accommodations and support to support [Student’s] learning.” Another was to provide redirections as needed to ensure that Student remained on task. Another was to pre-teach vocabularies before introducing new reading materials to assist Student reading and comprehension. Another was to give Student access to a graphic organizer to help aid her writing when necessary. However, the IEP team offered only one, the graphic organizer, of the many recommendations Hanford’s own assessment recommended. The IEP team did not offer to repeat instructions to ensure comprehension. It did not offer to check for Student’s understanding and allow Student to repeat instruction back to the teacher to ensure she understood the instruction. It did not offer, nor specify, what was meant by the vague term “continue to provide accommodations and support to support [Student’s] learning.” It did not offer to provide redirections as needed to ensure that Student remained on task, despite repeated and consistent references to Student’s needs for redirection. It did not offer to pre-teach vocabularies before introducing new reading

materials to assist Student reading and comprehension. For all these reasons, and based on the undisputed evidence of Student's needs presented by Hanford itself, the offer was not FAPE.

## GOALS WERE NOT CLEAR AS TO RESPONSIBLE PERSONS

The IEP is similarly vague with respect to the implementation of Student' specific goals. In pertinent part, the IEP offered goals in the areas of non-fiction writing and on-task behavior. However, the IEP is silent as to how Student's goals would be implemented during the one hour and 40 minutes of daily mainstreaming, or by whom.

For Goal number 1 in the area of non-fiction writing, the IEP stated that by February 2023, when given a writing assignment and a graphic organizer, Student would write informative or explanatory texts in which she would introduce a topic, use facts and definitions to develop points, and provide a concluding statement or section with no more than one teacher prompt. Even though this was an English language arts goal to be implemented during the recommended 40 minutes daily mainstreaming in that class, the persons designated as responsible for implementing this goal were stated to be Student, Parent, and special education staff. The delineation of Student and Parent as responsible for implementing IEP goals was not appropriate. The obligation to offer and implement FAPE belongs to Hanford alone. Also, the IEP confusingly designates special education staff as being responsible for implementing this goal, and not the general education English language arts teacher. According to the IEP, the only special education staff who would be present during mainstreaming was push in resource support twice a week for thirty minutes each. Thus, it is unclear which if any special

education staff would be present during Student's one hour and 40 daily minutes of mainstreaming for an hour in math and 40 minutes in English. Thus, the IEP states a goal but is unclear as to who would be responsible to implement it, or how.

Similarly, the IEP team offered Student a goal in the area of "on task behavior," a recognized area of need. The goal stated that by February 2023, Student would be redirected to task with no more than one prompt from staff within a two-hour window in four out of five days both in the general education classroom as well as the special day classroom. The IEP stated that the persons responsible for implementing this goal were the special education staff. The IEP team also inappropriately designated Student as a person responsible for implementing her goals. Special education staff was to be present in the general education classroom only 30 minutes twice a week, whereas the offer of mainstreaming envisioned Student would be in general education for one hour and 40 minutes every day. Since the general education teacher was not designated as a responsible person for implementing this goal while mainstreamed, no one else was either. This was inappropriate, given the statement that Student's baseline was that she would sometimes begin to talk about a topic not related to her work, or could be seen looking around or daydreaming instead of working. Her baseline for this goal also stated that when she was off-task, Student "just needs a gentle reminder to get back to work. Within the general education classroom setting, Student continues to require some gentle reminders to get back to work. This happens four to five times per week." Yet, in this IEP, no one was tasked with making sure the gentle reminders were given. For these reasons, the IEP did not offer FAPE, as it failed to contain a clear offer of the special education and related services to be provided to the child, (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320), or 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).) For all these reasons, Hanford has failed to establish that the IEP offered Student a FAPE.

## 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:

Hanford may not implement Student's February 28, 2022, individual educational program without Parent consent.

Student prevailed on Issue 1.

## 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/

June Lehrman

Administrative Law Judge

Office of Administrative Hearings