

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENT ON BEHALF OF STUDENT,

v.

PALO ALTO UNIFIED SCHOOL DISTRICT.

CASE NO. 2023060486

DECISION

DECEMBER 7, 2023

On June 13, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Student, naming Palo Alto Unified School District. On July 24, 2023, OAH continued the due process hearing to September 19, 2023. On August 14, 2023, OAH continued the due processing hearing to September 26, 2023. Administrative Law Judge Christine Arden heard this matter via videoconference on September 26, and 27, and October 3, 4, 5 10, 11, 12, and 17, 2023.

Attorneys Marc Buller and Sarah Fairchild represented Student. Mother attended all hearing days on Student's behalf and Father attended a portion of some hearing days

on Student's behalf. Tracy Petznick Johnson represented Palo Alto Unified School District, called Palo Alto. Cynthia Loleng-Perez, Director of Special Education, attended the hearing on all days on Palo Alto's behalf, except for a half-day on September 26, 2023, and for approximately one hour on October 10, 2023. Teri Lee, Special Education Program Coordinator, attended the hearing on Palo Alto's behalf for one-half day on September 26, 2023, and for approximately one hour on October 10, 2023.

At the parties' request, the matter was continued to November 13, 2023, to allow time for the parties to submit their written closing arguments. The record was closed, and the matter was submitted on November 13, 2023.

ISSUES

1. Did Palo Alto Unified School District deny Student a free appropriate public education, called a FAPE, in the 2022-2023 school year in the May 12, 2022 individualized education program, called an IEP, and the June 7, 2022 IEP, by failing to offer:
 - a. appropriate behavior support services;
 - b. appropriate academic instruction;
 - c. an appropriate placement, specifically, a nonpublic school; and
 - d. appropriate mental health services?

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2. Did Palo Alto Unified School District deny Student a FAPE during the 2023-2024 school year in the IEP addressed at the IEP team meetings held on March 8, 2023, April 17, 2023, and May 16, 2023, by failing to offer:
 - a. appropriate behavior support services;
 - b. appropriate academic instruction;
 - c. an appropriate placement, specifically, a nonpublic school;
 - d. appropriate mental health services; and
 - e. an extended school year program?

During the hearing, specifically on October 17, 2023, counsel for each of the parties agreed on the record that sub-issue 2(e) concerned an extended school year program during summer 2023.

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

- all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living, and

- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

The IDEA affords parents 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).) In this case Student has 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).)

At the time of hearing Student was 13 years old and in seventh grade at the Esther B. Clark School, called EBC, a nonpublic school, where he was unilaterally, privately placed by Parents at the beginning of sixth grade. Student resided within Palo Alto's geographic boundaries at all relevant times. Student was eligible for special education under the categories of autism, specific learning disability, and other health impairment.

LEGAL FRAMEWORK UNDER THE IDEA

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 that 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 [102 S.Ct. 3034]; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000] (*Endrew F.*))

ISSUE 1: DID PALO ALTO DENY STUDENT A FAPE IN THE 2022-2023 SCHOOL YEAR IN THE MAY 12, 2022 IEP, AND THE JUNE 7, 2022 IEP, BY FAILING TO OFFER AN APPROPRIATE PLACEMENT, ACADEMIC INSTRUCTION, AND BEHAVIOR SUPPORT AND MENTAL HEALTH SERVICES?

Student contends the behavior support services, specialized academic instruction, placement, and mental health services Palo Alto offered Student for the 2022-2023 school year at Jane Lathrop Stanford Middle School, called JLS, which was a large, comprehensive middle school campus, did not constitute a FAPE because they were insufficient to enable Student to access his education. Student further contends his significant social-emotional, mental health, attention, processing, and sensory needs could not be met at JLS, regardless of the multiple services and supports Palo Alto

offered because the campus was too large, too noisy, served too many children, and required too many transitions. Student further contends his disabilities required placement in a small, therapeutic, nonpublic school, such as EBC, in which intensive behavior and mental health services and supports were embedded into the program. Student further contends his significant social-emotional deficits, anxiety disorder, and misophonia required that Student's academic instruction be delivered to him either individually, or otherwise in a quiet, small environment with minimal transitions throughout the school day until such time that he developed necessary coping skills.

Student further contends in order to avoid regression Palo Alto should have offered him an extended school year program for summer 2023. Student further contends he needed to remain in school at EBC during the 2023-2024 school year because he had not yet developed skills needed in order to access his education at a large comprehensive campus like JLS. Student further contends that EBC, where Parents unilaterally placed Student, was an appropriate placement because it served a small student population, was located on a small campus, and intensive mental health and behavioral services and supports were embedded into the program throughout the school day.

Palo Alto contends its offer of a FAPE for the 2022-2023 school year in general education for 92 percent of the school day at JLS was appropriate because that placement was the least restrictive environment appropriate for Student. Palo Alto further contends the behavior support services, specialized academic instruction, and mental health services it offered Student for the 2022-2023 school year were appropriate to enable Student to access his education at JLS. Palo Alto further contends it was prevented from helping Student develop tolerance for receiving instruction in a group

setting with neurotypical peers because it conceded to Parents' request to reduce demands on Student and to allow him to leave the classroom during fifth grade whenever he experienced anxiety and dysregulation.

Palo Alto further contends its offer of a FAPE for the 2023-2024 school year in general education for 84 percent of the school day at JLS was appropriate because that placement was the least restrictive environment appropriate for Student. Palo Alto further contends the behavior support services, specialized academic instruction, and mental health services it offered Student for the 2023-2024 school year were appropriate to enable Student to access his education at JLS. Palo Alto further contends Student did not require extended school year for summer 2023 in order to avoid regression. Palo Alto further contends EBC was not a reasonable alternative placement for Student because it was not the least restrictive environment in which Student could be educated, and he was instructed individually for much of his school day there. Palo Alto further contends Student's negative behaviors increased at EBC, establishing it was not a reasonable alternative placement for Student.

STUDENT'S BACKGROUND - INFANCY THROUGH FOURTH GRADE

Student was born prematurely and experienced a variety of serious health issues during his infancy and early childhood. At two years old, Student exhibited developmental speech delays, behavior problems, and mental health issues, for which he received regional center services. He was diagnosed with autism spectrum disorder at three years old. Shortly after that, Student began therapy to address his mental health issues with Dr. Kari Berquist, a psychologist in private practice devoted to

treatment of very young children. In October 2021, Student also began having regular sessions with Pamela Olson, an occupational therapist in private practice, to address his substantial sensory and motor issues.

Student was initially found eligible for special education shortly before his sixth birthday. He attended kindergarten at Hoover Elementary School, called Hoover, a school within Palo Alto. Hoover served slightly under 400 pupils in kindergarten through fifth grade. Student was diagnosed with attention deficit hyperactivity disorder, called ADHD, at eight years old. At nine years old, Student was diagnosed with an anxiety disorder. He took medications for his ADHD and for his anxiety. He was also later diagnosed with dyslexia and misophonia, which is an extreme sensitivity to noises.

From kindergarten through third grade, Student's IEP teams recognized it was extremely difficult, if not impossible, for him to function at school in a group of peers. He required individual instruction to learn. Due to the COVID-19 pandemic, remote instruction began in spring 2020, when Student was in the last quarter of third grade.

Student attended the entire fourth grade in the 2020-2021 school year remotely. Even when in remote learning, Student often became anxious during on-line group instruction. However, he often muted his classmates, which provided him some relief. Student functioned fairly well in remote instruction because distractions, noise, and social challenges, all of which triggered Student's anxiety, were minimized.

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BOTH ACADEMIC AND NON-ACADEMIC NEEDS MUST BE ADDRESSED IN AN IEP

An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is broadly construed and includes the student's

- academic,
- social,
- emotional,
- communicative,
- physical, and
- vocational needs. (*Seattle School Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500 [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

A disabled child's IEP must be tailored to the unique educational needs of that particular child, who, by reason of disability, needs special education and related services. (*Ibid.*)

The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. (*Endrew F., supra*, 580 U.S. at p. 404.) California law defines placement as follows:

"Specific educational placement means that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified

in the IEP, in any one or a combination of public, private, home and hospital, or residential settings.” (Cal. Code Regs., tit. 5, § 3042.)

A student’s unique needs that must be addressed by the IEP are not limited to the child’s academic needs but may also include social and emotional needs that affect academic progress, school behavior and social behavior, and socialization. *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.

STUDENT EXHIBITED EXTREME BEHAVIOR AND MENTAL HEALTH DEFICITS IN FIFTH GRADE

Student’s fifth grade placement in the 2021-2022 school year was a general education class at Hoover co-taught by Kimberly Kwon and Pamela Price. Kwon taught the class four days a week, and Price taught the class one day a week. Student had a one-to-one aide for six hours a day. The aide was with Student for the entire day, except for lunch and recess, and at times Student was pulled out of class for related services.

Throughout fifth grade, but particularly in the second half of the school year, Student’s anxiety and mental health issues were of paramount concern. Parents shared that concern with Student’s teachers, Kwon and Price, case manager, Erin Hurd, and other IEP team members throughout the 2021-2022 school year. Student’s involuntary behaviors, including tantrums, whining, making noises and body jerks, interfered materially with his ability to access his education. He experienced debilitating anxiety when he was around groups of peers, in noisy environments, and required to make transitions between tasks.

Student received speech and language therapy services for 30 minutes a week in a “push-in” model, with speech therapy provided in a group inside the general education classroom, and he was also pulled out of class for 30 minutes a week for group speech therapy in a separate room. Student also received 150 minutes a week of individual specialized academic instruction from education specialist Hurd in the resource room that school year. The resource room was a quiet and comfortable place for Student. Additionally, Hurd went into Student’s fifth grade class to provide him with another hour a week of individual specialized academic instruction inside the general education classroom. Starting in December 2021, Student also participated in several group counseling sessions open to all general education pupils. Student’s IEP included a behavior intervention plan.

At the beginning of the 2021-2022 school year, Palo Alto returned to in-person instruction for all pupils after more than a year of distance learning during the COVID-19 pandemic. The transition from distance learning to in-person instruction was extremely difficult for Student due to his anxiety disorder, mental health issues, and his significant social-emotional, processing, sensory, and attention deficits. Furthermore, Student’s misophonia caused him to react strongly to sounds, especially those emanating from people, such as coughs, sneezes, throat clearing, and chewing sounds. He was particularly agitated by sounds made by people he did not prefer. Groups of people and noise consistently triggered Student’s anxiety, causing him to become dysregulated. At these times Student

- threw tantrums,
- whined,

- shouted,
- made noises, and
- cried.

While dysregulated, Student was not able to access his education.

Additionally, Student was a perfectionist and competitive. He reacted very badly to losing a game or getting an answer wrong. He threw tantrums and became dysregulated about half of the times he got an answer wrong on an assignment. Student was also extremely sensitive to being judged by others. Due to his processing disability, he consistently took more time to complete tasks and master new material than his general education classmates. He was keenly aware and self-conscious about this, which resulted in him feeling bad about himself. Price recalled an occasion where Student told her he felt like Forky, a character in the movie Toy Story 4. Price testified this meant Student “felt like trash.” Student also had great difficulty with transitions, especially if they were unexpected.

Many factors at Hoover triggered Student’s anxiety and caused him to engage in tantrums and other inappropriate behaviors. Once dysregulated, it took him a while to calm down so he could focus on instruction and academic tasks. The amount of time it took Student to calm down varied. He was often in a “fight or flight” mode at school, which took a serious toll on his mental health.

Student

- had a short attention span,
- lacked self-control,

- was unhappy often,
- had unusual fears,
- was difficult to calm, and
- was sensitive and easily emotionally hurt.

At school, he frequently exhibited tantrums, whining, and other negative behaviors when he was around peers or exposed to noises, transitions, and nonpreferred tasks. His executive functioning was poor. Student rarely socialized with peers at school. He almost always ate lunch and spent recess alone. In the rare instances when he interacted with peers at school, he preferred doing so with younger children.

There were 17 children in Student's general education fifth grade class, which was significantly smaller than the usual general education class at Hoover. The children were allowed to choose their seats. Shortly after the school year started, Student began sitting at a table located at the back of the classroom, a distance away from his classmates.

Student often threw tantrums, screamed, whined, cried, flopped to the floor, destroyed inanimate objects, and engaged in negative self-talk at school. For purposes of collecting data, Student's behavior team characterized Student's negative behaviors as protest, noncompliance, and tantrums. The function of these behaviors was usually escape or avoidance from nonpreferred situations or tasks. Occasionally the function of his negative behaviors was to get adult attention. Student's "protests" were defined as high-pitched vocalizations paired with negative self-talk, body jolts, and/or crying with or without tears for more than 15 seconds. Student's "noncompliance" was defined as his refusal to engage in expected tasks or demands, putting his head down on his

desk, pretending to be asleep, and engaging in fake crying. Student's tantrums were defined as screaming, crying, stomping, kicking or throwing objects, or minor property destruction, for more than 30 seconds. The tantrums were often paired with growling, yelling, or making threats. Student's assigned aide and other Palo Alto personnel collected data on how often Student engaged in those behaviors. The frequency and duration of those behaviors increased over the course of fifth grade, and none of them were extinguished.

Student experienced a particularly upsetting incident early in the school year when he was assigned a task referred to as "ball duty." This task was regularly assigned to two fifth graders. The students on "ball duty" handed out balls and other playground equipment to the younger children to use during recess. The two fifth graders also collected the balls and equipment from the children at the end of recess. Student did not want to take on this assignment, but was assured by Kwon he could handle it. Student's "ball duty" partner was a boy he knew well and liked. Due to the noise and disorder inherent in that responsibility, Student became overwhelmed and dysregulated. He had a tantrum and shouted loudly that he wished he had a gun, and that everyone would leave. Kwon testified she was informed Student had another incident during which he lost his temper and threw objects at a group of water bottles, angrily knocking them over. Kwon assumed this incident occurred in physical education class.

Rebecca was Student's first assigned aide at the beginning of the school year. Rebecca went on medical leave in late September or early October 2021. In the final week of October 2021, Sawyer Lythcott-Haims, called Haims, was assigned as Student's permanent one-to-one aide. Haims had completed two years of college and had not been trained as a behavior aide when he started as Student's aide. He eventually

received some aide training from Palo Alto. Haims took directions from Kwan, Price, and Hurd. It was Haims's responsibility to be responsive to Student's need for assistance. Haims testified that, because Student's involuntary whines, screams, and shouted words were loud, unexpected, and somewhat shocking to others, Student's classmates had all been asked and agreed to be in the class with Student.

After the "ball duty" incident in fall 2021, private psychologist Berquist informed Parents she was very concerned about Student's mental health because he was miserable and extremely stressed at Hoover. He could not cope with being in a noisy, group setting. Berquist recommended Parents ask Hoover staff to "pull-back" and relieve Student from many demands at school. At an IEP team meeting held on December 6, 2021, Mother asked the IEP team if Student could attend school remotely two days a week in an effort to reduce his anxiety. Palo Alto refused that request.

Parents communicated Berquist's concerns over Student's declining mental health to Kwon, Price, and Hurd starting in fall 2021. Parents conveyed to Kwon that they were extremely worried about Student's heightened anxiety and fears at school. Parents asked Kwon, Price, and Hurd to allow Student to leave the classroom when he was dysregulated and needed to calm himself. Parents also requested that Student be allowed to leave the classroom to work in a quiet location when he requested to do so. Price testified that Student's IEP team met to consider these requests. Despite some reservations, Palo Alto agreed to Parents' requests. After that, Student was allowed to leave class with Haims when he requested a break by either stating "break," or by holding up a "break" card. If Student was too upset to even hold up the "break" card, he

was allowed to communicate he needed a break by getting up and moving toward the classroom door. Student often had to leave the classroom because he was so upset about getting an answer wrong.

Haims timed the breaks Student took to calm down. If Student was not calm after three minutes lapsed, Student could request that the break be extended for several more minutes. Once Student became regulated, he returned to the classroom with Haims. With the help of Kwon or Price, Haims attempted to get Student up to speed with the class instruction Student had missed while he was out of the classroom on a break.

Around the beginning of December 2021, Parents requested Student be able to do his academic work outside of his general education class. The IEP team agreed to this request. Therefore, starting on December 6, 2021, Student was required to stay in his general education classroom only long enough for his teacher to give him instructions for an assignment. After that, Student and Haims went to either the resource room or the picnic table located outside the classroom to do academic work. On four out of five days a week, Student was in the general education classroom usually for about only five minutes, which was just long enough to get instructions from the teacher for an assignment. Occasionally, when she was able, Kwon left her classroom to go where Student and Haims were located to provide Student with individual instruction. However, Student received most of his instruction from Haims, who was not a credentialed teacher or qualified to provide instruction.

Sometimes Student worked outside the classroom for the entire day. As the 2021-2022 school year progressed, Student's anxiety and his negative and dysregulated

behaviors worsened, and his mental health further deteriorated. Student tolerated being in the classroom with his peers for only about five minutes. Student was very anxious over his inevitable transition to middle school in sixth grade. Haims testified Student got very upset when Haims merely mentioned middle school to Student.

Kwon testified Student was not often in her classroom during the second half of the school year. Both Kwon and Haims testified Student was not able to receive instruction in a group setting. They also both testified Student was only able to learn when receiving individual instruction, and when he worked with his aide away from noises and distractions of classmates. Price testified Student rocked his body frequently in class, which indicated he was anxious and not calm enough to learn. Price avoided approaching Student when he was anxious. Kwon testified Student's anxieties and fears were "deep and real."

The Kwon-Price class started with a morning meeting, during which the children sat in a circle and greeted each other, shared experiences, sometimes played games, and reviewed the itinerary for the day. Student rarely participated in the morning meeting. If he ever participated, he did not join circle, but instead sat away from the rest of the class. Student developed a routine where he would get the first assignment of the day from his teacher and promptly leave the class with his aide before the morning meeting even started.

Student regularly got very upset if he was working on something he wanted to complete when the rest of the class moved on to another subject or task. Kwon then allowed Student to continue working on his current task, and Student handled the daily work from the next subject at home that night with Parents. As a result, Student was

often not working on the same subject or task that the rest of the class was then addressing. Student also found it very difficult to work on group projects with peers. Due to his processing deficit, he took more time to complete a task than his classmates did, which upset him.

Kwon observed Student in music and physical education classes quite often, especially in the second half of the year. Both music and physical education were especially difficult classes for Student due to the noise in those settings. Most of the time in those classes Student did not participate in the same activity as his classmates. In physical education he often engaged with his aide in an activity different from the rest of the class.

Student was usually not able to tolerate being in music class due to the noise. Sometimes the music class was conducted outside. In those instances, Student stayed inside and watched the class through open windows. If he was ever outside with the music class, he positioned himself a distance away from the class. He did the same during physical education. Consequently, he only nominally participated in physical education and music classes.

Student usually wore noise-cancelling headphones at school to negate the noise in his surroundings. Testimony established at times he wore two sets of headphones. He also plugged his ears with his fingers if he was presented with a nonpreferred task, or he heard an upsetting noise, such as a sneeze or cough. He often wore a pressure vest, and used other sensory equipment, such as modeling clay or a plush toy, to soothe himself.

On average, Student had about one tantrum at school every day and a half, although that amount varied at different times during the school year. When Student had a tantrum, he yelled, occasionally kicked things, took smaller objects and destroyed them, such as ripping up paper, squeezing his headphones, or stomping on an object. It usually took one to five minutes for Student to calm down after a tantrum. However, occasionally it took Student more than a half hour to become calm. In one instance Student participated in the Halloween celebration in Kwon's class but had a meltdown when he lost a game at the party. He could not be comforted and continued to cry for a very long time.

The children in Kwon's class rotated to an adjacent classroom with another teacher for a different subject once a week. Student found this transition disturbing. By the end of the school year, Student consistently rejected this rotation. Instead of participating in the rotation with his classmates, he took breaks with his aide at that time outside the classroom.

On November 28, 2021, Mother wrote an email to Kwon, Price, and Hurd, informing them Student was very anxious about returning to school after the Thanksgiving break. Mother informed them that Berquist, Student's private psychologist, recommended they allow Student to work outside the classroom in an alternate location away from all classmates, because Student was extremely anxious at school and exhibiting intense avoidance and escape behaviors. Mother also asked that Student only be required to join the class for reading, a subject he preferred and during which time the classroom which was less noisy than during other subjects.

In an IEP team meeting held during the 2021-2022 school year, Hoover's principal, Jim Sherman, acknowledged Student was extremely anxious at school. Sherman also voiced concern that Student was missing out on a lot of instruction by leaving class so frequently. At hearing, Nestor Ramos, the Palo Alto board-certified behavior analyst, called a BCBA, who supervised the implementation of Student's behavior intervention plan, testified Student was outside of the general education class during 34 percent of academic instruction each school day, on average.

After the winter break ended in early January 2022, Student did not timely return to school because he was so anxious about going back to Hoover. Evidence established that after Student eventually returned to school around mid-January 2022, Student's anxiety, dysregulation, tantrums, whining, and other negative and distracting behaviors at school increased steadily and continued to increase through the end of that school year. On February 10, 2022, Student's IEP team met because Parents wanted to discuss their concerns about Student's progress. Mother told the IEP team she was extremely concerned about Student's behavior at school, and questioned whether Palo Alto was able to support Student.

At this point in the school year, the IEP team's plan was to have Student work on academics in alternate locations, rather than in the regular classroom with peers. Mother told the IEP team she thought Student's behavior goals were of paramount importance because he was so uncomfortable and agitated in school. Mother informed the IEP team that because she was so worried about Student's increasingly negative behaviors she sought an assessment for him at Stanford University Medical Center, but that assessment would not occur before Student's three-year-review IEP team meeting in March 2022.

At an IEP team meeting held in the second half of the 2021-2022 school year, Ramos reported to the IEP team that Student was not often in his general education classroom. Ramos recommended Student be required to do at least one step of an assignment before he be allowed to leave the classroom. The evidence was unclear if Student was ever required or able to do that. At hearing, Ramos credibly testified that at the end of fifth grade, Student was not ready to attend middle school. Since the context of Ramos's response was in a line of questions about Student's readiness in Spring 2022 to attend JLS in Fall 2022, the obvious inference from Ramos' testimony was that Student was not ready to attend JLS, a large comprehensive middle school, after fifth grade. Unfortunately, Ramos had not mentioned this crucial opinion at IEP meetings when the IEP team offered Student placement at JLS for sixth grade, as discussed below.

TESTIMONY OF FIFTH GRADE TEACHER KIMBERLY KWON

In connection with an assessment of Student on January 28, 2022, Kwon completed the teacher report of the Conners Comprehensive Behavior Rating Scales. A summary of Kwon's responses on that instrument indicated Kwon thought Student was experiencing very elevated emotional distress, and that he was having upsetting thoughts and significant physical symptoms as a result of his stress. Kwon's ratings also indicated she thought Student had

- separation fears,
- high social anxiety,
- defiant behaviors,
- hyperactivity,

- social problems, and
- perfectionistic and compulsive behaviors.

Kwon further reported that Student's problems seriously affected his functioning very frequently. Kwon wrote the following regarding her additional concerns about Student's academic future: "I am worried about the student's ability to function in a general education setting in middle school; he and his parents do not have realistic expectations for how he can be in a room with other students." Kwon testified Parents hoped Student would be able to leave the classroom often and work on his academics outside of class with his aide in middle school. However, Kwon did not see how that would be feasible because much more group instruction would be required of Student at JLS, than had been at Hoover.

Kwon, who taught fifth grade in Palo Alto for 15 years, answered most questions posed to her knowledgably, competently, and candidly. However, in light of her admission that Student's anxiety and fears were "real and deep," and that Student was rarely in her classroom during the second half of fifth grade due to his anxiety and emotional dysregulation, her opinion provided at hearing that JLS was an appropriate placement for Student in sixth grade was neither convincing, nor credible. She offered no explanation as to how Student could function successfully in a large, noisy, and demanding placement such as JLS, when he had not been able to do so at Hoover, which was a much smaller school with far fewer children and smaller class sizes.

TESTIMONY OF DR. KARI BERQUIST

Berquist testified extremely convincingly at hearing. She was candid, sincere, and was genuinely worried about Student's well-being and mental health during his

fifth-grade year. During their therapy sessions, Student shared with Berquist the misery and tremendous anxiety he endured at Hoover. He also shared that he felt bad about himself due to his behaviors and what he perceived as his failures at school. Berquist had very serious concerns about Student's mental health in a large, public-school placement. Consequently, Berquist recommended Parents hire private psychologist Dr. Lori Bond, to identify an appropriate educational placement for Student. Berquist opined that a large campus, such as JLS, was not an appropriate educational placement for Student.

Berquist attended an IEP team meeting on June 7, 2022, and shared her concerns about Student's regression at Hoover in fifth grade. Berquist further shared with the IEP team that Student required a more individualized approach than could be provided in a placement at a large school like JLS. Berquist told the IEP team that, despite all the accommodations and support Palo Alto had provided Student at Hoover during fifth grade, he was still struggling. She further told the IEP team that Student required a much smaller environment with fewer people. Her hope was that after spending some time in a smaller school environment, like EBC, he could eventually return to a public-school placement.

The IEP team appeared to disregard Berquist's input at the June 7, 2022 IEP meeting and Palo Alto program coordinator, Laurie Garcia, stated Palo Alto could provide Student a FAPE at JLS and it would not offer Student placement in a nonpublic school for sixth grade. No evidence was provided as to why Palo Alto disregarded Berquist's opinions about Student's mental health needs at the June 7, 2022 IEP team meeting.

During her testimony at hearing, Berquist was emotional and expressed her grave concerns for Student in a large public school. Berquist knew Student very well and was an extremely qualified, competent, and persuasive witness. Berquist had a Ph.D. in psychology, as well as extensive experience as a child psychologist with an emphasis in developmental disabilities. She supervised an autism program for children, and also acted as a behavior consultant. She was also a clinical professor specializing in children with autism at Stanford University Medical Center. Berquist's testimony was extremely credible and persuasive, and therefore, was given significant weight.

TESTIMONY OF DR. LORI BOND

In January 2022, Parents hired Bond, a psychologist with a private practice and a Ph.D. in school psychology from University of Pennsylvania, to provide recommendations for an appropriate educational placement for Student. Bond had 17 years of experience in assessing and recommending appropriate educational placements for autistic children, and testified very competently, thoroughly, and persuasively at hearing.

Bond observed Student in class at Hoover on March 23, 2022. She noted Student went in and out of the classroom multiple times during her observation. She also noted Student was not able to participate with the class. Bond testified Student was able to focus on academic work only when his aide eventually took him to the resource room to work. Bond opined it was inappropriate for Student to go in and out of his classroom. It was clear to Bond that Student was struggling in many areas. Bond noted that Student did not interact with any children during recess. Instead, he stayed by himself at the picnic table outside his fifth-grade classroom.

Bond conducted an extensive review of Student's records, including Palo Alto's three-year-review assessments, and conferred with Berquist regarding Student's needs. Bond also conferred with Dr. Jennifer Phillips from the Stanford Autism Clinic about Student's disabilities and needs. Bond testified at hearing that Student had a complicated presentation, with significant anxiety, rigidity, slow processing speed, and social deficits. Student had great difficulty focusing on tasks. Bond further noted Student was acutely aware he performed poorly at school compared to his peers. Consequently, his self-esteem was significantly impacted. Bond also recognized that Student had challenges with higher level comprehension, which required drawing inferences rather than merely grasping concrete facts. In May 2022, Bond informed Parents that Student needed placement in a small school setting with intensive mental health and behavioral supports, and therapeutic resources and strategies embedded in the classroom. She recommended EBC.

On February 13, 2023, Bond went to JLS to observe Palo Alto's placement offer for Student for both sixth and seventh grades. She opined that JLS was a large, busy, noisy, bustling campus. She also noted there was a large number of children attending JLS and they were expected to make many transitions independently throughout the school day. Bond observed both a sixth-grade general education class and an Academic Communication class, which provided specialized academic instruction for children at JLS. Bond convincingly opined that JLS was not an appropriate placement for Student. She believed Student would be overwhelmed by the large size campus and the large number of children enrolled there. Bond also stated Student could not handle having many classes with multiple teachers. JLS was further unsuitable for Student because the number of children in each class was large. She also noted that the sensory stimulation

and noise at JLS would be overwhelming for Student. She further noted that JLS is fast paced, and Student works slowly. Bond convincingly opined that Student, who was hypersensitive to his environment and noise, would not be able to obtain educational benefit at JLS.

Bond also observed Student at EBC on February 16, 2023. Bond noted that EBC was a very small, orderly school with a warm, friendly staff. She conferred with Caroline Goerke, the behavior program manager at EBC. Bond also later conferred with Lesley Rios, the classroom behavior specialist, and Jody Miller, the then-director of EBC. Bond noted that Student worked in the main classroom with his classmates at EBC, but he also sometimes worked for brief periods of time in an attached side room (with the door open) when the classroom became too noisy for him. Bond further noted that Student's aide at EBC, Marcella, had significant training in working with children with autism.

Bond persuasively opined a nonpublic school was an appropriate placement and EBC was an appropriate school for Student. Bond testified convincingly that Student needed very individualized instruction with a therapeutic program embedded in the curriculum. This kind of placement would enable Student to work on developing coping strategies. Bond opined Student was doing well at EBC and recommended he stay at EBC for seventh grade in the 2023-2024 school year.

Bond further opined that in order to obtain educational benefit, Student should have been offered extended school year for summer 2023. Bond noted Student needed a consistent, structured, therapeutic program for the entire calendar year in order for him to maintain skills he has mastered. Bond further convincingly opined that nonpublic school was the least restrictive environment appropriate for Student, and EBC was an appropriate

school for Student. Bond stated Student's mental health would be in jeopardy at a large placement like JLS because his anxiety would be very high there. She also noted Student needed daily mental health support, which was provided at EBC, because he must feel good about himself in order to learn.

Bond further noted when she saw Student at EBC in February 2023, he had made progress compared to when she observed him at Hoover in fifth grade the previous school year. She noted Student made slow but meaningful progress at EBC. She also noted Student's mental health needs were being addressed at EBC. Bond further testified very persuasively that Student would likely suffer significant regression in his mental health if he transferred to JLS for seventh grade. No other witness at hearing was more convincing than Bond about how Student's needs could be met at school.

TESTIMONY OF EBC DIRECTOR, DR. JODY MILLER

Dr. Jody Miller, the former director of EBC's Palo Alto campus until June 2023, testified candidly and competently at hearing. Miller had a Ph.D. in education and a master's degree in educational administration. She was also a BCBA. Miller had extensive experience working for nonpublic schools and other programs specializing in educating children with autism and severe behavior deficits. She was the director of EBC's Palo Alto campus for four years, including the 2022-2023 school year. She was very familiar with Student. Miller testified that EBC was a small therapeutic school. The goal for all pupils at EBC was to help them learn coping and other skills they need so that they can be returned to and be educated at a comprehensive public-school campus. Miller noted that it usually took pupils two and one-half to three years at EBC

to accomplish this goal. In the 2022-2023 school year, there were 75 to 80 children between the grades of kindergarten and 10th grade enrolled at the EBC Palo Alto campus. Class size at EBC did not exceed 12 children.

Student was privately placed by his Parents at EBC's Palo Alto campus starting in August 2022. The EBC program included individual and group therapy, and weekly family therapy for all pupils. EBC had a rigorous behavioral program and a number of trained behavior professionals on its staff. Student had a one-to-one aide at EBC. He was assigned to therapist Anna Nelson for individual therapy sessions. Nelson had a master's degree in social work, and professional experience in both public and nonpublic schools. Student made progress in his weekly individual therapy sessions with Nelson over the 2022-2023 school year.

Miller convincingly testified that Student benefitted from both the therapeutic and behavioral components of EBC's program. All children at EBC received one hour a week each of family therapy, individual therapy, art therapy, and group therapy. All EBC pupils participated in extended school year.

Aides at EBC were all supervised by a BCBA, and were all credentialed as registered behavior technicians, who have passed an analytic behavior analysis, called ABA, skills test. Student's aide at EBC, Marcella, was in an ABA master's degree program. EBC collected data on Student's behaviors every day. Student's sixth grade class had 11 pupils in it.

Miller testified Student was dysregulated and unstable when he started at EBC in August 2022. He exhibited inappropriate behaviors at school. Student originally spent

most of his day in a side room attached to his classroom. EBC was able to gradually socialize Student so that by the end of the school year he was integrating into the main classroom. EBC concentrated on Student's triggers and teaching him coping skills. By June 2023, Student was able to stay in the main classroom for two classes a day for at least half of the period. Student also benefited from the therapy sessions provided at EBC. Student made progress in both academics and social-emotional functioning by June 2023. Student participated in extended school year during summer 2023, which he needed to maintain his social-emotional growth.

Student's behaviors improved over the 2022-2023 school year, and he was able to stay in the main classroom for increasingly longer periods of time with a cardboard partition attached to three sides of his desk. Miller convincingly testified that Student was not ready to return to a public-school campus by June 2023. Miller opined that Student felt EBC was a "safe space" and he benefitted from the rigorous emotional support provided there. EBC's program for Student was tailored to meet his individual needs. Miller further testified she was delighted with Student's growth at EBC during the 2022-2023 school year. The evidence established that EBC was an appropriate school setting for Student.

Miller further persuasively opined that Student needed to continue to attend EBC longer than just one school year before he could successfully transition to a comprehensive, public-school campus. Miller's testimony about Student's behaviors at the end of sixth grade supported her opinion that Student needed to attend EBC longer than one year to successfully transition to a public school. No witness offered convincing testimony rebutting Miller's persuasive testimony that Student was not ready to return to a comprehensive, public-school campus by fall 2023.

PALO ALTO EDUCATION SPECIALIST ASHLEY CHECHOO OBSERVED STUDENT AT EBC

Ashley Chechoo, a Palo Alto education specialist, testified at hearing. She first heard about Student in February 2023 when Student was already attending EBC. Cheechoo observed Student at EBC in February 2023 in preparation for his 2023 annual IEP team meeting because Parents asked Palo Alto to make an offer of a FAPE to Student for the 2023-2024 school year. Cheechoo observed Student at EBC in February 2023 while he worked with his aide in a side room attached to his main classroom, with the door to the classroom ajar.

Chechoo again observed Student in class at EBC on September 14, 2023. During that observation, Student was working in the main classroom along with his classmates. He had a cardboard partition affixed to his desk.

Chechoo opined at hearing that all disabled children, including Student, can and should be educated with their neurotypical peers in general education classes on a comprehensive, public-school campus. Other than observing Student twice at EBC and attending several of his IEP team meetings in spring 2023, Chechoo had no other knowledge of, or experience with, him. Moreover, she never reviewed his educational or other relevant records. Chechoo's testimony was not given much weight due to her limited knowledge of and involvement with Student, and because of the overbroad tenor of her opinion that all children can be educated inclusively in general education classes on a comprehensive, public-school campus. That opinion did not account for the unique needs of certain children, like Student, who need to be educated in a small, therapeutic, nonpublic school with embedded mental health and behavioral supports.

PALO ALTO'S OFFER FOR THE 2022-2023 SCHOOL YEAR

Palo Alto's offer of a FAPE for Student for sixth grade in the 2022-2023 school year was addressed by Student's IEP team in three meetings held on March 30, 2022, May 12, 2022, and June 7, 2022. The purpose of the March 30, 2022 IEP team meeting was to conduct both Student's annual IEP and three-year-review reassessment meeting and make an offer of a FAPE for the next school year. The purpose of the May 12, 2022 IEP team meeting was to address Student's transition to middle school. The purpose of the June 7, 2022 IEP team meeting was to address Parents' questions and concerns about Palo Alto's offer of a FAPE for sixth grade.

At the March 30, 2022 IEP team meeting, and again at the May 12, 2022 IEP team meeting, Palo Alto offered Student the following for the period starting on August 10, 2022, the first day of the 2022-2023 school year, through March 30, 2023, the date when Student's next annual IEP team meeting was due to be held:

- Placement in general education for 92 percent of the school day at Jane Lathrop Stanford Middle School, called JLS;
- 210 minutes weekly of specialized academic instruction in a group setting, which consisted of a class called either Academic Planning or Academic Communication, serving seven to 10 pupils;
- 30 minutes weekly of individual counseling;
- 30 minutes weekly of speech and language therapy in a group setting, in a separate class;
- 30 minutes weekly of speech and language therapy in a group setting, in a general education class; and

- 1,610 minutes weekly of intensive individualized services in the general education class, which constituted services from a one-to-one aide assigned solely to Student for 5 hours and 36 minutes each school day.

JLS was a large, comprehensive middle school with a spacious campus serving about 1,000 students in sixth, seventh, and eighth grades. It was a busy, noisy, bustling campus. General education class size at JLS was usually 25 students.

The class schedule at JLS varied depending on the day of the week, but on at least one day a week pupils there had seven classes in one day, taught by a variety of teachers in different classrooms. The pupils at JLS were required to make a lot of transitions. Furthermore, the classes at JLS would each serve about 25 pupils, except for the single, specialized academic instruction class offered to Student.

At the June 7, 2022 IEP meeting, Parents informed the IEP team they were very concerned Student would not receive any individual specialized academic instruction at JLS, like he always had previously received at Hoover. The district members of the IEP team told Parents that specialized academic instruction was only provided in a group model at JLS. Palo Alto also informed Parents that Student would have two or three different adults alternating as his aide, rather than just one person, which had always been the case at Hoover. Palo Alto told Parents that was the way aide service was provided at JLS. This worried Parents because transitions among service providers were difficult for Student. Only a very small number of children at JLS were assigned a one-to-one aide.

At the June 7, 2022 IEP team meeting, Parents informed Palo Alto they did not think Student could be educated JLS. They also informed Palo Alto Student had been

accepted at EBC, a small nonpublic school with a therapeutic program, and that Student would be attending EBC starting in fall 2022. Parents also informed Palo Alto they would seek reimbursement from Palo Alto for the costs of that placement and related services.

PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT

The student's placement must be determined at least annually. The placement must be based on the child's IEP and be as close as possible to the child's home, unless the IEP of a child with a disability requires some other arrangement. In determining the educational placement of a child, the public agency must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, and the meaning of the evaluation data. Ed. Code, § 56341.

Generally, the appropriate placement option is the least restrictive environment in which the child can be educated. The IDEA requires school districts ensure that children with disabilities are educated alongside their nondisabled peers "[t]o the maximum extent appropriate." (20 U.S.C. § 1412(a)(5)(A).) School officials may remove a disabled child from the regular classroom "only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (*Ibid.*) This provision reflects the IDEA's "strong preference" for educating children with disabilities in a regular classroom environment. (*Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834(*Poolaw*).)

In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that the child needs.

Also, a child with a disability must not be removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.) The law requires students be educated with nondisabled peers to the maximum extent appropriate. Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur only if the nature or severity of a 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).)

A four-factor test must be applied to the evidence to determine whether a school district has complied with the least-restrictive-environment requirement. (*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404(*Rachel H.*)). The first and most important factor compares the academic benefits a child receives from placement in the regular classroom with the academic benefits available in a special education classroom. (*Id.* at p. 1400–1401; *Poolaw*, *supra*, 67 F.3d at p.836.) The second factor considers the non-academic benefits a disabled child derives from being educated in a regular classroom, such as the development of social and communication skills from interaction with nondisabled peers. (*Rachel H.*, *supra*, 14 F.3d at p. 1404; *Oberti v. Board of Education*, 995 F.2d 1204, 1216 (3d Cir. 1993); *see also Ms. S. v. Vashon Island School District*, 337 F.3d 1115, 1137 (9th Cir. 2003), *superseded by statute on other grounds*, 20 U.S.C. § 1414(d)(1)(B).)

The third factor weighs the potential negative effects a disabled child's presence may have on the education of other children in the classroom or the teacher. (*Rachel H.*,

supra, 14 F.3d at p. 1404.) The fourth factor considers the costs to the school district of providing the supplementary aids and services necessary to educate a disabled child in the regular classroom. (*Ibid.*)

A NONPUBLIC SCHOOL WAS THE LEAST RESTRICTIVE ENVIRONMENT FOR STUDENT IN THE 2022-2023 SCHOOL YEAR

The evidence established that Student did not receive educational benefit from being in a general education class at Hoover in fifth grade, even with extensive aides and supports. He was only able to learn on occasions when he was outside of the general education classroom receiving individual instruction from Hurd or his aide, who was not qualified to teach Student.

Student was also not receiving any nonacademic benefits from interacting with neurotypical children because he did not interact with other children at Hoover. The effect of Student's presence in the general education classroom on other students and the teachers did not appear to be a significant factor regarding whether the regular classroom was the appropriate placement for Student, even though his involuntary behaviors were disruptive at times, because he actually was outside of the classroom most of the time. However, when the IEP team made its offer of a FAPE for the 2022-2023 school year, it improperly assumed Student would be outside the regular classroom when he was dysregulated, as he had been during fifth grade. In fact, the team was hoping to locate private spaces on the JLS campus where Student could go to regulate himself. The IEP team should have offered a placement that he did not have to leave during much of the school day. Lastly, neither side introduced evidence regarding

the cost of placing Student in a general education classroom. Therefore, application of the four *Rachel H.* factors leads to the conclusion that general education at JLS was not the least restrictive environment appropriate for Student in sixth grade.

Miller, Berquist, and Bond all convincingly testified placement in EBC, a small, therapeutic, nonpublic school, was the least restrictive environment in which Student could be educated at the times relevant to this case. He could not be educated in a general education classroom, even with the use of supplementary aids and services, due to his severe anxiety disorder, sensitivity to noise, processing deficits, and mental health issues. Consequently, Palo Alto erred when it failed to recognize that a small, therapeutic, nonpublic school, like EBC, was the least restrictive environment and appropriate placement for Student for the 2022-2023 school year.

THE SNAPSHOT RULE APPLIES WHEN DETERMINING IF A DISTRICT OFFERED A FAPE

Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. An IEP is a snapshot, not a retrospective. In striving for “appropriateness,” an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) This standard for evaluating IEPs is known as the “snapshot rule.” (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439.)

PALO ALTO DENIED STUDENT A FAPE IN THE 2022-2023 SCHOOL YEAR BY FAILING TO OFFER STUDENT AN APPROPRIATE PLACEMENT, ACADEMIC INSTRUCTION, AND BEHAVIOR SUPPORT AND MENTAL HEALTH SERVICES

Palo Alto's offer of placement at JLS for the 2022-2023 school year was not appropriate to meet Student's unique needs. The district members of Student's IEP team were aware by March 2022 that Student's severe mental health and behavioral deficits were paramount, and materially interfered with his ability to access his education. Student's needs in those areas were so acute they could not be effectively addressed at JLS, a large, comprehensive, public school. Student's unique needs required placement at a small, therapeutic, nonpublic school with rigorous mental health and behavior components embedded into the program. Student could not make academic progress until such time that his behavioral and mental health issues were successfully addressed.

The evidence about Student's needs that was available to the IEP team when it met in March through June 2022, amply established Student required a small therapeutic placement, such as EBC. Student also needed individual specialized academic instruction in order to learn. However, only group specialized academic instruction was offered and available at JLS. Moreover, the behavior support and mental health services offered for the 2022-2023 school year were not adequate to address Student's serious deficits in those areas. In order to make progress, Student required intensive behavioral and mental health supports embedded in his program throughout

the school day. Therefore, Palo Alto's offer of placement at JLS, along with behavioral, specialized academic instruction, and mental health services for the 2022-2023 school year did not offer Student a FAPE.

There was no combination of academic instruction, services, supports, modifications, and/or accommodations that would have made JLS an appropriate placement for Student in sixth grade. Student established that Palo Alto failed to offer him a FAPE for the 2022-2023 school year. Student also established that EBC was an appropriate certified nonpublic school alternative placement. Student prevailed on Issue 1.

ISSUE TWO: DID PALO ALTO DENY STUDENT A FAPE DURING THE 2023-2024 SCHOOL YEAR IN THE IEP ADDRESSED AT THE IEP TEAM MEETINGS HELD ON MARCH 8, 2023, APRIL 17, 2023, AND MAY 16, 2023, BY FAILING TO OFFER AN APPROPRIATE PLACEMENT, ACADEMIC INSTRUCTION, BEHAVIOR SUPPORT AND MENTAL HEALTH SERVICES, AND AN EXTENDED SCHOOL YEAR PROGRAM FOR SUMMER 2023?

PALO ALTO'S OFFER OF A FAPE FOR THE 2023-2024 SCHOOL YEAR

Because they privately placed Student at EBC during the 2022-2023 school year, Parents requested Palo Alto make Student an offer of a FAPE for the 2023-2024 school year, when Student would be in seventh grade. To address Parents' request, the IEP team met on March 8, 2023, April 17, 2023, and May 16, 2023.

Since Student had been at EBC during sixth grade, the following EBC personnel attended the March 8, 2023, meeting:

- Caroline Goerke, BCBA;
- Jody Miller, school director;
- Pamela Olson, occupational therapist;
- Anna Nelson, therapist; and
- Marcella Digel, aide.

Dr. Lori Bond, Parents, Palo Alto staff members of the team, and an attorney for each of Student and Palo Alto also attended that meeting.

The following EBC personnel attended the April 17, 2023, meeting: Miller, school director; Olson, occupational therapist; Nelson, therapist; and Digel, aide. Bond, Parents, Palo Alto staff members of the team, and an attorney for each of Student and Palo Alto also attended that meeting.

The following EBC personnel attended the May 16, 2023, meeting: Miller, school director; Olson, occupational therapist; Nelson, therapist; and Digel, aide. Bond, Parents, Palo Alto staff members of the team, and an attorney for each of Student and Palo Alto also attended that meeting.

During the course of the three IEP team meetings, EBC personnel informed Palo Alto Student had made significant behavioral and social-emotional progress during sixth grade. Miller further informed the IEP team Student was not yet ready to make the transition to a comprehensive campus. Miller further told the team Student could eventually return to a comprehensive campus, but he needed more time at EBC to

develop coping and other mental health skills that would allow him to successfully make that transition. Bond told the IEP team JLS would be a very bad placement for Student because it would be extremely stressful for him. Bond also stated JLS would actually be a more restrictive placement for Student than EBC because at JLS he would have to be outside of the regular classroom often to become regulated. Miller stated Student was then able to stay in the main classroom at EBC during most of two classes each day and he was making steady progress toward staying in the main classroom longer. Bond also told the team Student was making progress in the intensive therapy provided at EBC.

At the May 16, 2023 IEP team meeting, Palo Alto informed Parents it would continue to offer placement at JLS with services. After all three of the spring 2023 IEP team meetings had been held, Palo Alto's offer of a FAPE to Student for most of the 2023-2024 school year was:

- Placement - general education for 84 percent of the school day at JLS;
- Specialized academic instruction – 410 minutes in a group setting, which consisted of two classes, Academic Planning, and Academic Communication, each serving seven to 10 pupils with IEPs;
- Speech and language services – 30 minutes weekly in a group setting in a separate room, and 30 minutes weekly (push-in model) in a group setting in the general education classroom;
- Individual counseling – 30 minutes weekly in an individual setting in a separate room;

- One-to-one aide – 1810 minutes weekly across all settings, or six hours a day;
- Occupational therapy – 40 minutes a year consultation; and
- Behavior services – 200 minutes a year consultation.

Palo Alto did not offer Student an extended school year program for summer 2023. The exact dates to which this offer of a FAPE applied were May 17, 2023, through March 8, 2024, the deadline for Student's next annual IEP.

Once Palo Alto made the above offer of a FAPE, Parents informed Palo Alto that they planned to privately place Student at EBC during the summer 2023 extended school year and the 2023-2024 regular school year and seek reimbursement from Palo Alto for the costs of that placement and services. In response, Palo Alto's special education coordinator, Laura Thorpe, sent a prior written notice to Parents stating Palo Alto believed it had offered Student a FAPE for the upcoming school year and declined Parents' request for reimbursement of the costs of sending Student to EBC. That notice informed Parents there would be a room available at JLS for a safe space where Student could go to calm himself when he was dysregulated. Testimony of various Palo Alto witnesses established the location of such a space on the large JLS campus had not yet been determined by the time of hearing.

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PALO ALTO FAILED TO PROPERLY APPLY THE SNAPSHOT RULE WHEN IT DISREGARDED STUDENT'S NEED TO MAKE FURTHER PROGRESS AT EBC IN THE 2023-2024 SCHOOL YEAR BEFORE HE COULD SUCCESSFULLY TRANSITION TO A LARGE, COMPREHENSIVE SCHOOL

Palo Alto had several of its special education staff members observe Student at EBC in February 2023. Those observations were very brief. Because Palo Alto had not worked with Student since the end of the 2021-2022 school year it should have heavily relied on information provided by EBC personnel and Parents to inform the IEP team about Student's then current needs, present levels of performance in all areas, and readiness to attend a large comprehensive public school like JLS. Parents, EBC personnel then working with Student, and Bond all informed the team at IEP meetings in spring 2023 that Student had made slow, but steady, progress in sixth grade, but it was essential he remain at EBC during seventh grade. He needed more time at EBC to further develop coping, and other mental health and social-emotional skills required for his eventual successful transition to a large, comprehensive school like JLS.

However, Palo Alto disregarded this essential information about Student provided by EBC personnel, Parents and Bond in spring 2023. Palo Alto ignored crucial information provided by Miller and Bond that Student was not yet ready to return to a large school. Palo Alto even ignored Bond's warning that it would be harmful to Student to transition to JLS in seventh grade. There were no facts presented to the IEP team in March through May 2023, that suggested Student would be able to successfully access his education at JLS in fall 2023. Therefore, Palo Alto failed to appropriately apply the "snapshot rule" when it ignored the objective information about

Student provided to it in spring 2023 when the IEP was drafted. Moreover, there was no evidence that the IEP team considered whether Student required an extended school year program for summer 2023 to avoid regression.

PALO ALTO DENIED STUDENT A FAPE IN THE 2023-2024 SCHOOL YEAR BY FAILING TO OFFER STUDENT AN APPROPRIATE PLACEMENT, ACADEMIC INSTRUCTION, BEHAVIOR SUPPORT AND MENTAL HEALTH SERVICES, AND AN EXTENDED SCHOOL YEAR PROGRAM

For the reasons discussed above, Palo Alto's offer of placement at JLS and services for the 2023-2024 school year was not appropriate to meet Student's unique needs at the time it was offered and did not constitute a FAPE. Palo Alto ignored the information provided by Parents, EBC staff members, and Bond, which established Student had made progress at EBC, but he was not yet ready to attend a large, comprehensive, public school like JLS for the 2023-2024 school year.

Moreover, no witnesses at hearing refuted Bond's testimony that Student needed an extended school year program to avoid regression. The law requires an IEP to state whether extended school year services are offered. (Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, title 5, section 3043, provides:

"Extended school year services shall be provided, in accordance with 34 C.F.R. section 300.106, for each individual with exceptional needs who has unique needs and requires special education and related services in excess of the regular academic year. Such individuals shall have disabilities which are likely to continue indefinitely or for a prolonged period, and

interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her disabling condition.”

Bond convincingly opined at hearing that Student needed a year-round therapeutic school program to avoid regression.

Student’s unique needs could only be met at a nonpublic school with appropriate social-emotional and behavioral supports embedded in its program during the summer 2023 extended school year, and the 2023-2024 regular school year. Student needed to continue attending school in a small, therapeutic environment with rigorous mental health and behavior components embedded into the program during seventh grade. He was unable to make appropriate academic progress for his circumstances until such time that his behavioral and mental health issues were further successfully addressed. EBC was an appropriate school and the IEP team had adequate information indicating a transition to a school other than EBC for seventh grade would be traumatic for Student. The evidence about Student’s needs before the IEP team in March through May 2023 established Student continued to need to attend EBC over summer 2023 and in the 2023-2024 school year.

There was no combination of academic instruction, services, supports, modifications, and/or accommodations that would have made JLS an appropriate placement for Student in seventh grade. Student established that Palo Alto failed to

offer him a FAPE for the 2023 extended school year and the 2023-2024 regular school year. Student also established that EBC was an appropriate alternative placement. Student prevailed on Issue 2.

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:

Palo Alto Unified School District denied a FAPE in the 2022-2023 school year in the May 12, 2022 IEP and the June 7, 2022 IEP, by failing to offer Student appropriate behavior support services, appropriate academic instruction, an appropriate placement, specifically, a nonpublic school, and appropriate mental health services.

Student prevailed on Issue 1.

ISSUE 2:

Palo Alto Unified School District denied Student a FAPE during the 2023-2024 school year in the IEP addressed at the IEP team meetings held on March 8, 2023, April 17, 2023, and May 16, 2023, by failing to offer Student appropriate

behavior support services, appropriate academic instruction, an appropriate placement, specifically, EBC, a nonpublic school, appropriate mental health services, and an extended school year program for Summer 2023.

Student prevailed on Issue 2.

REMEDIES

LAW APPLICABLE TO PARENTS' UNILATERAL PRIVATE PLACEMENT

Parents who unilaterally place a child in private school may seek reimbursement for the costs of special education and related services. (See 20 U.S.C. § 1415; (“[C]ourts may grant, reimbursement under § 1415(i)(2)(C)(iii) only when a school district fails to provide a FAPE and the private-school placement is appropriate.”).) The IDEA specifies reimbursement is permitted “for the cost of [private school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.” (Id. at p. 248, quoting 20 U.S.C. § 1412(a)(10)(C).)

PALO ALTO SHALL REIMBURSE PARENTS FOR EXPENSES THEY INCURRED IN PRIVATELY PLACING STUDENT AT EBC

The IDEA permits reimbursement to parents for their private unilateral placement if they can show both that the IEP offered by the school district violated the IDEA and that the alternative private placement they chose was proper under the Act. (*See C.B. v. Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d 1155, 1159; 20 U.S.C. § 1412(a)(10)(C). Because reimbursement is a form of discretionary equitable relief, a

court must also assess the reasonableness of both parties' conduct to determine whether reimbursement is warranted. (See *Anchorage School District v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1058–59.) Relevant factors include the existence of more suitable placements for the student and the parties' level of cooperation during the IEP process. (*Ibid.*)

Mother credibly testified that Parents paid EBC or its affiliate, Children's Health Council, in monthly installments for Student's tuition at EBC and services he received at EBC since August 2022, the beginning of the 2022-2023 regular school year, through the date she testified at hearing in mid-October 2023. EBC charged a daily rate for tuition. The rate EBC charged for services varied depending on the nature of the service and the provider. The daily rate for tuition at EBC in September 2023 was \$334. The evidence was not clear if that same daily rate applied throughout the entire 2022-2023, and 2023-2024 regular school years and the 2023 extended school year. An invoice from Children's Health Counsel, an affiliate of EBC, established Parents were charged \$8,014.30 for Student's tuition and related services provided from August 10, 2023, through September 29, 2023. Palo Alto was obligated to provide Student transportation to a nonpublic school during the 2022-2023, and 2023-2024 regular school years and the 2023 extended school year. However, Student failed to introduce evidence regarding costs, if any, that Parents incurred for transporting Student to EBC from August 2022, through the time of hearing.

The evidence established Parents acted reasonably and cooperatively throughout the IEP process during all relevant times. Therefore, Parents are entitled to reimbursement from Palo Alto for the costs of Student's enrollment at EBC during the 2022-2023 regular school year, the summer 2023 extended school year, and the

2023-2024 regular school year through the last day of hearing, including the costs of related services provided to Student at EBC, pursuant to title 20 United States Code section 1415(i)(2)(C)(iii).

Palo Alto shall reimburse Parents for the aggregate amount of their payments to EBC for tuition, mandatory fees, and services provided to Student for the 2022-2023 regular school year, the extended school year program in summer 2023, and the 2023-2024 regular school year. Parents shall provide Palo Alto with documentation establishing the daily rate (or other applicable periodic rate) EBC, or Children's Health Counsel, charged for Student's tuition and services, and proof that Parents paid those charges. Palo Alto shall reimburse Parents for those payments within 30 days of the date Parents provide it with that documentation.

PALO ALTO SHALL CONTRACT WITH EBC FOR STUDENT'S PLACEMENT THERE

Within 30 days of the date of this Order, Palo Alto shall contract with EBC for Student's continued placement at EBC, and all related services offered in the IEP dated March 8, 2023, along with services and programs required for all pupils attending EBC.

ORDER

1. Palo Alto Unified School District shall reimburse Parents for the payments they made to EBC, or its affiliate, Children's Health Council, for education and services provided to Student for EBC's regular 2022-2023 school year, the extended school year program in summer 2023, and for the regular 2023-2024 school year. Parents shall provide Palo Alto with

documentation establishing the daily rate (or other applicable periodic rate) EBC, or Children's Health Counsel, charged for Student's tuition, mandatory fees, and services, and proof that Parents paid those charges. Palo Alto shall reimburse Parents for those payments within 30 days of the date that Parents provide it with that documentation.

2. Within 30 days of the date of this Order, Palo Alto shall contract with EBC for Student's placement at EBC, and all related services offered in the IEP dated March 8, 2023, along with services and programs required for all pupils attending EBC. Palo Alto shall also either contract with a transportation provider directly for Student's round trip transportation between home and EBC or reimburse Parents for transporting Student to and from EBC at the current Internal Revenue Service rate.
3. Within 30 days of the date of this Order, Palo Alto shall contract with EBC for Student's placement at EBC, and all related services offered in the IEP dated March 8, 2023, along with services and programs required for all pupils attending EBC. Palo Alto shall also either contract with a transportation provider directly for Student's round trip transportation between home and EBC or reimburse Parents for transporting Student to and from EBC at the current Internal Revenue Service rate.

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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.

Christine Arden

Administrative Law Judge

Office of Administrative Hearings