

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

VICTOR ELEMENTARY SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

CASE NO. 2023100085

DECISION

DECEMBER 8, 2023

On October 2, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Victor Elementary School District, called Victor Elementary, naming Student. Administrative Law Judge Jennifer Kelly heard the matter via videoconference on October 24, 25, and 26, 2023.

Attorney Laurie Arrowsmith represented Victor Elementary. Tanya Benitez, Assistant Superintendent of Pupil Services, and Kathleen Peters, Program Manager for Desert Mountain Special Education Local Plan Area, attended all hearing days on Victor Elementary's behalf. Parent represented Student at the hearing.

At the parties' request, OAH continued the matter for written closing briefs. The parties submitted the matter and OAH closed the record on November 20, 2023.

## ISSUE

A free appropriate education is called a FAPE. An individualized education program is called an IEP.

Did Victory Elementary's March 9, 2023, IEP offer constitute a FAPE in the least restrictive environment such that Victor Elementary may implement the March 9, 2023, IEP without parental consent?

## JURISDICTION

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

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, and 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; and see 20 U.S.C. § 1415(i)(2)(C)(iii).) Victor Elementary filed the due process complaint and had the burden of proof. The factual statements in this Decision constitute the written findings of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was eight years old and in second grade at the time of the hearing. At all relevant times, Student resided with Parent within Victor Elementary's geographic boundaries. Victor Elementary was a member of the Desert Mountain Special Education Local Plan Area, called Desert Mountain SELPA. Student qualified for special education under the primary category of intellectual disability and secondary category of speech and language impairment.

Student had Down syndrome and chronic lung disease. Student was nonverbal. San Bernardino County Superintendent of Schools initially found Student eligible for special education under the category of intellectual disability on January 9, 2019. San Bernardino County Superintendent of Schools is called San Bernardino.

ISSUE: DID VICTOR ELEMENTARY'S MARCH 9, 2023, IEP OFFER CONSTITUTE A FAPE IN THE LEAST RESTRICTIVE ENVIRONMENT SUCH THAT VICTOR ELEMENTARY MAY IMPLEMENT THE MARCH 9, 2023, IEP WITHOUT PARENTAL CONSENT?

Victor Elementary contends it offered Student an appropriate special education program and placement in the least restrictive environment in the IEP dated March 9, 2023. The March 9, 2023, IEP was a continuation of a three-part, annual IEP team meeting that began on October 18, 2022, reconvened on January 18, 2023, and concluded on March 9, 2023. The October 18, 2022, January 18, 2023, and March 9, 2023, IEPs are referred to collectively as the March 9, 2023, IEP. Victor Elementary contends placement in a moderate-to-severe special day class operated by San Bernardino was the appropriate placement for Student in the least restrictive environment. Victor Elementary further contends Student's diagnostic placement in a mild-to-moderate special day class during the 2022-2023 school year demonstrated Student required a structured program with a small class size, higher teacher-to-student ratio, and embedded academic and functional supports.

Student contends placement in a mild-to-moderate special day class was appropriate and in the least restrictive environment because Student had access to general education curriculum and the opportunity for modeling higher functioning peers' language, behavior, and social skills. Parent did not agree with the March 9, 2023, IEP's placement offer in a moderate-to-severe special day class operated by San Bernardino. Parent refused to consent to any part of the IEP.

Victor Elementary met its burden of demonstrating its FAPE offer in the March 9, 2023, IEP was appropriate. The preponderance of the evidence proved Victor Elementary's placement offer in a moderate-to-severe special day class with one-to-one aide support, small class size, slower paced instruction, and communication, behavior, and adaptive functioning supports was designed to meet Student's unique needs and reasonably calculated to provide Student with educational benefit in the least restrictive environment.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate considering the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 402 [137 S.Ct. 988, 1000] (*Endrew F.*))

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Special education is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) Related services are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26) 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a), (b) [in California, related services are also called designated instruction and services].)

An IEP is a written statement for each child with a disability that is developed, reviewed, and revised based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); 34 C.F.R. § 300.320; Ed. Code, § 56032.) Parent and school districts develop an IEP tailored to meet the unique needs of each child with a disability. (20 U.S.C. §§ 1401(14), 1414(d).) 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 results of the most recent evaluations 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); Ed. Code, § 56341.1, subds. (a), (d).) If a child's behavior impedes the child's learning or the learning of other children, the IEP team must consider the use of positive behavioral interventions and supports. (20 U.S.C. § 1414(d)(3)(B)(i); Ed. Code, § 56341.1, subd. (b)(1).)

The procedural requirement of a formal IEP offer creates a clear record and eliminates troublesome factual disputes years later about what placement and services were offered. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) A formal written offer is, therefore, more than a mere technicality, and this requirement is vigorously enforced. (*Ibid.*) The school district must offer a single, specific program, in

the form of a clear, coherent offer that parents can reasonably evaluate and decide whether to accept or reject. (*Glendale Unified Sch. Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1107-1108.) The formal IEP offer may be clarified by a prior written notice. (20 U.S.C. § 1415(b)(2)(B)(3); 34 C.F.R. § 300.503; *Union, supra*, 15 F.3d at pp. 1519, 1526.)

When a school district seeks to demonstrate that it offered a FAPE, the legal tribunal applies a two-part analysis. First, the school district must prove it complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the school district must prove the IEP was designed to meet the child's unique needs and reasonably calculated to enable the child to receive an educational benefit appropriate considering the child's circumstances. (*Ibid.*; *Andrew F., supra*, 580 U.S. 386, 402 [137 S.Ct. 988, 1000].)

When reviewing whether a proposed education program was appropriate, the IEP is not judged in hindsight, but instead is based on the information reasonably available to the parties at the time the IEP was developed. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

In a district-filed case, a hearing officer shall not base a decision solely on non-substantive, procedural errors unless the administrative law judge finds the non-substantive, procedural errors resulted in the loss of an educational opportunity to the student or interfered with the parent's opportunity to participate in the IEP formulation process. (Ed. Code, § 56505, subd. (j).)

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)) An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IEP not required to provide for an "education ... designed according to the parent's desires"].) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child. (*Ibid.*) The school district is ultimately responsible for ensuring that a student is offered an appropriate program. An IEP team should not offer an inappropriate placement simply to honor the parents' wishes for the child to be educated in a particular setting. (*J.W. ex rel. J.E.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431 (*J.W.*) [while the district had an obligation to consider the parents' input, it also had to ensure that it offered the student a FAPE].) For a school district's offer of special education services to constitute a FAPE, the offer of educational services and placement must be designed to meet the student's unique needs, comport with the child's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Gregory K., supra*, 811 F.2d at p. 1314.)

## STUDENT'S ENROLLMENT IN BRENTWOOD ELEMENTARY SCHOOL FOR THE 2021-2022 SCHOOL YEAR

In August 2021, Parent enrolled Student in kindergarten at Brentwood Elementary School, called Brentwood. Brentwood was located within Victory Elementary and was Student's school of residence. Student had never attended day care or school prior to attending Brentwood.

Victor Elementary obtained parental consent and conducted a psychoeducational assessment for Student in September 2021. School psychologist Sonia Najera conducted the psychoeducational assessment to evaluate Student's cognitive, academic, and functional skills. At the time of the assessment, Student was six years old. Student demonstrated deficits in fine and gross motor skills, communication, and functional behavior. He was not yet toilet trained or able to feed or dress himself. Student required hand-over-hand assistance with eating, drinking, and writing.

The evaluation demonstrated Student's cognitive and academic skills were extremely low, and Student had not developed many of the foundational skills necessary to participate in a kindergarten classroom. Student could not complete any standardized assessments due to distractibility, communication deficits, and lack of understanding. Based on Student's inability to perform tasks required by the standardized instruments used, the best estimate of Student's cognitive and academic functioning was in the very low range.

Najera conducted an informal play assessment to obtain information on Student's school-readiness skills. Student did not respond verbally. He smiled and gestured with his hands. Student demonstrated he did not want to participate by pushing Najera's hands away. Functionally, Student demonstrated an immature pencil grasp. He engaged in play activities with extensive prompting. Student sometimes engaged with an adult with verbal and hand-over-hand prompting. Student stacked blocks on top of each other, knocked them over, and then clapped and laughed. Student did not mimic or imitate actions.

Najera administered the Developmental Profile, Third Edition, to assess Student's development and functioning in five key areas of development –

- physical,
- adaptive behavior,
- social-emotional,
- cognitive, and
- communication.

Parent completed the rating scales. Student's scores in tasks requiring large and small muscle coordination were in the extremely low range, with a corresponding age-equivalent score of one year, five months. The adaptive behavior scale measured Student's adaptive skills, such as eating, dressing, and functioning independently. Student scored in the extremely low range, with an age-equivalent score of eight months. On the social-emotional scale, which measured Student's interpersonal - relationship abilities and social and emotional understanding, Student scored in the extremely low range, with a corresponding age equivalency of six months. Student's score on the communication scale, which measured expressive and receptive communication skills using both verbal and nonverbal language, was in the extremely low range, with a corresponding age equivalency of five months.

Najera administered the Adaptive Behavior Assessment System, Second Edition, to assess Student's adaptive functioning. This assessment was a questionnaire completed by Parent. Parent rated Student's overall adaptive functioning skills in the extremely low range when compared to his same-aged peers. Student's ability to communicate, complete basic academic skills such as reading and writing, engage in self-care, and independently complete tasks was in the extremely low range.

Victor Elementary convened an IEP team meeting on September 24, 2021, which was continued to November 30, 2021, to review its assessment and develop Student's educational program. Parent and Student's adult sister attended the IEP team meetings. Najera presented the results of her assessment. Student had significantly below average cognitive, academic, and functional skills. Student required substantial assistance in all areas. After reviewing the assessment report, the IEP team determined Student's primary disabling condition impacting his access to education was intellectual disability.

The IEP team documented Student's present levels of performance in his areas of need, which were fine motor, academic, social-emotional, communication, and daily living skills. Student's strengths included grabbing a writing utensil after modeling and verbal prompting. Student showed emotion by clapping. He stacked blocks with prompting and modeling. Student's sister reported he functioned more independently in the home setting. For example, Student could hold a spoon and lift it when attempting to feed himself. Student's diet consisted of pureed foods to avoid choking.

The IEP team determined Student demonstrated significantly below average intellectual functioning, and significant deficits in adaptive behavior and language. The IEP team developed four functional goals for Student in sustaining attention, holding objects, manipulating a variety of textures, and responding to his name. The IEP team discussed, and agreed, additional assessments were needed in the areas of speech and language and occupational therapy. The IEP team agreed to reconvene after the additional assessments were completed to determine if additional goals were needed in the areas of speech and language and fine and gross motor skills.

The IEP team discussed the need for modifications to the general education curriculum and accommodations. The IEP team determined Student required accommodations, including sensory breaks, a small group setting, and staff emergency training to address Student's health needs.

The IEP team considered a range of placement options for Student. Specifically, the IEP team discussed general education, resource specialist programs, and special day classes, including mild-to-moderate, moderate-to-severe, and severe or profound special days classes. Dr. Benitez explained the differences between each of these programs to Parent. Terri Williams, a school principal with San Bernardino, attended the November 30, 2021, IEP team meeting. She described the programs offered by San Bernardino within Victor Elementary, including programs for students with moderate-to-severe disabilities, and programs for students with severe or profound disabilities. The moderate-to-severe program focused on teaching students both functional and academics skills.

The IEP team members, except Parent, did not believe a general education placement was appropriate for Student. Student did not have the functional skills necessary to obtain educational benefit in a general education classroom. The IEP team also discussed a mild-to-moderate special day class for first through third grades. The mild-to-moderate special day class focused on first and second grade level academics, as most of the students were around one to two grade levels behind their same-aged peers. The school district members of the IEP team did not believe Student had the requisite school-readiness skills to participate in a mild-to-moderate special day class,

and predicted Student would receive very little or no academic benefit in that setting. Student lacked basic pre-academic skills, such as holding a pencil, recognizing colors, numbers, and letters, and following directions, to successfully participate in the mild-to-moderate special day class.

After a detailed discussion about placement options, Victor Elementary offered Student placement in a grade level appropriate, moderate-to-severe special day class operated by San Bernardino. The program consisted of a small class size and a high teacher-to-student ratio, one-to-one aide support, and embedded supports in behavior, occupational therapy, and speech and language. The program focused on academic as well as functional living skills. The moderate-to-severe special day class was located at Brentwood. The FAPE offer included 360 minutes daily specialized academic instruction, except for 240 minutes specialized academic instruction on Fridays which was a district-wide shortened school day.

Parent and Student's sister disagreed with the placement offer. They believed Student should participate in a general education setting with one-to-one aide support where Student could model social skills demonstrated by his typically developing peers. Parent and Student's sister believed Student's acquisition of social skills was the top priority. The Victor Elementary IEP team members, including Benitez and Williams, explained to Parent that the IEP team needed to consider all of Student's needs, including his academic, functional, communication, and fine motor skills.

Parent and Student's sister requested time to consider Victor Elementary's FAPE offer. Benitez relayed it was imperative that Parent quickly decide so Student could receive the special education and related services he required to meet his needs. Parent

did not consent to the placement offer. Parent's main objection to the placement offer, and to Victor Elementary's subsequent placement offers, centered on her strong belief Student could not receive a social benefit in a moderate-to-severe special day class.

Following the September 24, 2021, IEP team meeting, Victor Elementary continued to have discussions with Parent about Student's placement. Parent expressed reservations about Student's placement in a moderate-to-severe special day class. Victor elementary held an IEP team meeting on November 30, 2021, to discuss Student's diagnostic placement in a mild-to-moderate special day class at Brentwood. Victor Elementary offered to have Student attend the mild-to-moderate special day class for a 30-day period, after which time the IEP team would reconvene to determine Student's progress.

Victor Elementary requested a note from Student's physician about Student's dietary and medication needs. Student ate mainly pureed foods and required an inhaler to treat his asthma. Victor Elementary informed Parent that Student could begin the program after Victor Elementary received and reviewed the physician's note.

Parent provided Victor Elementary written permission to assist in providing Student's medication on March 14, 2022. At hearing, evidence was not offered establishing when Parent consented to the diagnostic placement in the mild-to-moderate special day class. However, Student began attending the mild-to-moderate special day class at Brentwood on March 30, 2022. Student attended school with a health aide to assist with his personal care needs, including eating and toileting. Also, Student was supported by a one-to-one instructional aide.

## APRIL 20, 2022, IEP TEAM MEETING TO DISCUSS STUDENT'S DIAGNOSTIC PLACEMENT IN A MILD-TO-MODERATE SPECIAL DAY CLASS

The IEP team met on April 20, 2022, to review Student's progress in the mild-to-moderate special day class. Student's special education teacher discussed Student's progress with the IEP team. Student had not demonstrated academic achievement or a desire to learn. Student usually refused to sit at a table with his peers or participate in group work, and often screamed and cried. Student did not recognize letters or sounds. During center activities, which was a time for students to socialize and engage in group activities such as building blocks or playing with Legos, Student typically did not participate. When he participated, he often put items in his mouth or picked them up and dropped them.

During small-group activities, Student's special education teacher or a teacher's assistant helped Student attend to a task, such as sorting objects by color, identifying letters, matching objects, and responding to directives. Student sometimes joined the small-group activities when given an incentive, such as a preferred sensory toy. At other times, Student refused to participate and screamed and cried for five seconds up to 15 minutes. Student preferred to sit, lay, or crawl on the carpet.

Throughout the day, Student's teacher or a teacher's assistant encouraged Student to look at them when they called his name. Sometimes Student gazed at the speaker after multiple prompts. During recess, Student did not play with other children. He usually stayed with his one-to-one aide or health aide.

Najera testified at the due process hearing. Najera had been a school psychologist for approximately 10 years. She conducted approximately 40 psychoeducational assessments each year, and over 500 assessments during her career. She had significant experience assessing students for special education eligibility, including in intellectual disability, autism, emotional disturbance, other health impairment, and specific learning disability. Najera was familiar with Student from conducting the September 2021 psychoeducational assessment, attending Student's IEP team meetings, and observing him in the mild-to-moderate special day class. Najera observed Student on multiple occasions during the 2022-2023 school year.

Najera observed Student in the mild-to-moderate special day class several times during his diagnostic placement. Her last observation was in May or June 2022. Student cried frequently. He had difficulty transitioning between the classroom setting and recess or school drills. He sometimes voluntarily fell to the ground outside the classroom and refused to return. Najera observed Student joining his classmates at the tables for centers, but he did not interact with his peers. Based upon her assessments and observations of Student, she persuasively opined a moderate-to-severe special day class was the appropriate placement in the least restrictive environment for Student to make progress considering his unique circumstances.

Brentwood's school principal, Brandon Birr, testified at hearing. Birr similarly opined the mild-to-moderate special day class did not provide Student sufficient supports. On several occasions, Student refused to enter or return to the classroom, despite assistance from his aides. He sometimes sat on the hot pavement and refused to move, prompting the need for school staff and administrators to bring Student to the classroom.

Parent believed the special education teacher did not give Student enough attention and the IEP team had an overly negative view of Student. Parent saw more improvement in the home setting, including Student's understanding of his daily routine and playing with other children.

The IEP team determined Student had needs in reading, writing, mathematics, speech, motor skills, work completion, functionally equivalent replacement behavior, and on-task behavior to obtain educational benefit. The IEP team, except Parent, believed the mild-to-moderate special day class was not appropriate to meet Student's needs. Student lacked the foundational skills required for group instruction in an academic setting, including joint attention, behavior regulation, functional communication, and basic pre-academic skills. Victor Elementary offered Student placement in a moderate-to-severe special day class operated by San Bernardino. The FAPE offer included 330 minutes daily specialized academic instruction in a small group setting with intensive behavior intervention services. Student would participate with general education students for lunch, recess, and school-wide events. Parent did not consent to the offer.

#### VICTOR ELEMENTARY'S MARCH 9, 2023, IEP AND FAPE OFFER

Student attended school during the 2022-2023 school year in the mild-to-moderate special day class at Brentwood. Student's health aide and one-to-one aide continued to support Student throughout the school day.

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## NOTICE OF IEP TEAM MEETINGS AND PROCEDURAL SAFEGUARDS

School districts must provide parents with notice of meetings that will be held to decide placement. (34 C.F.R. § 300.501(b)(1).) The IEP team meeting must be scheduled at a mutually agreed upon time and place. (Ed. Code, § 56341.5, subd. (c).)

State and federal law require school districts to provide the parent of a child eligible for special education with a copy of a notice of procedural safeguards upon initial referral, and thereafter at least once a year, as part of any assessment plan, and at other designated times. (20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.504(a); Ed. Code, § 56321, subd. (a).) The notice must include a full explanation of all procedural safeguards and be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent. (20 U.S.C. § 1415(d)(2); 34 C.F.R. §§ 300.503(c)(1), 300.504); Ed. Code, § 56321, subd (a).) At each IEP team meeting, the district must inform the parent of state and federal procedural safeguards. (Ed. Code, § 56500.1, subd. (b).)

Victor Elementary established it provided proper notice to Parent for each IEP team meeting held to develop the March 9, 2023, IEP. Victor Elementary also proved it provided Parent a copy of the procedural safeguards in her native language of Spanish at the October 18, 2022, January 18, 2023, and March 9, 2023, IEP team meetings. At each IEP team meeting, Victor Elementary asked Parent if she had any questions about the procedural safeguards. Parent replied she did not have any questions.

## REQUIRED IEP TEAM MEMBERS

A school district must ensure the IEP team includes all legally required participants. The IEP team must include:

- one or both of student's parents;
- no less than one general education teacher if the student is, or may be, participating in the regular education environment;
- no less than one special education teacher or, if appropriate, a special education provider for the student;
- a representative of the school district who is qualified to provide or supervise specially designed instruction, and is knowledgeable about the general education curriculum and the availability of district resources;
- an individual who can interpret instructional implications of assessment results;
- at the discretion of the parent or district, any other individual who has knowledge or special expertise regarding the student, including related services personnel, as appropriate; and
- whenever appropriate, the student with exceptional needs. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a); Ed. Code, § 56341, subd. (b).)

The IEP team initially met for part one of Student's annual IEP on October 18, 2022. All required participants attended the October 18, 2022, IEP team meeting, including

- Parent,
- Brentwood principal Birr,
- special education teacher Malika Gurzenda,

- general education teacher Stephanie Morrissey,
- school psychologist Najera,
- speech-language pathologist Gazit Chaya Nkosi, and a
- Spanish-language interpreter.

Student's adult sister and Jessica Ain, a family friend and graduate student, also attended. Independent evaluator Dudley J. Wiest, Ph.D. also attended. Each subsequent IEP team meeting included all required IEP team members, and Student did not contend otherwise. Victor Elementary established all IEP team members attended the IEP team meetings held to develop the March 9, 2023, IEP.

## PARENT PARTICIPATION

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(b) & (c); Ed. Code, §§ 56304, 56341, subd. (b).) The IDEA requires school districts to ensure the parents of disabled children are members of any group that makes decisions about their child's educational placement. (34 C.F.R. §§ 300.327; 300.501(c)(1); *W.G., et al. v. Boards of Trustees of Target Range School Dist., etc.* (9th Cir. 1992) 960 F.2d 1479, 1483 [superseded by statute on other grounds].) A parent has meaningfully participated in the development of an IEP when they

- are informed of the child's problems,
- attend the IEP team meeting,
- express 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 Board of Education* (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].)

Victor Elementary established Parent meaningfully participated in the IEP process. Parent and Student's sister contributed to the present levels of performance and goal development. They asked questions and expressed disagreement about Victor Elementary's placement offer in a moderate-to-severe special day class. Victor Elementary listened to Parent and Student's sister's concerns and provided answers and feedback.

Parent wanted Student to have a typical school experience, even if that was not in a general education setting. Parent and Student's sister told the January 18, 2023, IEP team they noticed growth after Student began attending the mild-to-moderate special day class, particularly in following directions. Student's sister asked questions about the moderate-to-severe special day class, including the high teacher-to-student ratio, access to general education peers, and the daily schedule. Victor Elementary answered all questions posed by Parent and Student's sister about the moderate-to-severe special day class. At the March 9, 2023, IEP team meeting, Student's sister inquired why Student's IEP goals could not be implemented in a general education environment. Najera explained why placement in the moderate-to-severe special day class was tailored to meet Student's unique needs, and Student had not made progress in the mild-to-moderate special day class. Victor Elementary met its burden of proving Parent participated in development of the March 9, 2023, IEP.

## PRESENT LEVELS OF PERFORMANCE

An IEP must include a student's present levels of performance. The present levels of academic achievement and functional performance must include how the student's disability affects the involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320(a)(1); Ed. Code, § 56345, subd. (a)(1).)

Victor Elementary proved it included accurate, current, present levels of performance in the March 9, 2023, IEP. Victor Elementary identified Student's present levels of performance based upon recent assessments in

- psychoeducation,
- speech and language,
- adaptive physical education,
- assistive technology, and
- occupational therapy.

The IEP team reviewed and considered an independent neuropsychology evaluation and report dated August 21, 2022, by Dr. Wiest, and information provided by Parent and Student's sister. Victor Elementary considered Student's needs in

- academics,
- communications,
- social-emotional,
- fine motor, and
- adaptive functioning.

The IEP team considered information from Student's teachers and service providers from the time he began attending school on March 30, 2022, through the IEP team meeting on March 9, 2023.

Dr. Wiest attended the October 18, 2022, IEP team meeting to report the results of his independent neuropsychology evaluation and report dated August 21, 2022. Dr. Wiest and his staff assessed Student over six hours on August 5 and 6, 2022. Dr. Wiest reported Student had significant developmental delays. Student did not grip a pencil appropriately and lacked fine motor control. Student did not use language with the examiners. Student was alert and oriented, but also overactive and impulsive. Student had difficulty with transitioning. He appeared joyful when playing, and then angry and noncompliant. On the Cognitive Assessment System, a standardized assessment measuring cognitive skills, Student's standard score was below 50, which was below the first percentile. Student's adaptive skills, based on Parent interviews, were significantly below average.

Dr. Wiest used non-standardized, play-based assessments to evaluate Student. Student was active and inattentive. His eye contact was fleeting. He engaged in stereotypical movements and put nonedible objects into his mouth. Student made repetitive sounds and screams. In pre-academic skills, Student correctly oriented a book, but did not open the book or turn the pages. He sorted objects using two colors. Student could not match identical pictures or make animal noises.

Dr. Wiest determined Student met criteria for intellectual disability. He had very little understanding of expressive and receptive language. His social skills were exceptionally delayed, and he required significant supports on a consistent basis.

Dr. Wiest recommended goals in pre-academics, speech and language, fine and gross motor, and functional skills. Dr. Wiest recommended placement in a moderate-to-severe special day class with a one-to-one aide, with brief opportunities for mainstreaming, such as during assemblies and announcements. The Victor Elementary IEP team members generally agreed with Dr. Wiest's recommendations.

The October 18, 2022, IEP team considered the results of a speech and language evaluation conducted on June 16, 2022, by speech-language pathologist Gazit Chaya Nkosi. Student demonstrated significantly below average skills in articulation and receptive and expressive language. Student did not engage with the examiner during the assessment. Student did not imitate any single words with the assessor despite maximum modeling and prompting. Nkosi observed Student produce the word "all-do" for "all done" and "bye." Student's voice and fluency could not be evaluated due to lack of expressive communication. Student did not point to items on a receptive one-word vocabulary test, and the assessment could not be completed. Nkosi recommended the IEP team explore picture exchange and icon selection to support Student's communication skills.

The January 18, 2023, IEP team considered the results of a November 12, 2022, assistive technology assessment. The assessor recommended Student use Picture Exchange Communication System, called PECS, to support his communication skills. PECS was a basic, low-technology, stand-alone communication system that was not reliant on a computer or electronic device. The user was given a small notebook containing pictures on Velcro stirps. The user was trained to identify, select, and then give a communication partner a picture of a desired object or activity. The user learned to request single items or activities, discriminate between pictures, and create pictures by putting two or more picture cards together.

Adapted physical education teacher Jeff Bragg reviewed the results of his adapted physical education assessment at the January 18, 2023, IEP team meeting. Student had gross motor deficits, including the inability to trap or catch a ball. The IEP team determined Student required adapted physical education services to develop Student's fundamental motor skills.

Gurzenda was Student's special education teacher in the mild-to-moderate special day class during the 2022-2023 school year. Gurzenda held a bachelor's degree in communication science and disorders, and a master's degree in special education. She held a mild-to-moderate special education teaching credential. At hearing, Gurzenda described the mild-to-moderate special day class. The class had 19 students and two paraeducators. The class rotated between subjects, including math, reading and writing, and social-emotional learning. Academic activities included writing simple sentences, using correct capitalization, and using numbers one through 100. The curriculum was based on a general education core curriculum but was taught at a slower pace.

Student struggled to perform pre-academic activities, such as recognizing numbers and letters and following directions. Student could not participate in the same academic activities as his peers. Student worked independently with the assistance of his one-to-one aide. For example, he worked on drawing lines, recognizing shapes, and sorting objects.

Gurzenda provided a substantive overview of Student's performance in academics, social-emotional, communication, fine motor, and daily living skills to the March 9, 2023, IEP team. When shown a book or flashcards, Student briefly glanced in the direction of the book when verbally prompted. Student placed letters on and off a

magnet board. He held a paint brush or crayon and made marks and dots on the page. Student held pencils, crayons or paint brushes for an average of five seconds. Student could not use scissors. In mathematics, he stacked blocks together, took them apart, and put them in a container. Student enjoyed when adults or peers clapped. He made brief eye contact when called upon. Student spontaneously laughed or screamed. Student preferred to sit or lay on the floor. He enjoyed his Chromebook, emoji pillow, and blocks. Student required adult assistance for all daily living skills.

Student did not focus on pictures, words or stories. He did understand the function of writing devices. He did not recognize his written name. Student did not demonstrate any understanding of numbers or counting. He displayed limited receptive and expressive language skills. He did not demonstrate an interest in his peers nor initiate interactions. Student's March 9, 2023, IEP team identified Student's needs in

- academics,
- social-emotional,
- communication,
- fine motor, and
- daily living skills.

Victor Elementary met its burden of proving the March 9, 2023, IEP was based on accurate and current levels of performance in all areas of need.

## ANNUAL GOALS

An IEP must contain a statement of measurable annual goals for the child designed to enable the child to be involved in and make progress in the general education curriculum and meet each of the other educational needs. (20 U.S.C.

§ 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals should describe what a student with a disability can reasonably be expected to accomplish within a 12-month period. (Ed. Code, § 56344; *Letter to Butler* (United States Department of Education, Office of Special Education and Rehabilitative Services, March 25, 1988); U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,371 (1999 regulations).) The purpose of goals is to assist the IEP team in determining whether a student is making progress in all areas of need. Therefore, the IEP must also describe how progress towards the goals will be measured and reported. (20 U.S.C. § 1414(d)(1)(A)(viii); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the specific special education services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

Victor Elementary established the March 9, 2023, IEP included appropriate annual goals in all areas of need. The IEP team developed 10 goals in

- communication,
- academics,
- fine and gross motor,
- behavior, and
- functional skills.

Goal One was a speech and language goal. Student's baseline reflected he did not use verbal phrases to make requests or protests. Goal One aimed for Student to use verbal phrases, such as "I want," to request and protest items using a low-technology

augmentative and alternative communication system in four of five opportunities in a session over four consecutive sessions. The speech-language pathologist would measure Student's progress thorough activities and observation.

Goal Two was a speech and language goal to use augmentative and alternative communication to identify basic concepts. Student's baseline reflected he could identify familiar objects in the home setting but did not regularly do so in the school setting. The goal required Student to identify concepts, such as common objects or feelings, during a structured activity with 70 percent accuracy over four consecutive sessions. The speech-language pathologist would measure Student's progress thorough activities and observation.

Goal Three was a speech and language goal that aimed for Student to use speech or augmentative and alternative communication to communicate 10 different words or short phrases for at least three communicative functions, such as a protest, request, comment, or greeting. Student's baseline reflected he communicated by clapping and gesturing and used only a few verbal words. The speech-language pathologist would measure the goal over four consecutive sessions through activities and observations.

Goal Four was a gross motor goal that aimed for Student to prepare for catching a ball by having his eyes on the person throwing the ball and his hands extended out in front of his body. Student's baseline showed Student had difficulty focusing on the person throwing a ball and he could not catch a ball. The goal required Student to catch a nine-inch ball bounced to him by using his hands and trapping it with his body in eight out of 10 trials. The adapted physical education teacher would measure the goal by observations.

Goal Five was an academic goal in English language arts. Student's baseline showed when he was presented with four names on different index cards, he could not select his name. The goal aimed for Student to touch the card with his name on it with hand-over-hand assistance with 25 percent accuracy in four of four trials. The special education teacher would measure the goal through observations.

Goal Six was an academic goal in mathematics. Student's baseline showed when given a shape, he could match the object to another object with six percent accuracy. The goal aimed for Student to match each object from a field of five with 50 percent accuracy in four of five trials. The special education teacher would measure the goal through observations.

Goal Seven was a fine motor goal. Student's baseline was that when given paper, he scribbled on the paper with no intention. He could not independently trace line strokes. With hand-over-hand assistance, Student could trace lines with his finger. Goal Seven aimed for Student to trace line strokes with 25 percent accuracy in four of four trials. The special education teacher and occupational therapist would measure the goal through observations.

Goal Eight was a behavioral goal. Student's baseline reflected that during a 10-minute interval, Student could remain seated and demonstrate on-task behavior for 30 percent of the 10-minute interval. The goal aimed for Student to demonstrate on-task behavior for 50 percent of a 10-minute interval period with 10 reminders, in four of four trials. The special education teacher would measure the goal through observations and data collection.

Goal Nine was an adaptive functioning goal. Student's baseline was that he could not unzip his jacket. Student could use a three-finger grasp to pick up small

items, such as beads. The goal aimed for Student to unzip his jacket in four of four trials with 25 percent accuracy over four consecutive weeks as measured by observations by a special education teacher and occupational therapist.

Goal Ten was an adaptive functioning goal. Student's baseline reflected he had emerging skills with cutting. Student could not cut paper independently with appropriate bilateral coordination. The goal aimed for Student to cut strips of paper with proper thumbs-up position and bilateral integration with 50 percent accuracy in three of four opportunities measured over three consecutive sessions. The goal would be measured by the special education teacher and occupational therapist through work samples.

The preponderance of the evidence established the 10 goals were based on Student's present levels of performance. The IEP goals were measurable and designed to meet Student's needs. The goals described skills the IEP team believed Student could achieve within one year. The goals were directly related to Student's present levels of performance. Progress towards the goals was measured primarily through observations and work samples. Each goal had short-term objectives to track Student's progress. Progress would be reported each trimester through IEP team meetings, report cards, progress reports, or notes and telephone calls to Parent.

Parent and Student's sister were equal participants in the development of goals at the January 18, 2023, and March 9, 2023, IEP team meetings. Parent and Student's sister were given the opportunity to, and did, provide input on Student's present levels and goals. Further, Victor Elementary considered and adopted some of Dr. Wiest's goal recommendations, including goals in name identification, independently making marks and lines, staying on task, using scissors, and working on gross motor skills. At hearing,

Parent did not identify any specific issue or concern she had with any of Student's goals. Victor Elementary established the IEP goals were procedurally and substantively appropriate.

## PLACEMENT, SERVICES, SUPPORTS, AND ACCOMMODATIONS

An IEP must include a description of the placement, services, and accommodations offered to the student, including program modifications or supports. (*Burlington v. Department of Educ. Of Mass. (1985) 471 U.S. 359, 368* [105 S.Ct. 1196]; 20 U.S.C. § 1414(d)(1)(A)(IV); 34 C.F.R. § 300.324(a)(2)(iv); Ed. Code, § 56345, subd. (a)(4).) An IEP must include a statement of the special education and related services, based on ... peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child:

- to advance appropriately toward attaining the annual goals;
- to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities; and
- to be educated and participate with other children with disabilities and nondisabled children. (34 C.F.R. § 300.320(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)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).)

The IEP must contain any supplementary aids and supports and/or program modifications or supports that will be provided to the student to advance in attaining the goals, make progress on the general education curriculum, and participate in education with disabled

and non-disabled peers. (*Ibid.*) An IEP must also contain a statement of appropriate accommodations necessary to measure the student's academic achievement and functional performance on state and district-wide assessments. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(6); Ed. Code, § 56345, subd. (a)(6)(A).)

When developing an IEP, the IEP team must consider whether the student requires assistive technology devices and services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324(a)(2)(v); Ed. Code, § 56341.1, subd. (b)(5).) A school district is required to provide any assistive technology device that is needed to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a)(12)(B)(i); 34 C.F.R. § 300.105; Ed. Code, § 56341.1, subd. (b)(5).)

An IEP must state whether extended school year services are offered. (Ed. Code, § 56345, subd. (b)(3). Extended school year services must be provided if the IEP team determines they are necessary for a student to receive a FAPE. (34 C.F.R. § 300.106(a)(2).) Extended school year services are special education and related services that are provided beyond the normal school year, in accordance with the student's IEP, and at no cost to parents. (34 C.F.R. § 300.106(b).)

An IEP must document its rationale for placement in other than the student's school and classroom they would otherwise attend if not disabled. (34 C.F.R. § 300.116; 71 Fed. Reg. 46,588 (August 14, 2006); Cal. Code Regs., tit. 5, § 3042.) The IEP must indicate why the student's disability prevents their needs from being met in a less restrictive environment even with the use of supplementary aids and services. (*Ibid.*)

The IEP team is required to make an individualized determination about how an IEP can be implemented under emergency conditions, in which instruction or services, or both, cannot be provided to the student either at home or in person for more than

10 school days. (Ed. Code, § 56345, subd. (a)(9)(A).) This determination must be included in the development of each initial IEP or the regularly scheduled revision of an IEP and must take public health orders into account. (Ed. Code, § 56345, subd. (a)(9)(B).)

Victor Elementary proved the March 9, 2023, IEP's offer of placement, services, and accommodations was appropriate and offered Student a FAPE in the least restrictive environment. The March 9, 2023, IEP offered the following services:

- 360 minutes daily specialized academic instruction, except for 240 minutes specialized academic instruction on Fridays which was a district-wide shortened school day;
- 340 minutes daily individual intensive intervention services to support Student's safety and adaptive functioning;
- individual speech and language services 60 minutes weekly, delivered in two 30-minute sessions;
- individual adapted physical education 80 minutes monthly, delivered in weekly 20-minute sessions; and
- individual occupational therapy services 60 minutes monthly, delivered in three 20-minute sessions.

The specialized academic instruction and services would be delivered in a moderate-to-severe special day class, which was a self-contained classroom for special education students with significant disabling conditions.

The March 9, 2023, IEP offered Student assistive technology devices and services to support Student's communication and academic goals. The IEP offered daily roundtrip transportation services to and from school. The IEP contained an

emergency circumstances consideration provision that stated how Student's special education and related services would be provided in the event instruction or services, or both, could not be provided at school or in person for more than 10 school days due to a qualifying state of emergency.

The IEP team determined Student displayed a loss of previously taught academic skills and an inability to quickly regain those skills following lengthy interruptions in instruction. The IEP team offered extended school year services from June 19, 2023, through July 19, 2023. The extended school year offer included

- 180 minutes daily specialized academic instruction,
- individual speech and language services for 60 minutes weekly, delivered in two 30-minute sessions,
- occupational therapy services for 40 minutes monthly, delivered in two 20-minute sessions, and
- daily roundtrip transportation.

The March 9, 2023, IEP offered Student supplementary aids and supports necessary to enable Student to advance appropriately toward IEP goal attainment and be involved and make progress in the general education curriculum. The supports were sensory breaks, breaking tasks into smaller parts or steps, a small group setting, and five minutes weekly staff training. Student would not participate in statewide assessments in English language arts in reading, writing, listening, or mathematics. The IEP described the time Student would spend in the general education environment with his typically developing peers as lunch, recess, passing periods, and school day activities.

The March 9, 2023, IEP's offer of special education, related services, accommodations, and supports was appropriate and reasonably calculated to enable Student to make progress appropriate considering his circumstances. The IEP described the

- specialized academic instruction,
- related services in
  - speech and language,
  - occupational therapy,
  - assistive technology,
  - adapted physical education, and
  - transportation, and
- set forth the projected start date, length, frequency, and duration of instruction, services, and supports.

The IEP offered Student extended school year services to prevent regression and described how his IEP would be implemented in emergency conditions.

## LEAST RESTRICTIVE ENVIRONMENT

School districts are required to provide each special education student with a program in the least restrictive environment. School districts must ensure, to the maximum extent appropriate, that children with disabilities are educated with non-disabled peers, and that special classes or separate schooling occur only if the nature or severity of the 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); 34 C.F.R. § 300.114(a); Ed. Code, §§ 56031, 56033.5.) This requirement

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 determining the educational placement of a child with a disability, a school district must ensure that:

- the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into consideration the requirement that children be educated in the least restrictive environment;
- placement is determined annually based upon the child's IEP and is as close as possible to the child's home;
- unless the IEP specifies otherwise, the child must attend the school that he would attend if non-disabled;
- in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or the quality of services he needs; and
- a child with a disability is not removed from education in age-appropriate regular classroom solely because of needed modifications to the general education curriculum. (34 C.F.R. § 300.116; Ed. Code, § 56342.)

School districts, as part of a special education local plan area, must have available a continuum of program options to meet the instructional and service needs of special education students. (34 C.F.R § 300.115(a); Ed. Code, § 56360.) The continuum of program options includes but is not limited to, in increasing order of restrictiveness:

- regular education;
- resource specialist programs;
- designated instruction and service;
- special classes;
- nonpublic nonsectarian schools;
- state special schools;
- specially designed instruction in settings other than classrooms;
- itinerant instruction in settings other than classrooms; and
- instruction using telecommunication, and instruction in the home, in hospitals, or other institutions. (Ed. Code, § 56361.)

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

1. the educational benefits available in the general education classroom, supplemented with appropriate aids and services, as compared with the educational benefits of the special education classroom;
  2. the nonacademic benefits of interaction with children without disabilities;
  3. the effect the student has 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 Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)].)

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

A general education placement is not the least restrictive environment for some children with particularly severe handicaps. (*Poolaw, supra*, 67 F.3d 830, 834, citing *Daniel R.R., supra*, 874 F.2d at p. 1044) [In some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment].) In a recent decision, the Ninth Circuit determined the benchmark for measuring whether a student can be educated in a regular classroom is progress towards meeting their IEP academic goals, not achieving grade-level performance. (*D.R. v. Redondo Beach* (9th Cir. 2022) 56 F.4th 636, 644-645 (*D.R.*)). In *D.R.*, the student made substantial progress toward the academic goals in his IEP. Specifically, the student met four of his six academic goals and made progress on the remaining two. The Ninth Circuit determined the student received significant academic benefit in his existing general education classroom and the general education placement was the appropriate, least restrictive placement. (*Ibid.*)

Whether education in the regular classroom, with supplemental aids and services, can be achieved satisfactorily is a fact-specific inquiry. (*Daniel R.R., supra*, 874 F.2d at p. 1048.) If a school district determines a child cannot be educated in a general education

environment, then the least-restrictive-environment analysis requires a further determination whether the child has been mainstreamed to the maximum extent appropriate considering the continuum of placement options. (*Daniel R.R.*, *supra*, 874 F.2d at p. 1050.)

The overwhelming weight of the evidence proved Student required a more restrictive placement than a regular classroom. The first factor under *Rachel H.* considers the educational benefits of full-time placement in a regular classroom. Victor Elementary's IEP team members and Student's independent evaluator Dr. Wiest agreed Student could not obtain educational benefit in a full-time regular classroom. Academically, Student lacked the pre-academic skills necessary to participate in a regular classroom. Student could not follow directions or communicate his needs. Functionally, Student was dependent on his health aide and one-to-one aide. Student also received little nonacademic benefit from participating with his general education peers. For example, Student did not enjoy participating in morning circle time in the general education classroom. Students in the mild-to-moderate classroom started the day in a general education classroom and discussed a topic chosen by the general education teacher. Student usually was agitated and refused to participate. Student sat on the floor and screamed and cried. None of the witnesses at hearing, including Parent, testified Student received academic or social benefit in the regular classroom. The first factor under *Rachel H.* weighed in favor of placement in a more restrictive placement.

The second factor under *Rachel H.* considers the nonacademic benefits of placement in the regular classroom. The weight of the evidence showed Student would receive little nonacademic benefits in the regular classroom. Student did not interact with his peers and required support from his one-to-one aide or a teacher's assistant to

sit at a table with his peers. He did not participate in group activities, such as playing with Legos and blocks. The second factor under *Rachel H.* weighed in favored of a more restrictive placement.

The third factor considers the effect the child with a disability has on the teacher and children in the regular classroom. Neither party offered evidence that Student had a negative impact on his teacher or peers, although at a minimum his refusal to participate in class activities was a distraction to Student's peers and teachers. The fourth *Rachel H.* factor considers the cost of placing the child with a disability full-time in a regular classroom. Here, cost was not a factor in determining Student's placement. Accordingly, both the third and fourth factors under *Rachel H.* were neutral.

Balancing the *Rachel H.* factors, along with persuasive testimony from Victor Elementary's witnesses about Student's extensive needs in academics, communication, fine and gross motor, behavior, and adaptive functioning, Student would not receive educational benefit from full inclusion in general education, even with the use of supplementary aids and services. Student required a more restrictive placement to obtain educational benefit and meet his IEP goals.

Having determined Student could not be educated fulltime in a general education environment, the least restrictive environment analysis requires a further determination whether placement in the moderate-to-severe special day class provided Student mainstreaming opportunities to the maximum extent appropriate considering the continuum of placement options. (*Daniel R.R., supra*, 874 F.2d at p. 1050.) Special day classes serve students with similar and more intensive needs. (Ed. Code, § 56364.2.) Students may be enrolled in special day classes only when the nature or severity of the disability is such that education in the regular class with the use of supplementary aids

and services, including curriculum modification and behavioral support, cannot be achieved satisfactorily. (*Ibid.*) School districts must ensure that each child with a disability participates in activities with nondisabled pupils to the maximum extent appropriate to the needs of the individual with exceptional needs, including nonacademic and extracurricular services and activities. (*Ibid.*) Mild-to-moderate and moderate-to-severe special day classrooms are at the same level of restrictiveness on the continuum of placement options because California law does not differentiate between these placements. (Ed. Code, §§ 56360, 56361, and 56364.2.)

Victor Elementary proved by a preponderance of the evidence that placement in a moderate-to-severe special day class was the least restrictive environment for Student considering the continuum of placement options. Student struggled significantly in the mild-to-moderate classroom. At hearing, Victor Elementary's witnesses, including Dr. Benitez, school psychologist Najera, special education teacher Gurzenda, general education teacher Morrissey, occupational therapist Dr. Lisa Sutton, and adapted physical education teacher Bragg offered consistent and persuasive testimony about Student's needs. Each witness was familiar with Student through working with him and observing him during the time period at issue.

Dr. Benitez testified at hearing. Benitez was employed by Victor Elementary as the Assistant Superintendent of Pupil Services since 2013. Benitez held a master's degree in education and a doctorate in organizational leadership. She held a California Administrative Credential. She previously worked as an elementary school teacher and school principal. Dr. Benitez's substantial experience as an educator and assistant superintendent, her knowledge of Victor Elementary's programs, and her straightforward and candid demeanor rendered her testimony persuasive.

Benitez was responsible for overseeing special education programs for Victor Elementary. She opined Victor Elementary had the continuum of placement options available to students with special education. For children with disabilities who required more significant supports, Victor Elementary contracted with San Bernardino to provide special education and related services. Dr. Benitez was familiar with Student from attending his IEP team meetings and observing him in the mild-to-moderate special day class. She passionately and convincingly opined the mild-to-moderate special day class was not appropriate to meet Student's needs. During her observation of Student, Student worked with his one-to-one aide and did not participate with his classmates. Dr. Benitez persuasively opined Student required a smaller, structured setting that focused on academic and functional skills.

At the time of hearing, San Bernardino operated four programs within Victor Elementary including a moderate-to-severe special day class at Brentwood. Dr. Benitez observed all the San Bernardino programs, including the moderate-to-severe special day class at Brentwood. The moderate-to-severe special day class had 12 to 13 students, a special education teacher, and two paraeducators, compared to 18 to 22 students in the mild-to-moderate special day class. The program had embedded services including speech and language, behavior support, physical therapy, and occupational therapy. Special education teachers were trained to work on these skills with the students throughout the school day. The program emphasized functional skills, including hygiene, toileting, and safety. The classroom was equipped with adjacent restrooms and changing tables for students who required diapering. The program also had a speech-language pathologist onsite to deliver individual speech and language services.

Dr. Benitez explained students in the moderate-to-severe classroom remained students of Victor Elementary, although the program was operated by San Bernadino.

They had mainstreaming opportunities, including lunch, recess, passing periods, and school day activities such as assemblies. As an example, she described the upcoming “Trunk or Treat” event for the Halloween holiday, in which all students could participate.

Sutton was an occupational therapist at Victor Elementary since 2011. She held a doctorate in occupational therapy. Sutton was the supervising occupational therapist at Brentwood at the time Victor Elementary conducted Student’s initial fine motor development assessment by an occupational therapist in October 2022. Student had fine motor, perceptual, and adaptive skill deficits. He could not use a tripod grasp to write or use scissors to cut shapes. He required hand-over-hand assistance to position and hold the paper while cutting. He could not write letters. Sutton observed Student in the mild-to-moderate classroom on several occasions during the 2022-2023 school year. Student elected to sit on the floor away from his peers. He did not engage in the same activities as his peers or communicate with them. He did not want to participate in occupational therapy services. Student did not make eye contact with Sutton and moved away. Student did not attempt tasks that were modeled for him.

Sutton was familiar with the moderate-to-severe classroom at Brentwood. She explained the program had a modified curriculum and embedded supports. She opined the moderate-to-severe program was more appropriate to meet Student’s fine motor and adaptive skill deficits. Sutton was familiar with Dr. Wiest’s independent educational evaluation. She opined the fine motor and functional goals offered in the March 9, 2023, IEP were comparable to Dr. Wiest’s proposed goals. She persuasively opined the IEP’s offer of three-monthly sessions of individual occupational therapy, for 20 minutes each session, was sufficient to meet Student’s fine motor and adaptive living skills. Parent did not disagree.

Morrissey was a general education teacher at Brentwood. She held a multiple-subject teaching credential. She had worked as an elementary school teacher for over 10 years. She was familiar with Student from attending his IEP team meetings during the 2022-2023 school year and observing him on campus. She opined a general education setting was not appropriate for Student because of his inability to follow directions, lack of basic pre-academic skills, and deficits in fine motor skills.

Student's adapted physical education teacher, Bragg, testified at hearing. Bragg had worked at Victor Elementary as an adapted physical education teacher for nine years. He worked with children with disabilities to improve their gross motor skills. Bragg conducted an adapted physical education assessment for Student in January 2023. Student was inattentive and had difficulty focusing. Bragg built a rapport with Student and displayed genuine care for Student. He developed the IEP goal designed to teach Student to trap or catch a ball thrown to him. Bragg often saw Student on campus. Student did not interact with his peers. When Bragg came to the mild-to-moderate classroom to bring Student to adapted physical education, Student usually was lying or sitting on the ground. He went willingly with Bragg and enjoyed adapted physical education. Bragg was familiar with the moderate-to-severe special day class. He observed students from the moderate-to-severe class on campus and in the gymnasium and cafeteria. He opined placement in the moderate-to-severe special day class was appropriate for Student. Bragg's substantial experience, knowledge of Student, and caring demeanor rendered his testimony persuasive.

Parent was concerned the change in placement would negatively affect Student's growth, particularly because he would have a new teacher. She explained it was difficult for Student to warm up to new people. Parent believed Student would make more

progress in the mild-to-moderate special day class. Student's sister wanted Student placed in a general education classroom with one-to-one aide support. Parent expressed Student could do more at home than at school. Other than disagreeing with the placement offer, Parent did not express disagreement to any other components of the IEP.

Parent testified at hearing. Parent was devoted to Student. She expressed genuine concern about Student's long-term ability to communicate and function in society. Parent did not express disagreement with Student's present levels of performance, the proposed IEP goals, or the services offered. Parent's main disagreement with the March 9, 2023, IEP was its placement offer in the moderate-to-severe special day class. Parent did not articulate any reason why she disagreed with the placement offer, other than stating Student would not have mainstreaming opportunities.

Parent made conflicting statements about what program she believed was appropriate for Student. She initially testified she did not want Student to be transported by bus in prospective years to other programs operated by San Bernardino. She then changed her testimony and said transportation was not an issue. Confusingly, she testified she did not disagree a moderate-to-severe program was appropriate for Student, but then argued a mild-to-moderate program was the most appropriate placement. These inconsistencies reflected Parent's genuine concern about Student's educational program and did not seem to be intentionally contradictory.

Parent toured the moderate-to-severe classroom at Brentwood. Parent did not offer persuasive testimony disputing the appropriateness of the program. Although Parent preferred placement in the mild-to-moderate special day classroom, the classroom was not designed to meet Student's unique needs. (*Gregory K., supra*, 811 F.2d at p. 1314.)

Jessica Ain testified on Student's behalf. Ain previously worked as a special education teacher in Nevada and was a candidate for a Doctor of Philosophy of Special Education. Ain opined Student's least restrictive placement was in a general education setting with one-to-one aide support. She strongly disagreed with Victor Elementary's placement offer in a moderate-to-severe special day class. Ain's conclusions were based upon her review of Student's records, her attendance at the January 18, 2023, IEP team meeting, and discussions with Parent and Student's sister. Ain's opinions conflicted with the opinions expressed by Victor Elementary's witnesses, as well as Dr. Wiest's report.

Ain's testimony was unconvincing because she had never met Student. She had not observed him in the home or educational settings. She had not assessed Student. Her testimony reflected a lack of knowledge about Student and his needs in

- pre-academics,
- social-emotional,
- communication,
- fine motor, and
- daily living skills.

On cross-examination, Ain could not describe Student's strengths and weaknesses in any area, other than generally stating his functional levels were below his age level.

Further, Ain's testimony reflected a general misunderstanding of the continuum of placement options. She incorrectly opined placement in a moderate-to-severe special day class was "the most restrictive environment" on the continuum of placement options. She argued the moderate-to-severe special day class was inappropriate but was not familiar with the program other than reading about it on San Bernardino's website. Ain did not tour the program or speak with any of Student's teachers or service providers, or anyone from San Bernardino. Her lack of knowledge about the proposed program further rendered her testimony unpersuasive. For these reasons, Ain's opinions were given little weight.

Victor Elementary met its burden of proving the March 9, 2023, IEP offered Student a FAPE in the least restrictive environment. The March 9, 2023, IEP was comprehensive and contained all statutorily required information. The IEP contained:

- Student's present levels of academic achievement and functional performance;
- an analysis of how Student's disability affected his involvement and progress in the general education curriculum;
- a statement of 10 measurable, annual goals designed to meet Student's unique needs and allow him to make educational progress;
- a statement of how Student's goal performance would be measured and reported to Parent; and
- a description of related services along with projected start dates and duration, frequency, and location of services, supports and accommodations.

Victor Elementary established placement in a moderate-to-severe special day class was the least restrictive environment. Victor Elementary met its burden of proving the March 9, 2023, IEP complied with procedural and substantive requirements.

## VICTOR ELEMENTARY TIMELY FILED ITS DUE PROCESS COMPLAINT

A school district is required to send a prior written notice to a parent whenever it proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a).) If a school district determines that a proposed special education program component to which a parent does not consent is necessary to provide a FAPE, the school district shall initiate a due process hearing. (Ed. Code, § 56346, subd. (f); *I.R. ex rel. E.N. v. Los Angeles Unified School Dist.* (9th Cir. 2015) 805 F.3d 1164, 1165 [school district must act with reasonable promptness to adjudicate its differences with the parents where in the school district's judgment the child is not receiving a FAPE].) School districts have some flexibility in initiating a due process hearing to allow for due consideration of the parent's reasons for withholding consent to an IEP component. (*Id.* at p. 1169.)

Parent disagreed with the March 9, 2023, IEP. Parent notified Victor Elementary on June 27, 2023, that she disagreed with the March 9, 2023, IEP offer. Parent requested Victor Elementary adopt Dr. Wiest's recommendations from his August 2022 independent evaluation.

Victor Elementary responded to Parent in a prior written notice dated August 17, 2023. The prior written notice explained the March 9, 2023, IEP incorporated many of Dr. Wiest's recommendations, including a one-to-one aide, placement in a moderate-to-

severe special day class with a high teacher-to-student ratio with mainstreaming opportunities during lunch, recess, passing periods, and school-wide activities. The IEP offered services in occupational therapy, speech and language, and adapted physical education. The IEP offered Student augmentative and alternative communication support, and supplementary aids and services.

Parent's notice of disagreement was sent during the summer break. Victor Elementary sent its prior written notice to Parent on August 17, 2023, three days after the start of the 2023-2024 school year. Victor Elementary filed its due process complaint on October 2, 2023, 46 days later. Victor Elementary initiated its due process complaint with reasonable promptness.

## 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

Victory Elementary's March 9, 2023, IEP offer constituted a FAPE in the least restrictive environment such that Victor Elementary may implement the March 9, 2023, IEP without parental consent.

Victor Elementary prevailed on its sole issue.

## ORDER

Victory Elementary's March 9, 2023, IEP offer constituted a FAPE in the least restrictive environment. Victor Elementary may implement the March 9, 2023, IEP without parental consent.

## RIGHT TO APPEAL THIS DECISION

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

Jennifer Kelly

Administrative Law Judge

Office of Administrative Hearings