

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

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CASE NO. 2022091016

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PARENTS ON BEHALF OF STUDENT,

v.

TURLOCK UNIFIED SCHOOL DISTRICT.

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DECISION

MARCH 13, 2023

On September 30, 2022, Student filed a due process hearing request with the Office of Administrative Hearings, called OAH, naming Turlock Unified School District. Turlock Unified School District is known as Turlock. On November 7, 2022, OAH granted Turlock's request for continuance of the due process hearing. Administrative Law Judge Deborah Myers-Cregar heard this matter via videoconference on December 6, 7, 14, 15, 16, 20, and 21, 2022, and January 18, 2023.

Leroy Sumter, Attorney at Law, represented Student and attended all hearing days. Sheila Bayne, Attorney at Law, also represented Student and attended on December 6, and 14, 2022. Parent attended all hearing days on Student's behalf.

Tilman Heyer and Marcy Gutierrez, Attorneys at Law, represented Turlock and attended all hearing days. Louis Chaippe, Attorney at Law, also represented Turlock and attended on December 14, 2022. Ericka Tschantz, Director of Special Education, attended all hearing days on Turlock's behalf.

At the parties' request, OAH continued the matter to February 13, 2023, for written closing briefs. The parties timely filed the briefs. OAH closed the record, and submitted the matter for decision on February 13, 2023.

## ISSUES

1. Did Turlock deny Student a free appropriate public education, known as a FAPE, by failing to respond to Parent's request for an assessment for eligibility on October 7, 2021?
2. Did Turlock deny Student a FAPE by failing to assess Student for special education eligibility between October 7, 2021, and May 23, 2022.
3. Did Turlock deny Student a FAPE at the May 23, 2022 individualized education program, known as an IEP, team meeting, by failing to offer occupational therapy?
4. Did Turlock deny Student a FAPE at the May 23, 2022 IEP team meeting, by failing to offer behavior intervention services?
5. Did Turlock deny Student a FAPE at the May 23, 2022 IEP team meeting, by failing to offer a one-to-one aide?

6. Did Turlock deny Student a FAPE at the May 23, 2022 IEP team meeting, through September 30, 2022, by failing to offer home applied behavior analysis therapy and clinic meetings?
7. Did Turlock deny Student a FAPE at the May 23, 2022 IEP team meeting, through September 30, 2022, by failing to offer parent training?
8. Did Turlock deny Student a FAPE at the May 23, 2022 IEP team meeting, by (a) predetermining placement, and by (b) failing to offer appropriate placement in Parent's preferred general education placement?

During the hearing, the issues were clarified consistent with *J.W. v. Fresno Unified v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].)

## JURISDICTION

OAH held this hearing under the Individuals with Disabilities Education Act, referred to as IDEA, 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 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 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).) The party requesting the hearing has the burden of proof by a preponderance of the evidence and 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, supra*, at pp. 57-58, 62.) 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).)

Student was seven years old and in second grade at the time of hearing. Student resided within Turlock's geographic boundaries at all relevant times. He attended Medeiros Elementary School on an intra-district transfer. On May 23, 2022, Turlock found Student eligible for special education under the categories of autism spectrum disorder and specific learning disability.

For Student's kindergarten year, in the 2020-2021 school year, Turlock kept its physical school campuses closed and did not provide in-person instruction. Turlock provided virtual instruction using several distance learning platforms. For first grade, in

the 2021-2022 school year, Turlock re-opened its campuses and provided in-person instruction, with health and safety protocols including masks. Student attended first grade in-person at Medeiros Elementary School. Turlock lifted the mask mandate in February 2022.

### ISSUE 1: DID TURLOCK DENY STUDENT A FREE AND APPROPRIATE PUBLIC EDUCATION, KNOWN AS A FAPE, BY FAILING TO RESPOND TO PARENT'S REQUEST FOR AN ASSESSMENT FOR ELIGIBILITY ON OCTOBER 7, 2021?

Student contends Parent requested a special education assessment on October 7, 2021. Student asserts Turlock did not timely respond to the October 7, 2021 request. Turlock contends Parent did not request an initial assessment for special education on October 7, 2021.

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

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the*

*Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, 402-403 [137 S.Ct. 988, 1000] ("*Endrew.*".)

A student must be assessed if the school district determines that the educational or related service needs, and improved academic achievement and functional performance, of the student warrant assessment, or if the parents or teacher request an assessment. (Ed. Code, § 56381, subds. (a) and (b).)

A school district must provide an assessment plan to parents within 15 days of the referral for assessment. School districts must give notice of the proposed assessment plan, along with a copy of the parents' procedural safeguards and rights under the IDEA and related state laws. (20 U.S.C. § 1415(c),(d), Ed. Code, § 56321, subd. (a).) A school district must explain the evaluation procedures and the areas of proposed reassessment. (20 U.S.C. § 1415(c), 20 U.S.C. § 1414(b)(1).)

Student failed to prove Parent asked Turlock to assess Student for special education on October 7, 2021.

District held a meeting concerning Student's sibling on October 7, 2021. Candace Looney, the Medeiros Elementary School assistant principal, attended and facilitated the meeting. Parent, the sibling's teacher, and the school psychologist also attended. Looney took notes. Looney included the perspectives of the team, data shared, and any pertinent information related to the sibling's needs, accommodations, and interventions. She included conversations between Parent and staff. The notes did not document Parent requesting a special education assessment for either child.

Looney persuasively testified that Parent did not request a special education assessment for Student or his sibling at the meeting. Looney also persuasively testified if Parent had asked for an assessment, she would have included it in the meeting notes. There were no notes which documented Parent asking Turlock to assess Student. Looney persuasively testified that if Parent had made that request, she would have documented it in the meeting notes, and discussed the next step with Nicole Moren, the school psychologist, who attended the meeting.

Moren recalled the October 7, 2021 meeting. She persuasively testified that Parent did not request an assessment for Student at the meeting. If Parent had, Moren would have immediately prepared an assessment plan for Parent to take home.

Parent's testimony that she requested Student be assessed for special education eligibility at his sibling's October 7, 2021 meeting was not persuasive. Nor was Parent's testimony that she tried asking for assessments for two years. Parent was inconsistent with facts and dates throughout her testimony. Parent told Turlock that Student was being assessed by the regional center in March 2022, yet Parent testified at hearing that she is still deciding whether to agree to the regional center assessment. Parent's conduct also appeared inconsistent with her claim because when Turlock later proposed an assessment plan on January 14, 2022, she delayed picking up and signing the proposed assessment plan for two months until March 22, 2022. And, when Turlock later offered an occupational therapy assessment on May 23, 2022, Parent refused to sign it.

Parent was not a credible witness. Parent's honesty regarding where and when she requested the assessment was questionable. The consistent testimony of Moren,

Looney, and the documented meeting notes were more persuasive than Parent. The weight of the evidence established Parent first requested an assessment on January 14, 2022.

Parent did not establish she requested an assessment for special education for Student on October 7, 2021, and Student did not meet his burden of proof. Student did not establish Turlock denied Student a FAPE by failing to respond to Parent's request for an assessment on October 7, 2021, because Parent did not make a request. Turlock prevailed on Issue 1.

## ISSUE 2: DID TURLOCK DENY STUDENT A FAPE BY FAILING TO ASSESS STUDENT FOR SPECIAL EDUCATION ELIGIBILITY BETWEEN OCTOBER 7, 2021, AND MAY 23, 2022?

Student contends Turlock had reasonable notice of a suspected disability and should have assessed Student beginning October 7, 2021. Student asserts Turlock was on notice of a suspected disability when his general education teacher submitted a referral for a student study team meeting on September 29, 2021. Student asserts Turlock was on further notice when Looney spoke to Parent about assessing Student on December 3, 2021.

Turlock contends Student's educational delays seemed primarily from a lack of instruction caused by absences, in reading, math, or environmental, cultural, and economic factors, which was outside of the IDEA's qualifying criteria. Turlock asserts it appropriately used the resources of the general education class including tiered intervention, before referring him for an assessment.



A student shall be referred for special education only after the resources of the regular education program have been considered and where appropriate, utilized. (Ed. Code, § 56303). Students whose educational needs are primarily due to a lack of instruction in reading or mathematics are not considered to be individuals with exceptional needs, unless the child has a qualifying disability. (Ed. Code, § 56026, subd. (e).)

A child with a disability means a child with

- intellectual disabilities,
- hearing impairments,
- speech or language impairment,
- visual impairment,
- serious emotional disturbance,
- orthopedic impairments,
- autism,
- traumatic brain injury,
- other health impairments, or
- specific learning disabilities.

As a result of the disability, the child needs special education and related services. (20 U.S.C. § 1401(3)(A).)

The requirements to assess a student may be triggered by the informed suspicions of outside experts. Once a school district notices a student has symptoms of an eligible disability, it must assess the student in all areas of that disability with reliable, standardized testing instruments, utilizing procedures that meet the statutory requirements. Informal observations and the subjective opinions of staff members

who dispel such reported suspicion, are not sufficient. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1121, 1122; *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1209.)

For purposes of evaluating a child for special education eligibility, the district must ensure that the child is assessed in all areas of suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158.)

A school district must provide an assessment plan to parents within 15 days of the referral for assessment. (20 U.S.C. § 1415(c),(d), Ed. Code, § 56321, subd. (a).) The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

School districts must obtain the informed consent of student's parent to assess the student. (20 U.S.C. §§ 1414(b)(2)(A)(i), 1415(b)(3); 34 C.F.R. § 300.304(a).) The school district shall make reasonable efforts to obtain informed consent of the parent before conducting the assessment. The assessment can begin immediately after receipt of consent. (Ed. Code, § 56211 subd. (c)(1) and (c)(4).)

Initial evaluations must be conducted within 60 days of parental consent. (34 C.F.R. § 300.301(c).)

A school district's failure to conduct appropriate assessments or reassess in all areas of suspected disability may constitute a procedural denial of FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033 ("*Park*") A procedural violation results in liability for denial of a FAPE only if the violation impeded

the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

Student did not meet his burden of proof that Turlock failed to assess for special education eligibility between October 7, 2021, and May 23, 2022. Student did not prove Turlock knew he had educational or related service needs which warranted assessment, and that it failed to assess him. (Ed. Code, § 56381, subds. (a) and (b).)

#### OCTOBER 7, 2021, THROUGH JANUARY 14, 2022 ASSESSMENT PLAN

Student did not establish Turlock was required to assess him between October 7, 2021, and the development of an assessment plan on January 14, 2022. Student did not prove Turlock knew he had educational or related service needs which warranted assessment, and that it failed to assess him. Student was absent for one-third of his kindergarten and first grade years. Turlock reasonably believed Student's delays were impacted by his poor attendance and his prior year of distance learning. Turlock was entitled to use the resources of general education support before formally assessing him. Four months of general education interventions were appropriate to determine if Student could make progress with those supports without a referral for special education. (Ed. Code, § 56303).

Student began first grade on August 11, 2021, for in-person instruction on campus. Diane Blood was Student's first grade general education teacher, and taught 24 students. She had 20 years of experience as a first grade teacher with Turlock.

In August 2021, Blood observed how Student and many other students were behind in their skills after a year and a few months of virtual instruction. Her students generally had a harder time following class direction, sitting in their seats, and focusing on lessons. Blood opined they did not have the same structure when they were learning at home. Blood also noted that academically, more students entered first grade without knowing their basic foundational skills. Initially, Blood attributed this general learning loss to her students being in a virtual instruction setting because of COVID-19 campus closures.

By early September 2021, Blood completed Student's baseline classroom assessment. The data showed he had difficulties in reading, writing, and math. Student could not identify the alphabet letters, and could not blend sounds, as expected of a first grade student. Nor could Student identify his numbers and count as expected for his grade level. Blood referred Student for tier-two intervention in reading and math, which included small group instruction in her classroom. Blood also referred five other students for tier-two intervention, a higher number than previous years.

By late September 2021, Student had not made progress and Blood referred him for tier-three intervention in reading and math. Luana Miller, Turlock's reading intervention teacher, and Trevor Holdbrook, Turlock's math intervention teacher, worked with Student in another classroom. Each session was 30 minutes, four days per week.

On September 29, 2021, Blood referred Student for a student study team meeting to discuss Student's absences, educational deficits, and possible assessments. Student had not attended school regularly for the first six weeks of the 2021-2022 school year. On October 7, 2021, Looney spoke to Parent about Student's excessive absences, and the importance of sending him to school.

On approximately November 15, 2021, during Student's parent-teacher conference, Blood spoke to Student's father about her concerns that Student was not progressing due to his excessive absences. Student had not attended six consecutive weeks of school. Blood provided Parent with Zoom links to independent study synchronous learning, in which Student could attend school virtually, but Student did not sign on. Blood submitted assignments to Student at home, and Parents had classroom books to follow along. Blood did not have reason to suspect Student had a disability impacting his learning. Blood knew Student needed more time in her class, more time in small group intervention, and more repetition.

Student's three-week, six-week, and 12-week progress reports, and trimester reports cards, showed he missed 25 out of 61 days, almost one-third of the trimester. He missed 40 out of 117 days at the second trimester. Each month contained approximately 21 school days, which means Student missed two months of first grade. Student missed almost one-half of his tier-three intervention sessions. Student had similar absences in kindergarten and missed one-third of his instructional school days. Over the kindergarten and first grade years, Student missed almost two full trimesters.

As a result of these substantial absences, on December 3, 2021, Looney spoke to Parent about her concern with Student's academics and attendance. Looney wanted to schedule a student study team meeting with Parent. Parent initially responded she was thinking about asking for testing, but she did not want to set up the student study team meeting.

On December 14, 2021, Looney followed up and called Parent. Looney scheduled a student study team meeting with Parent for January 4, 2022, the day after instruction resumed from winter break. On January 4, 2022, Parent cancelled the student study

team meeting because the family had contracted COVID-19 and needed to quarantine. Turlock asked Parent to call them to reschedule the meeting when they recovered. Parent did not follow up.

On January 14, 2022, Parent asked Turlock to assess Student. Turlock prepared an assessment plan and made it available to Parent the same day. As discussed in Issue 1, Parent's testimony that she requested this assessment for two years was not persuasive.

Between October 7, 2021, and January 14, 2022, Turlock continued to evaluate Student's progress and provided Student with three tiers of general education intervention. Student had chronic and significant absences, made minimal progress, and lacked many academic skills. Blood could not easily determine if Student's delayed skills were caused by his many absences, or from a learning loss from distance learning. She did not suspect a disability because her main concern was how his poor attendance impacted his learning. By November, Blood noted Student had 25 absences. She knew he needed more time in intervention to see if he would progress. Blood opined it was hard to know if the interventions were working when she did not see Student. By the end of December 2021, Blood noted that as the skills became more difficult, Student required more small group instruction to fill the gaps in his understanding.

Miller, Student's reading intervention teacher, began working with Student the end of September 2021. At the beginning, he seemed typical of a student without much knowledge. When Student missed school instruction, he returned to school at a loss. She often had to move him into a lower group to be at a more appropriate level

because he did not make progress. He fell further behind the others, and she had to provide him different material and textbooks. She explained that for each day Student was absent, he missed a total of three tiers of intervention. Student missed

- the whole group instruction taught in Blood's general education class,
- Blood's small group intervention, and
- the tier-three intervention provided four days per week.

Miller explained how the lessons built on each other, and Student did not have the necessary consistency to benefit from the learning opportunities. Miller opined it took 18 to 20 weeks participating in the program to gather enough data to determine if the intervention was successful. By January 14, 2022, Student had been in intervention for less than 13 weeks, which is less than the recommended time needed to assess whether the general education interventions were successful. And, as discussed, Student was not present for at least one-third of the intervention sessions.

Parent testified at hearing that she kept Student out of school because of non-specific gun and bomb threats. She also explained Student had several medical appointments. However, Parent's explanations were not persuasive to justify Student's excessive absences.

Student did not meet his burden of proof that Turlock had a reason to assess for special education eligibility between October 7, 2021, and January 14, 2022. Student did not prove Turlock knew he had educational or related service needs which warranted assessment, and that it failed to assess him. Student also did not prove Student's

teacher or Parent referred Student for an assessment before Parent's request on January 14, 2022. Turlock developed an assessment plan on the same day Parent requested an assessment. (Ed. Code, § 56381, subds. (a) and (b).)

#### JANUARY 14, 2022, TO MAY 23, 2022 IEP

Student did not prove Turlock failed to timely assess Student between January 14, and May 23, 2022. Turlock complied with all procedural requirements.

Turlock timely developed an assessment plan on January 14, 2022, within the mandatory 15-day period. (20 U.S.C. § 1415(c) and (d); Ed. Code, § 56321, subd. (a).)

The assessment plan stated Turlock would evaluate Student's known and suspected disabilities, based upon Parent's reported concerns. The assessment plan's evaluation areas included:

- academic achievement;
- health;
- intellectual development; and
- processing measures.

On January 27, 2022, Turlock called Parent and reminded her the January 14, 2022 assessment plan was ready for her to pick up. On January 31, 2022, Parent picked up the assessment plan but did not sign it for two months.



On March 18, 2022, Blood spoke to Parent after school and followed up on the assessment plan. Parent told her Student was being evaluated by Valley Mountain Regional Center and she was debating whether to pursue the school assessment at the same time. Blood informed Looney.

Parent consented to the assessment plan on March 22, 2022. On March 29, 2022, Turlock updated the January 14, 2022 assessment plan to evaluate additional areas of suspected disabilities, based upon Parent's reported concerns and claim the regional center was assessing him.

The updated January 14, 2022 assessment plan's evaluation areas included:

- language and speech communication;
- motor development;
- social-emotional behavior; and
- adaptive behavior.

Parent consented to the updated assessment plan on March 29, 2022. Turlock could not assess student until it received Parent's informed consent. (20 U.S.C. §§ 1414(b)(2)(A)(i), 1415(b)(3); 34 C.F.R. § 300.304(a).) The assessment can begin immediately after receipt of consent. (Ed. Code, § 56211subd. (c)(1),(4).)

Turlock immediately began assessing Student after Parent consented. (Ed. Code, § 56211subd. (c)(1) and (c)(4).) Turlock conducted timely assessments which were completed within 60 days of Parent's consent, and used the full 60 days to do so. (34 C.F.R. § 300.301(c).)

School psychologist Moren, general education teacher Blood, speech and language pathologist Stephanie Kramer, resource specialist Ellen Ratzlaff, inclusion specialist Tiffany Maciel, and board certified behavior analyst Nicolas Margarite, each conducted assessments.

Turlock held a timely IEP team meeting on May 23, 2022, to review those assessments. The IEP team meeting was held within 60 days of Parent's consent to assess. Each assessor presented their findings. Turlock determined Student was eligible for special education with two qualifying disabilities. Student had autism and a specific learning disability. Student had below average cognition.

The IEP team recommended and prepared a new occupational therapy assessment plan to evaluate an additional area of suspected disability. The assessment plan's evaluation areas included:

- motor development, by an occupational therapist; and
- sensory processing.

However, Parent did not consent to the occupational therapy assessment plan. At hearing, Parent explained she did not sign the assessment plan because the staff at Turlock were too nice to her, and she did not trust them. Parent did not adequately explain why she did not trust them. The evidence did not support Parent's explanation that Turlock was being too nice when they gave her the assessments and she believed they were trying to trick her.

Student did not meet his burden of proof that Turlock failed to assess for special education eligibility between January 14, 2022, and May 23, 2022. Turlock had no reason to suspect Student's educational needs warranted an assessment before Parent requested

an assessment in January 2022. Turlock timely prepared an assessment plan in response to Parent's request for assessment. Turlock timely completed the assessments and presented them at an IEP team meeting within 60 days of Parent's consent. Turlock prevailed on Issue 2.

### ISSUE 3: DID TURLOCK DENY STUDENT A FAPE AT THE MAY 23, 2022 IEP TEAM MEETING, BY FAILING TO OFFER OCCUPATIONAL THERAPY?

Student contends Turlock denied Student a FAPE by failing to offer him occupational therapy services at the May 23, 2022 IEP team meeting.

Turlock contends Student showed no evidence he required occupational therapy services. Turlock asserts occupational therapy services are embedded in the Generalized Autism Special Day Class that it offered Student, even though not provided as a direct service.

A child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Rowley, supra*, 458 U.S. 176, 201-204 [102 S. Ct. 3034]; *Endrew F., supra*, 580 U.S. 402, 403 [137 S.Ct. 988, 1000].)

For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, the offer of educational services or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314; 20 U. S.C. § 1401(9) ("*Gregory*:".)

An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 .) An IEP is a snapshot, not a retrospective. (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

Student did not establish Turlock's failure to offer occupational therapy services denied Student a FAPE. Student's expert witness, Jandee Goodis, credibly testified that it would not be appropriate to offer services without an assessment. However, Turlock could not assess Student without Parent's consent.

The May 23, 2022 multidisciplinary assessment results showed Student had fine motor and sensory processing weaknesses warranting further assessment. Moren conducted initial assessments which evaluated Student for motor development and perceptual skills. Moren conducted the Beery Visual Motor Index, Sixth Edition, the Test of Visual Perception Skills, and the Adaptive Behavior Assessment System for Children. Moren reviewed Student's results and had concerns about Student's fine motor development and sensory processing. Moren believed further assessment was needed to address his specific areas of need, and recommended a new assessment plan to evaluate an additional area of suspected disability. Turlock presented the proposed occupational therapy assessment plan to Parent on May 23, 2022, but Parent did not consent to the assessment.

Goodis credibly testified that it was best practices in her field to conduct an occupational therapy assessment before recommending services. Goodis explained the information gleaned from the occupational therapy assessment determines the

occupational therapy needs. Goodis agreed it would not be appropriate to recommend occupational therapy services at the IEP team meeting. Rather, the first thing she would recommend would be an occupational therapy assessment. Goodis would administer motor development and sensory processing measures.

Significantly, Turlock's May 23, 2022 assessment plan included motor development and sensory processing measures, the exact measures Goodis recommended.

Goodis did not realize Turlock had offered Parent an occupational therapy assessment which Parent declined. Parent did not tell Goodis about the assessment plan. Goodis opined Parents should sign the assessment plan Turlock offered.

Goodis could not say with certainty Student required occupational therapy to benefit from his educational program. Both Goodis and Moren agreed Student should be assessed for occupational therapy with motor development and sensory processing measures. Both Goodis and Moren agreed Parents should sign the assessment plan. Both Goodis and Moren agreed it would not be appropriate to offer occupational therapy services to Student without this occupational therapy assessment.

Parent's refusal to sign the very occupational therapy assessment she is seeking defeats her claim for relief on this issue. Therefore, Student did not establish Turlock denied Student a FAPE by not offering occupational therapy services at the May 23, 2022 IEP. Turlock acted appropriately at the May 23, 2022 IEP team meeting, when it offered an occupational therapy assessment and did not offer direct services. Turlock prevailed on Issue 3.

#### ISSUE 4: DID TURLOCK DENY STUDENT A FAPE AT THE MAY 23, 2022 IEP TEAM MEETING, BY FAILING TO OFFER BEHAVIOR INTERVENTION SERVICES?

Student contends Turlock failed to offer behavior supports to address his behaviors in the classroom. Student contends his social skills, sensory, attention, and adaptive behavior required prompts and behavior intervention services.

Turlock contends Student did not display any behavioral issues that warranted behavior supports. Turlock contends that if Student required any behavior support, the Generalized Autism Special Day Class could provide that support.

The IDEA requires that, if a child's behavior "impedes the child's learning or that of others," the IEP team must "consider the use of positive behavior interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i).) If a student's behavioral issues impede appropriate learning, the IEP must reasonably address those behavioral issues. (*See Endrew F., supra*, 580 U.S. 386, 402-403 (requiring the application of IDEA's "reasonably calculated" standard to IEP of student who "exhibited multiple behaviors that inhibited his ability to access learning in the classroom." (*Department of Education v. L.S. by and through C.S.* (D. Hawaii, Mar. 29, 2019, No. 18-CV-00223 JAO-RT) 2019 WL 1421752 [nonpub. opn.], at p.11.)

Student did not establish behavior was an area of need at the May 23, 2022 IEP team meeting. Student had social skills deficits in his social communication, reciprocal conversation, and ability to sustain attention in large group instruction. While he had symptoms of autism, and did not meet all the social expectations in his classroom, his behavior did not impede his learning or the learning of others.

Blood described Student as a good boy with no behavior issues. Student was not disruptive. Student needed help completing his work because academics were difficult for him. Student interacted with his friends, and loved to talk with them and play with them outside. Student was sweet and got along with everyone.

Moren credibly testified that neither Blood nor Parent indicated Student had maladaptive behaviors warranting an assessment or a behavior intervention plan. Moren defined maladaptive behaviors as aggression, elopement, and property destruction. Student could be off-task, which could be addressed by other services. Based on her assessment, Moren did not believe he needed behavior services or a behavior implementation plan because the evaluation of his behaviors did not warrant additional behavior intervention.

Turlock's board certified behavior analyst Margarite, conducted Student's Autism Diagnostic Observation Schedule. He assessed and observed Student. He interviewed Blood, Student's general education teacher, and inclusion specialist Maciel. None of them saw any instances of behavior that impeded Student's ability to access his education.

Margarite persuasively testified Student did not require positive behavioral interventions and supports because his behavior did not impede his learning. Student's behavior was not an area of concern because he had no maladaptive behavior that put him or others at risk. Student did not elope, bang his head, hit, spit, steal items, kick, or bite himself or others.

Reading intervention specialist Miller, described Student as a "good kid who tried hard." She did not observe behavioral problems with him, such as running around or standing up from his chair. Student could attend to her small group instruction for the full 30-minute intervention session.

Student's expert witness, Dr. Theresa Edwards, also opined that Student did not present with behaviors that would impede or negatively affect his progress. Dr. Edwards formed her opinion based on Turlock's assessments, the multidisciplinary report, and the May 23, 2022 IEP.

Student did not establish the failure to offer a behavior intervention services was a denial of FAPE. Turlock prevailed on Issue 4.

#### ISSUE 5: DID TURLOCK DENY STUDENT A FAPE AT THE MAY 23, 2022 IEP TEAM MEETING, BY FAILING TO OFFER A ONE-TO-ONE AIDE?

Student contends he struggles with adaptive behavior and academics, and he requires a one-to-one aide. Turlock contends there was no evidence Student required a one-to-one aide to access his education.

A one-to-one aide is required as a related service if the student requires an aide to benefit from special education. (34 C.F.R. § 300.34(a).)

Student did not establish Turlock denied him a FAPE by failing to offer a one-to-one aide. Student could independently navigate his program without a one-to-one aide. Student did not establish any difficulties requiring him to have a one-to-one aide in his class setting.

Turlock's resource specialist Ratzlaff, worked with Student during first grade. Ratzlaff persuasively testified that one-to-one aides are used for maladaptive behaviors, health and safety, or eloping. Student did not have those behaviors. Student did not



need a one-to-one aide to help with instruction because it is the teacher who provides instruction, not the one-to-one aide. Student did not require a one-to-one aide because he did not have behavioral needs.

Blood and the assessors assessed Student without a one-to-one aide. Ratzlaff conducted the academic achievement tests, described how Student came willingly, seemed comfortable, was engaging, and was willing to try all the tasks she gave him. Ratzlaff and Blood both recalled Student did not act out, and did not leave his seat or the room. Student did not require Blood to redirect him to stay on task.

Margarite did not recommend giving Student an aide without first giving him skills to be successful. Margarite cautioned he did not want to have Student build dependence on an aide because it would be harder to fade the one-to-one aide out. Margarite recommended looking for other options first to help Student be independently successful.

Margarite recommended looking at a placement with the least restrictive environment for a student to be the most independent and as successful as possible. Students could become dependent on a one-to-one aide instead of learning to function independently. Margarite believed Student would gain independent skills in the Autism Generalized Special Day Class. He anticipated Student would be able to control and maintain his academic materials independently, and could gain academic skills independently in that setting.

Even Student's expert Dr. Edwards opined Student did not require a one-to-one aide. Dr. Edwards relied on the multidisciplinary report, the IEP, and her own interview with Parent and Student. Dr. Edwards believed Student had no behavioral needs requiring a one-to-one aide.

Student failed to prove the May 23, 2022 IEP denied him a FAPE by failing to offer behavior support in the form of a one-to-one aide. Student did not establish he had deficits which required a one-to-one aide to access his program. Moreover, one-to-one aide support could be considered a more restrictive educational setting because of the learned reliance on a dedicated adult. Turlock prevailed on Issue 5.

#### ISSUE 6: DID TURLOCK DENY STUDENT A FAPE AT THE MAY 23, 2022 IEP TEAM MEETING, THROUGH SEPTEMBER 30, 2022, BY FAILING TO OFFER HOME APPLIED BEHAVIORAL ANALYSIS THERAPY AND CLINIC MEETINGS?

Student contends he requires home applied behavioral analysis therapy because the math and reading interventions Turlock provided to him were not successful. Turlock contends there was no evidence Student required home applied behavioral analysis therapy and clinic meetings.

When a child's behavior impedes the ability to learn, the IEP team shall consider the use of positive behavioral interventions, supports, and strategies to address the behavior. (20 U.S.C. §§ 1414(d)(3)(B)(i); Ed. Code, § 56341.1, subd. (b)(1).) A child's education is more effective when positive behavioral interventions and supports are provided to address the child's learning and behavioral needs. (20 U.S.C. § 1400(c)(5)(F);

Ed. Code, § 56520, subd. (a)(3).) Students who exhibit serious behavioral challenges shall receive appropriate and timely assessments and positive supports and interventions. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56520, subd. (b)(1).)

Applied behavioral analysis, or ABA, therapy is a scientific method which looks at behavior, the function of the behavior, and the topography of the behavior. A board certified behavior analyst makes observations and determines if the behavior impedes a student's independent function, and if any behaviors need to be replaced.

Student did not exhibit problematic behaviors during the school year or during the assessments. Neither Parent, Blood, Margarite, Moren, Miller, nor Ratzlaff, reported problematic behaviors. Student was compliant, motivated, and actively participated in the assessment process. Student was friendly, calm, and answered the assessment questions. Student did not act out, leave his seat, or leave the room. Student's behaviors did not interfere with Student completing the assessments.

Margarite persuasively testified Student did not require positive behavioral interventions and supports because his behavior did not impede his learning. Student had no maladaptive behavior that put him or others at risk. Student did not elope, engage in head banging, hit, spit, steal items, kick, bite himself, or others. Dr. Edwards similarly opined Student did not require home ABA therapy because his behaviors were not an issue.

Based upon the credible testimony of Student's teacher, the assessors, and what the May 23, 2022 IEP team knew at the time, Student did not have deficits which required specialized services and home ABA therapy and clinical training. Therefore, Student failed to prove the May 23, 2022 IEP denied Student a FAPE by failing to offer in-home ABA therapy. Turlock prevailed on Issue 6.

#### ISSUE 7: DID TURLOCK DENY STUDENT A FAPE AT THE MAY 23, 2022 IEP TEAM MEETING, THROUGH SEPTEMBER 30, 2022, BY FAILING TO OFFER PARENT TRAINING?

Student contends Turlock did not provide parent training for his disabilities to help support his IEP. Student contends Turlock should have trained Parent in assistive technology devices, software and computer devices, behavior modification, data collection, post-secondary training, and vocational guidance. Turlock contends there was no evidence Parent required training as a related service.

Related services required to assist a student with exceptional needs to benefit from special education may include parent counseling and training. (Ed. Code, § 56363, subd. (b)(11).) Parent training means assisting a parent in understanding the special needs of the student, providing the parent with information about child development, and helping the parent acquire necessary skills to facilitate the implementation of the student's IEP. (34 C.F.R. § 300.34(c)(8)(i)-(iii).)

Student failed to prove Turlock denied Student a FAPE in the May 23, 2022 IEP, by failing to offer parent training. Parent did not establish she required training.

Turlock's inclusion specialist Maciel, conducted the Social Skills Improvement Scales, reviewed Parent's questionnaire, reviewed Student's grades, attendance, and discipline. Maciel helped the team identify his areas of need and develop his goals.

Maciel credibly testified she offered a form of parent training at the IEP team meeting. She gave Parent the community advisory referral with contact information, which she referred to as CAC. Maciel reviewed the brochure with Parent and explained the monthly meetings which provided further information and training.

Dr. Edwards opined that parent training was not a requirement. She believed Parent received her parent's rights regarding eligibility and placement, and that was sufficient in this case.

Parent did not provide information or an explanation as to why she needed parent training. Student failed to establish that any parent counseling or training was required for Student to benefit from his special education program. (Ed. Code, § 56363, subd. (b)(11).) Turlock provided Parent with resources to obtain parent training if Parent so desired.

Student did not establish that the failure to offer parent training denied Student a FAPE. Student failed to establish that any parent counseling or training was required for Student to benefit from his special education program. Turlock prevailed on Issue 7.

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ISSUE 8: DID TURLOCK DENY STUDENT A FAPE AT THE MAY 23, 2022 IEP TEAM MEETING, BY (A) PREDETERMINING PLACEMENT, AND BY (B) FAILING TO OFFER APPROPRIATE PLACEMENT IN PARENT'S PREFERRED GENERAL EDUCATION PLACEMENT?

Student contends the special day class Turlock offered was not in the least restrictive environment. Student claims his expert witness established he could make progress in the general education setting. Student did not address how Turlock predetermined the offer of placement.

Turlock contends it did not predetermine the placement at the IEP team meeting. Turlock alleges the Generalized Autism Special Day Class was the appropriate placement in the least restrictive environment for Student.

ISSUE 8a: PREDETERMINING PLACEMENT

School districts cannot predetermine a pupil's placement prior to the IEP team meeting and without parental involvement in developing the IEP. (*Target Range, supra*, 960 F.2d at p. 1481, 1484; *Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-859; *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267, 274-275.)

A school district may arrive at an IEP team meeting with a pre-written offer, but may not take a "take it or leave it" position. (*J.G. v. Douglas County School Dist.*, (9th Cir. 2008) 552 F.3d 786, 801, fn. 10, citing *Ms. S v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) School district staff may meet beforehand to prepare goals and objectives and can provide a written offer before parents have agreed to it. (*Doyle v.*

*Arlington County Sch. Bd.* (E.D. Va. 1992) 806 F.Supp.1253, 1262.) School districts do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*Mercer Island, supra*, 575 F.3d at p.1038 citing 34 C.F.R. § 300.501(b)(3) [an IEP meeting "does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed a later meeting"].)

Student did not establish Turlock predetermined placement when it recommended the Generalized Autism Special Day Class at the May 23, 2022 IEP team meeting.

At the IEP team meeting, Turlock discussed the assessment results. Turlock determined Student qualified for special education. The IEP team developed goals, discussed services and accommodations, and discussed placement options.

The IEP team discussed several placement options, including an autism special day class, a mild to moderate disability special day class, the resource specialist setting, and speech and language services. They gave a general overview of what services would look like in those settings.

Turlock offered Student placement in the Generalized Autism Special Day Class at Medeiros Elementary for 1,425 minutes per week, over four and a half hours per day, with inclusion in two general education classes per day. Turlock offered specialized services, accommodations, and modifications.

At hearing, all of Student's teachers, intervention specialists, and assessors opined the placement offered was the most appropriate for Student's needs. Their testimony

was consistent and established the placement decision was made at the IEP team meeting. Parent and her advocate were invited to share their concerns, and agreed to the offered placement at the IEP team meeting.

Moren assessed Student, completed the multidisciplinary assessment report, and discussed it at the IEP team meeting. She recalled the placement decision was made at the meeting, after the team reviewed the assessments and developed proposed goals.

Ericka Tschantz, Turlock's special education director, recalled only Student's identifying information and present levels of performance were filled out before the IEP team meeting. Tschantz also explained that staff's direct observations in the classroom or assessment results are sometimes filled out in the IEP in advance. Sometimes, draft goals are included. The rest of the document is not filled out until the meeting. Tschantz credibly testified the offer of placement was not filled out before the IEP team meeting.

The IEP draft document does not constitute a predetermined IEP document when it serves as working draft to help organize the meeting agenda. Student's IEP draft document was continually updated and revised during the meeting, and after the conclusion to finalize the notes. The updated document was then presented to Parent. The working draft provided to Parent, her advocate, and the other IEP team members was not the final IEP. The draft IEP facilitated parental participation and discussions with the IEP team.

Turlock did not predetermine the IEP offer of placement. Rather, Turlock provided the IEP team with a prewritten draft of certain components, but the resulting



offer did not demonstrate a “take it or leave it” attitude. Turlock did not predetermine their IEP offer simply because it created a draft IEP as a framework to address the meeting agenda. Turlock prevailed on Issue 8a.

## ISSUE 8b: PARENT’S PREFERRED PLACEMENT AND THE LEAST RESTRICTIVE ENVIRONMENT

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. (See *Gregory K., supra*, 811 F.2d 1307, 1314.) 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 student. (*Ibid.*) Nor must an IEP conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.)

### PARENT’S PREFERRED PLACEMENT

The general education setting Parent preferred was not the least restrictive setting for Student because he did not make progress, as discussed in this issue. Turlock’s special education director Tschantz, persuasively explained Student had been in general education with tier-three intervention, for two years and they should have seen progress. Student did not progress in the general education setting because he lacked the foundational skills that were needed for higher academic skills.

Student did not establish the failure to offer Parent’s preferred placement in general education was in itself a procedural violation which impeded his right to a FAPE,

significantly impeded Parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

## LEAST RESTRICTIVE ENVIRONMENT

In determining the educational placement of a child with a disability, a school district must ensure that, in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs, and that the child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116(d) and (e).)

To provide 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); Ed. Code, § 56031; 34 C.F.R. § 300.114(a).)

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

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

- (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 Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*)]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402.)

If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires a further determination of whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R., supra*, 874 F.2d at p. 1050.) Mainstreaming is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

The continuum of program options includes but is not limited to regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

Student did not establish Turlock denied him a FAPE by offering the Generalized Autism Special Day Class at Medeiros Elementary instead of Parent's preferred general education program. The IEP team used Student's present levels of performance to

develop his goals. Student's goals help determine the offer of placement. All of Student's teachers, intervention specialists, and assessors agreed the placement Turlock offered was the most appropriate for Student's needs.

As discussed in detail below, Student could not be satisfactorily educated in the regular education environment because he was not receiving educational benefit from his full-time placement in general education. The non-academic benefits of his general education program were minimal, as evidenced by Student's non-academic present levels of performance and his goals. While Student did not distract his teachers and other students in the classroom, he could not follow along with the lessons and needed redirection and prompting. He did not understand the material presented. (*Rachel H., supra*, 14 F.3d 1398, 1404.)

Despite two years and three tiers of general education interventions, Student did not make meaningful progress in general education. While there was no evidence of financial costs to mainstream Student, the delay in getting him early intervention in an appropriate environment meant he was falling further behind the general education curriculum. Student's continued placement in general education had a tremendous impact on him in a negative way. (*Ibid.*)

By the May 23, 2022 IEP team meeting, Student's present level of performance noted he could only identify 23 out of 120 numbers. He struggled to use strategies to add or subtract numbers.

The IEP team developed goals to address his areas of need, and his skills were far below his general education peers. His goals would best be addressed in a small group setting, with intensive academic support, in a special day class.

Student's math goal required him, in one year, to identify 120 numbers with 70 percent accuracy in three out of five trials. His second math goal required him, in one year, to add and subtract to 20 with 70 percent accuracy in three out of five trials.

Student's present level of performance noted he could recognize the names of 19 lowercase letters, and 17 uppercase letters, out of 26. He recognized the sounds of seven out of 30 letters and digraphs. His known letters were not always the same throughout the year. Student recognized four out of 100 site words. When he wrote, he confused uppercase and lowercase letters. Student was at least one grade level behind his general education peers in his classroom.

Student's writing goal required him to correctly copy letters, words, and sentences with appropriate spacing with 80 percent accuracy, as determined by student work samples. His reading readiness goal required him to provide the most common sound for the consonant and vowel with 80 percent accuracy in three out of five trials. Student's second reading readiness goal required him to correctly identify the uppercase and lowercase letters with 95 percent accuracy, in three out of five trials.

Student's non-academic goals included self-advocacy to ask for help when he could not follow directions for academic tasks; whole group instruction to maintain on task behavior during whole group lessons; peer interaction for engaging in group setting during academic activities; and communication to resolve conflicts with peers.

Student had significant learning deficits, and the characteristics of autism such as social communication, reciprocal conversation, and his inability to focus during large group instruction, impacted his ability to access the curriculum and progress in the general education setting. Student performed at a beginning first grade level, while his second grade class continued to progress.

Turlock offered Student placement in the Generalized Autism Special Day Class at Medeiros Elementary for 1,425 minutes per week out of 1,825 minutes. 1,425 minutes is more than four and a half hours per day. This was 78 percent of his day, and allowed for two general education classes for inclusion. Turlock offered door-to-door transportation, specialized services, accommodations, and modifications. The small group setting with intensive specialized academic instruction was designed to meet his academic deficits.

The Generalized Autism Special Day Class description is a highly enriched program based on Evidence Based Practices, 2020. The teaching strategies used are based on the principles of applied behavior analysis.

The program addresses 15 domains:

- Learning Readiness Skills;
- Receptive and Expressive Language Skills;
- Functional Communication Skills;
- Social Skills;
- Play, Recreation and Leisure Skills;
- Emotional Regulation;
- Behavior Flexibility;
- Executive Function and Organizational Skills;
- Independent Work Skills;
- Joint Attention;
- Academic Skills;
- Fine Motor and Handwriting Skills;
- Daily Living and Adaptive Skills;

- Self-Advocacy Skills; and
- Inclusion Skills.

The Generalized Autism Special Day Class had a higher student to staff ratio, with embedded interventions, visual supports, and embedded social skills supports and training. The program highlighted learning readiness skills. The class had one special education teacher, six paraprofessionals, and approximately eight students. Staff would redirect, prompt, and support Student's areas of need and his goals.

The goals in Student's identified areas of need were embedded in the Generalized Autism Special Day Class. Goals such as peer interaction, whole group instruction, self-advocacy, communication, social engagement, math, reading, and writing, would be addressed for more than four hours per day, five days per week.

The Generalized Autism Special Day Class utilized the accommodations in Student's IEP. It provided visual supports and schedules, alphabet charts, number cards, access to visual models, frequent checks for understanding, simple or repeated directions, and movement breaks.

All of the Turlock credentialed staff who assessed and worked with Student strongly believed the placement was appropriate for his needs. Moren, Blood, Marilu Miranda, Ratzlaff, Maciel, and Margarite, were familiar with the program and believed it was the best setting for him to achieve his goals. Student was two years behind academically, at the time of the hearing. His academic progress was minimal, and he had difficulty accessing the general education material and making progress. It was logical to provide a setting where his needs could be met, and his goals could be effectively worked on.

Maciel credibly testified Student had a shorter attention span during his general education whole group instruction because he did not understand the material. Yet, Student could attend and focus on his structured tier-three intervention for at least half an hour. Maciel opined that after almost two years of general education intervention, Student continued to lack fundamental skills for letter identification, reading, writing, recognizing numbers, and performing simple arithmetic. Student required a specialized small group setting to fill in the gaps. Academically, he fell further behind his general education peers. Student did not make the expected progress with the general education tiered interventions.

Maciel credibly opined Student required a small, specialized setting, with more focused instruction. When Student attended the tier-three interventions for reading and math, he received a total of one hour a day, four days a week, of small group instruction. The Generalized Autism Special Day Class would provide him with 1,425 minutes of specialized instruction per week, more than four and a half hours per day.

Tschantz opined Student's deficits and areas of need impeded his learning during whole group instruction in the general education class. Due to Student's deficits, he could not access instruction in general education for two years. The Generalized Autism Special Day Class was offered because it would place him in a smaller setting with more staff to learn the skills in his goals. Student needed to be explicitly taught these skills so he could attend to the instruction. Student needed to learn specific skills that could be more effectively addressed in the Generalized Autism Special Day Class, than in the general education class. Until he learned those skills, he could not successfully access general education.



Turlock's program specialist Marilu Miranda, was familiar with the Generalized Autism Special Day Class at Medeiros Elementary. It was the least restrictive of the three special day class programs offered at the school, because it offered the most opportunity to mainstream students into general education settings. Miranda was familiar with the skills taught and how goals would be addressed.

Miranda opined the most important skills Student needed was learning readiness. Student needed specific skills to attend to the instruction and receive academic information. If Student did not have learning readiness skills, it would impact him in general education. If Student could not access the information taught by the general education teacher, then he would continue to have difficulty in a small group environment such as intervention, because he did not have the underlying skills.

Miranda noted if Student could not hold his attention to the lesson for five minutes, it would affect his ability to learn in general education. She opined it would be hard for Student to get the full benefit of the lesson in the general education setting.

Ratzlaff, Student's case manager and resource specialist, assessed Student, and drafted math, reading, and writing goals. She believed the Generalized Autism Special Day Class was appropriate because Student would spend the majority of his day with trained staff who worked with students with autism who needed help with academics, social skills, and behavior. Ratzlaff believed best practices would be to provide early intervention for Student's academic needs in that program. She opined if Student had such consistent instruction for four hours per day, it could have a significant impact on him as a student with autism.

Ratzlaff further explained it would be difficult for Student to participate in second grade as a non-reader who could only add single digit numbers but could not subtract.

By second grade, students are required to have more advanced skills, such as adding digits with regrouping, and using place value 10s and 100 with manipulatives for regrouping. Students in second grade also

- wrote sentences, small paragraphs,
- read daily,
- responded to reading comprehension cues,
- retold stories,
- predicted stories, and answered the "who, what, where, why, and how" questions, and
- wrote about stories.

Reading intervention specialist Miller credibly testified that when Student was in second grade, he was still reading at the late kindergarten to early first grade levels. Student did not have any emerging second grade skills. Miller recalled she often had to move Student into a lower intervention group because he did not progress, as the other students advanced. As Student fell behind, he required different textbooks and instruction, compared to his peers in her intervention group.

Margarite also opined the Generalized Autism Special Day Class at Medeiros Elementary was the most appropriate placement for Student. Margarite observed Student had social deficits, and the structured program could help him learn those skills. In the Generalized Autism Special Day Class, Student would develop independent skills such as navigating the academic classroom independently, controlling and maintaining academic materials independently, and gaining academic skills independently.

Maciel assessed Student using the Social Skills Improvement System, and observed him in his general education class during math and physical education. Student had a lot of support in his general education class and still struggled to complete his work independently. He had difficulty starting and completing assignments. Student did not show he understood the material during the whole group instruction. Student was listening but not retaining the information. He copied the information, but did not learn it. Student required more prompting as Maciel's instructions became more challenging.

In evaluating the goals and basic skills Student needed to be successful, Maciel opined the Generalized Autism Special Day Class was the most appropriate placement for Student to grow academically and socially. Her observations and data demonstrated Student needed small group setting for academics and social skills. Student struggled with basic knowledge with letter identification and sound identification. He was still struggling in general education after two years of intervention.

Student's expert Dr. Edwards opined she did not have enough information about the Generalized Autism Special Day Class to determine whether it was appropriate. Dr. Edwards was not familiar with the Generalized Autism Special Day Class and had not toured it. Dr. Edwards did not assess Student. She did not observe him in a school setting. While she was generally concerned Student had not had enough time in the general education setting, she could not say if the placement Turlock offered was inappropriate. The testimony of Dr. Edwards did not establish the Generalized Autism Special Day Class was not the least restrictive environment for Student.

While Turlock argued that Dr. Edwards was biased because she had an ongoing financial relationship with Student's counsel, the more compelling factors in evaluating her credibility are her lack of observation and assessment of Student in a classroom, her lack of familiarity with his attendance, and her lack of familiarity with the Generalized Autism Special Day Class. Dr. Edwards had questions about the program and had the opportunity to communicate with Tschantz about it. Dr. Edwards admitted she did not have enough information to opine whether the placement offered was appropriate for Student.

Student did not establish the offer of the Generalized Autism Special Day Class was not the least restrictive environment. Student did not establish the educational benefits of his full-time placement in general education. Student did not establish any non-academic benefits to general education. While there was no evidence Student was distracting to others in the general education classroom, there was considerable evidence that his attention span was significantly longer when in a small group setting.

The weight of the evidence established Student did not receive educational benefit in the general education setting, but did receive educational benefit in the Generalized Autism Special Day Class with mainstreaming in two general education classes. Therefore, Turlock offered placement in the least restrictive environment and mainstreaming to the maximum extent appropriate in light of the continuum of program options. Turlock prevailed on Issue 8b.

## 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:

Turlock did not deny Student a FAPE by failing to respond to Parent's request for an assessment on October 7, 2021.

Turlock prevailed on Issue 1.

### ISSUE 2:

Turlock did not deny Student a FAPE by failing to assess Student for special education eligibility, between October 7, 2021, and May 23, 2022.

Turlock prevailed on Issue 2.

### ISSUE 3:

Turlock did not deny Student a FAPE at the May 23, 2022 IEP team meeting, by failing to offer occupational therapy.

Turlock prevailed on Issue 3.

#### ISSUE 4:

Turlock did not deny Student a FAPE at the May 23, 2022 IEP team meeting, by failing to offer behavior intervention services.

Turlock prevailed on Issue 4.

#### ISSUE 5:

Turlock did not deny Student a FAPE at the May 23, 2022 IEP team meeting, by failing to offer a one-to-one aide.

Turlock prevailed on Issue 5.

#### ISSUE 6:

Turlock did not deny Student a FAPE at the May 23, 2022 IEP team meeting, through September 30, 2022, by failing to offer home applied behavior analysis therapy and clinic meetings.

Turlock prevailed on Issue 6.

#### ISSUE 7:

Turlock did not deny Student a FAPE at the May 23, 2022 IEP team meeting, through September 30, 2022, by failing to offer parent training.

Turlock prevailed on Issue 7.

## ISSUE 8:

Turlock did not deny Student a FAPE at the May 23, 2022 IEP team meeting, by predetermining placement. Turlock did not deny Student a FAPE at the May 23, 2022 IEP team meeting, by failing to offer appropriate placement in Parent's preferred general education placement.

Turlock prevailed on Issues 8a and 8b.

## ORDER

All relief sought by Student is denied.

## 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.

Deborah Myers-Cregar  
Administrative Law Judge  
Office of Administrative Hearings