

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

PARENTS ON BEHALF OF STUDENT,

V.

SAN DIEGO UNIFIED SCHOOL DISTRICT.

CASE NO. 2024040570

DECISION

October 11, 2024

On April 12, 2024, the Office of Administrative Hearings, called OAH, received a due process hearing request from Parents on behalf of Student, naming San Diego Unified School District, called San Diego. OAH continued the due process hearing on May 13, 2024. Administrative Law Judge Sabrina Kong heard this matter by videoconference on August 13, 14, 15, 20, 21, 22, 27, 28, and 29, 2024.

Attorneys Meagan Nunez and Peter Cuevas represented Student. Parents attended each hearing day on Student's behalf. Attorneys Josh Walden and Mark Waterman represented San Diego. Program Specialist Jessica Coleman attended all hearing days on San Diego's behalf.

At the parties' request the matter was continued to September 12, 2024, for written closing briefs. The record was closed, and the matter was submitted on September 12, 2024.

On August 12, 2024, Student withdrew issues 1a, 4a, 4b, 5, 6a, 6b, 6c, 6d, 6e, and 6f, set forth in the August 2, 2024 Order Following Prehearing Conference. Only issues 1b, 2, 3a, 3b, 3c, 3d, 3e, and 3f, set forth in the August 2, 2024 Order Following Prehearing Conference and stated below, remained for determination at hearing.

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

ISSUES

1. Did San Diego deny Student a FAPE in the 2022-2023 school year, by failing to consider Student's changed circumstances, specifically social, emotional, educational, and safety needs, at the March 7, 2023 IEP team meeting?
2. Did San Diego deny Student a FAPE during the 2022-2023 school year, by failing to offer an appropriate educational placement at the March 7, 2023 IEP team meeting?
3. Did San Diego deny Student a FAPE during the 2022-2023 school year, by failing to offer appropriate services and supports at the March 7, 2023 IEP team meeting, specifically:
 - a. Social;
 - b. Emotional;
 - c. Behavioral;

- d. Academic;
- e. Transition; and
- f. Safety?

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).) Student has the burden of proof in this case. 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 14 years old and attending high school as a general education Student at the time of hearing. In August 2023, Parents revoked consent for Student to receive special education services upon her return to La Jolla High School in San Diego during the 2023-2024 school year. Parents resided within San Diego's geographic boundaries and Student was eligible for special education under emotional disability, formerly known as emotional disturbance, and other health impairment during the 2022-2023 school year, the relevant period for the issues in this case.

BACKGROUND

Parents placed Student in Ascend Healthcare, a residential treatment center at some point during the 2021-2022 school year. At Parents' request, San Diego offered Student a January 2022 IEP which placed her at the San Diego School of Creative and Performing Arts. Parents consented to the January 2022 IEP. In spring 2022, San Diego conducted multi-disciplinary assessments of Student in preparation for making an IEP offer for the 2022-2023 school year. Parents had placed Student at blueFire Wilderness Therapy, called the wilderness program, shortly before San Diego held the May 10, 2022 IEP team meeting.

At the May 10, 2022 IEP team meeting, Parents shared, and San Diego considered, that Student was experiencing social-emotional and behavioral challenges including

- suicide ideations,
- self-cutting,
- self-injury,
- feelings of being overwhelmed,
- anxiety,
- depression,
- self-esteem issues, and
- class avoidance.

San Diego's May 10, 2022 IEP team members concluded Student required a separate school with mental health related services, a small, structured environment, and an intensive therapeutic component throughout the school day. San Diego's IEP team members determined the Riley School, a local school with these features, was the least restrictive environment for Student to access her education. In the May 10, 2022 IEP, for the period of June 15, 2022, to May 9, 2023, San Diego offered:

- 30 hours weekly of specialized academic instruction provided by a mild to moderate education specialist at the Riley School;
- 48 hours yearly of mental health related services with a mental health clinician at the Riley School;

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- Five hours yearly of parent counseling services with a mental health clinician at the Riley School;
- 1,800 minutes weekly of mental health related services, behavior intervention, with a rehabilitation specialist at the Riley School.

The Riley School was a small, highly structured, therapeutic day school, that provided individualized academic instruction, with behavior and mental health services embedded in the program. Those services would help Student address social, emotional, mental health and behavioral challenges.

Additionally, the May 10, 2022 IEP offered four hours yearly of occupational therapy services, accommodations, and extended school year services. To accommodate Student's attendance at the wilderness program where Student did not have access to a phone or a computer, from May 10, 2022, to June 14, 2022, San Diego offered specialized academic instruction for five hours a month of independent study and 30 minutes weekly direct consultation services with a mild to moderate educational specialist at San Diego School of Creative and Performing Arts. The components of San Diego's offer summarized in this paragraph were not issues for hearing but summarized as background.

After Student completed the wilderness program, Parents unilaterally placed Student at New Leaf Academy and requested San Diego fund the placement instead of the Riley School offered in the May 10, 2022 IEP. New Leaf Academy changed its name to Embark Behavioral Health, called New Leaf/Embark. New Leaf/Embark was an emotional growth program with a residential boarding component and located in

Oregon. In August 2022, Student filed a complaint with OAH alleging FAPE denials in the 2020-2021 and 2021-2022 school years. In November 2022, San Diego filed a complaint with OAH to defend its May 10, 2022 IEP offer.

Student's independent educational assessor, Dr. Sondra Marshall, evaluated Student in November 2022 at New Leaf/Embark. San Diego held a January 13, 2023 IEP team meeting, which Marshall attended to share her findings and recommendations.

Marshall diagnosed Student with

- combined type attention deficit hyperactivity disorder,
- a tic disorder,
- disruptive mood dysregulation disorder,
- major depressive disorder, and
- generalized anxiety disorder, consistent with prior diagnoses.

Marshall found Student continued to show significant depressive and anxious symptomatology, mood variability and suicide ideations. Marshall characterized New Leaf/Embark as an emotional growth program and shared with the January 13, 2023 IEP team that Student had stabilized while at New Leaf/Embark.

Marshall concluded in the independent educational evaluation report Student was not ready to return to the least restrictive setting of a comprehensive general education school. She wrote Student required a therapeutic milieu for direct instruction, and intensive individual and group therapy to help develop necessary self-regulation and coping skills. Marshall emphasized the importance of seamless communication and

collaboration in both the school and home settings so Student could learn to generalize self-regulation and behavior strategies across settings. Marshall also recommended individual therapy to help Student manage anxiety, emotional distress, and improve self-esteem. Marshall concluded Student benefited from individual and group therapy to address

- mindfulness,
- interpersonal relationships,
- distress,
- tolerance, and
- emotional regulation.

At the January 13, 2023 IEP team meeting, Parents shared Student had an eating disorder and that Student recently revealed she had been sexually assaulted in her neighborhood when she was 11 years old. Parents preferred Student to remain at New Leaf/Embark for the remainder of the 2022-2023 school year to continue Eye Movement Desensitization and Reprocessing therapy, a methodology of therapy focused on trauma work, and intended to bring Student home to attend high school in the 2023-2024 school year. Parents shared Student wanted to return to San Diego to attend La Jolla High School in the 2023-2024 school year. San Diego made the same offer of FAPE to Student in the January 13, 2023 IEP, as in the May 10, 2022 IEP.

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On February 3, 2023, the parties entered into a settlement which resolved any disputes, known or unknown, arising from or related to Student's education program, up to and through February 3, 2023. The February 3, 2023 settlement shall be referred to as the Settlement Agreement. The Settlement Agreement provided:

- As of February 3, 2023, and until Student expressed intent to re-enroll in San Diego, Parents agreed that Student shall be a parentally placed private school student as described under 34 Code of Federal Regulations section 300.137, subdivision (a);
- If Parents intended to reenroll Student in San Diego during the 2022-2023 school year, Parents would provide written notice and request an IEP team meeting;
- San Diego agreed to convene an IEP team meeting on or before June 14, 2023, the last day of the 2022-2023 regular school year, to make a FAPE offer for the 2023-2024 regular school year, which would be Student's annual review and triennial review;
- San Diego had the right to assess Student and should it decide to assess Student would provide Parents with an assessment plan no later than March 15, 2023;
- Parents agreed to immediately provide San Diego authorizations for the release and exchange of information with any private assessors or private service providers, including, but not limited to, Stella Maris Academy,

Ascend Healthcare, blueFire Wilderness Therapy, Dr. Sondra Marshall and New Leaf/Embark, and to authorize observations by San Diego During Student's receipt of services from any private service provider, including, but not limited to, New Leaf/Embark.

Four days later, on February 7, 2023, pursuant to the terms of the Settlement Agreement, Parents informed San Diego they wanted to re-enroll Student and requested an IEP team meeting. On March 7, 2023, San Diego held an IEP team meeting. San Diego made the same offer to Student in the March 7, 2023 IEP, as it did in the January 13, 2023 and the May 10, 2022 IEPs.

This Decision first addresses San Diego's affirmative defense of whether the February 3, 2023 Settlement Agreement barred Student from challenging the March 7, 2023 IEP.

THE FEBRUARY 3, 2023 SETTLEMENT AGREEMENT DID NOT PRECLUDE STUDENT FROM BRINGING THE MARCH 7, 2023 IEP CLAIMS UNDER ISSUES 1, 2, 3a, 3b, 3c, 3d, 3e, AND 3f

As an affirmative defense, San Diego contends Student was precluded from bringing claims regarding the March 7, 2023 IEP offer. San Diego contends the circumstances that formed the basis of its May 10, 2022 IEP, January 13, 2023 and March 7, 2023 IEPs were the same. Therefore, San Diego contends Student should be barred from bringing the same claims she released in the Settlement Agreement.

Student contends she should not be precluded from bringing claims against San Diego after February 3, 2023, because she only waived claims through February 3, 2023, in the Settlement Agreement. Student also contends the circumstances which formed

the basis of San Diego's March 7, 2023 IEP offer were different from her circumstances on May 10, 2022. Therefore, Student contends San Diego's affirmative defense that the Settlement Agreement precluded Student's challenge to the March 7, 2023 IEP, was inapplicable.

California district courts have held that OAH has jurisdiction to interpret and enforce settlement agreements concerning the educational program of a disabled child. (See *Pedraza v. Alameda Unified School District* (N.D.Cal. Mar. 27, 2007) 2007 U.S. District 2007 WL 949603; *Hayden C. v. Western Placer Unified School District* (E.D.Cal. May 12, 2009) 2009 WL 1325945; *Lara v. Lynwood Unified School District* (C.D.Cal. July 29, 2009) 2009 WL 2366454.)

A special education settlement agreement is considered a contract, and the IDEA favors settlement of disputes between parents and school districts. (See *T.B. v. San Diego Unified School District* (9th Cir. 2015) 806 F.3d 451, 486, fn. 14, citing *D.R. v. East Brunswick Board of Education* (3rd Cir. 1997) 109 F.3d 896, 901.) A parent can waive his or her child's right to a FAPE. (*Ballard v. Philadelphia School District* (3rd Cir. 2008) 273 Fed.Appx. 184, 188; 20 U.S.C. § 1415(e)(2)(F) [parties may resolve FAPE disputes by written agreement].) Parties routinely enter into agreements to resolve litigation, and an agreement is not void because a party settled for less than he or she later believes the law provides. (*Ibid.*)

No parentally placed private school child with a disability has an individual right to receive some or all special education or related services that the child would receive if enrolled in a public school. (34 C.F.R. § 300.137(a).) However, where parents have withdrawn a student from public school and placed them in private school, parents need only ask for an IEP to trigger the school district of residence's obligation to offer one.

(*Capistrano Unified School District v. S.W.* (9th Cir. 2021) 21 F.4th 1125, 1138, cert denied, (*Capistrano*)). For individuals with exceptional needs who transfer from an educational agency located outside the State of California to a district within California within the same academic year, the local educational agency shall provide the pupil with a FAPE, including services comparable to those described in the previously approved IEP, in consultation with the parents, until the local educational agency conducts an assessment, if determined to be necessary by the local educational agency, and develops a new IEP, if appropriate, that is consistent with federal and state law. (Ed. Code, § 56325, subd. (a)(3).)

An IEP is a “snapshot” and must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)).

The effect of a prior settlement was discussed in *J.G. v. Los Angeles Unified School District* (C.D.Cal. July 10, 2023) 2023 WL 8125847 No. LACV 20-01593 (JGB Ex) 2023 WL 8125847, (*J.G.*). The District Court held a May 15, 2018 settlement agreement resolved claims under a February 20, 2018 IEP offer for the 2018-2019 school year and extended school year through February 19, 2019, where there was no intervening IEP. (*Ibid.*) The District Court found all special education claims offered in the February 20, 2018 annual IEP, including allegations of inappropriate placement, were known to the parents and accrued by the time of the May 15, 2018 settlement agreement. The District Court concluded that the circumstances which formed the basis of the placement offered in the February 20, 2018 IEP had not changed between the time the parents entered into the settlement agreement and the filing of the second due process complaint in August 2019.

The District Court held the student was precluded from challenging the February 20, 2018 IEP, up to February 19, 2019, the end date of the February 20, 2018 IEP for the 2018-2019 school year because student released all claims in the February 20, 2018 IEP in the May 15, 2018 settlement agreement. Student consented to the February 20, 2018 IEP as part of the settlement agreement. However, the District Court found parental consent to the February 20, 2018 IEP insignificant because the parents were already familiar with the Lowman Special Education Center as the student attended school there several years before the settlement. As a part of the settlement agreement, the school district also agreed to fund independent educational evaluations and convene an IEP team meeting to consider the independent education evaluators' results. The District Court affirmed the Administrative Law Judge's consideration of the school district's new May 30, 2019 IEP offer and conclusion the new IEP did not deny student a FAPE.

The District Court in *J.G.* considered two aspects in deciding the student could not challenge the placement offered in the February 20, 2018 IEP his parents released in a settlement agreement:

1. The parents' awareness of the inappropriateness of the Lowman placement offered in the February 20, 2018 IEP; and
2. whether there was a change in his circumstances that could give rise to a new claim to challenge the same February 20, 2018 IEP. (*Id.*)

The District Court disposed of the second aspect in a footnote concluding the student did not provide evidence that his circumstances changed after settlement such that the existing February 20, 2018 IEP was rendered deficient or that a new IEP was required. (*Id.* at fn. 3.). The District Court focused mainly on the first aspect in

precluding the student from challenging the same February 20, 2018 IEP, post-settlement. Because the parents were familiar with Lowman, where he attended several years pre-settlement, the District Court held allowing the student to challenge the placement offered in the same IEP post-settlement would render the settlement agreement meaningless. His attendance at Lowman several years before the settlement agreement was significant in the District Court's consideration of the circumstances that formed the basis of the parents' knowledge of the Lowman placement in relation to the student's needs. (*Id.* at *5.).

San Diego misconstrued *J.G.* and incorrectly concluded Student's waiver of the May 10, 2022 IEP in the Settlement Agreement barred Student from challenging the new March 7, 2023 IEP offer. San Diego argued when Student waived claims to the May 10, 2022 IEP offer in the Settlement Agreement, she also waived claims to the March 7, 2023 offer because San Diego made the same offers of FAPE in both IEPs. However, the March 7, 2023 IEP was not the May 10, 2022 IEP released in the Settlement Agreement. Student's waiver of claims as to the May 10, 2022 IEP did not extend to an offer of FAPE developed 10 months later on March 7, 2023, regardless of the similarities between the two offers.

Even in *J.G.*, the District Court concluded that the student's post-settlement claims could proceed as to a new IEP developed after the settlement agreement was executed. (*J.G.*, *supra*, 2023 WL 8125847, at *2.) In fact, *J.G.* affirmed the Ninth Circuit Court ruling under *Adams* that the adequacy of an IEP offer was evaluated as of the date it is written. (*Id.* at *6.) *J.G.* did not bar the challenge to IEPs developed after a settlement agreement. Here, the March 7, 2023 IEP was like *J.G.*'s second May 30, 2019 IEP, which the District Court concluded the Administrative Law Judge was correct in considering whether the new IEP denied the student a FAPE despite the settlement. (*J.G.*, *supra*, 2023 WL 8125847,

at *2.) San Diego's labelling the March 7, 2023 IEP, an amendment to the May 10, 2022 IEP, and making the same offer in both IEPs, did not change the reality that the March 7, 2023 IEP was a new, post-settlement IEP that needed to be evaluated based on the snapshot rule. Therefore, contrary to the parties' arguments, whether Student's circumstances changed post settlement was inapplicable to determine if the Settlement Agreement precluded Student's challenge to the March 7, 2023 IEP offer.

To support its affirmative defense, San Diego also cited to cases *including South Kingstown School Committee v. Joanna S.*, *Catling v. York School Department*, and *D.R. by M.R. v. East Brunswick Board of Education*. (*South Kingstown School Committee v. Joanna S.* (1st Cir. 2014) 773 F.3d 344, (*Joanna*); *Catling v. York School Department* (D.Me Sept. 17, 2019) 2019 WL 3936386 (*Catling*); and *D.R. by M.R. v. East Brunswick Board of Education* (3rd Cir. 1997) 109 F.3d 896 (*Brunswick*).) Each of those cases were from jurisdictions outside of California and the Ninth Circuit and were not binding on OAH. *Catling* is from a lower federal court with no precedential value. *Joanna* involved assessments, not a new IEP offer, which must be evaluated in terms of what was objectively reasonable when the IEP was developed and not whether circumstances changed post-settlement.

The parents in *J.G.*, *Catling*, and *Brunswick*, had all consented to an IEP and/or placement in the settlement agreement and each sought to challenge the same agreed upon IEP and/or placement post-settlement, so the claims were known, accrued, and released at the time of settlement. Here, Parents did not consent to any placement or IEP in the Settlement Agreement. Unlike *J.G.*, where parental consent to the

February 20, 2018 IEP was insignificant because the parents were familiar with the placement from the student's attendance several years before the settlement, Student never attended the Riley School, but instead, was privately placed in an out-of-state boarding school.

Lastly, the Settlement Agreement terms clearly delineated Student was disenrolled from San Diego as of February 3, 2023, and considered parentally placed at New Leaf/Embark, in Oregon. Therefore, unlike *J.G., Joanna, Catling, and Brunswick*, Student would be considered a pupil transferring from out of state when Parents notified San Diego, they would like to reenroll Student and requested an IEP team meeting. San Diego was required to develop a new IEP to offer Student a FAPE under the Settlement Agreement terms and under California law. (Ed. Code, § 56325, subd. (a)(3); see also *Capistrano, supra*, 21 F.4th 1125.) When San Diego convened and made an offer at the March 7, 2023 IEP team meeting, it was a new IEP offer, not the May 10, 2022 IEP, which the parties waived in the Settlement Agreement. San Diego's conclusions the March 7, 2023 IEP offer was an amendment to the May 10, 2022 IEP, and therefore waived in the Settlement Agreement, was unsupported by the terms of the Settlement Agreement. San Diego's decision to make the same offer of FAPE in a new March 7, 2023 IEP as the May 10, 2022 IEP, did not alter well established law requiring each IEP to be evaluated based on reasonableness at the time of the offer.

Had the parties intended Student to relinquish her right to challenge a post-settlement new IEP offer when Parents requested an IEP to transfer Student from her out-of-state placement, the parties could have included waiver language for the new IEP offer in the Settlement Agreement. Concluding the Settlement Agreement

prevented Student from challenging a new March 7, 2023 IEP offer would contradict the Settlement Agreement terms and established law regarding IEP offers, giving San Diego more than the bargain it negotiated in the Settlement Agreement.

San Diego did not prove its affirmative defense that the Settlement Agreement precluded Student from challenging the new March 7, 2023 IEP offer.

ISSUE 1: DID SAN DIEGO DENY STUDENT A FAPE IN THE 2022-2023 SCHOOL YEAR, BY FAILING TO CONSIDER STUDENT'S CHANGED CIRCUMSTANCES, SPECIFICALLY SOCIAL, EMOTIONAL, EDUCATIONAL, AND SAFETY NEEDS AT THE MARCH 7, 2023 IEP TEAM MEETING?

Student contends her social, emotional, educational, and safety needs changed from the time of the May 10, 2022 IEP offer to the time of the March 7, 2023 IEP offer. Student contends that on March 7, 2023, she was thriving at New Leaf/Embark, working through the trauma of a sexual assault with Eye Movement Desensitization and Reprocessing therapy, triggered by boys because of the sexual assault, still experiencing dysregulation, and had an eating disorder, but San Diego did not consider these changed circumstances at the March 7, 2023 IEP team meeting.

San Diego contends Student's needs did not amount to a change of circumstances and were the same on March 7, 2023, as on May 10, 2022.

Because this Decision found the Settlement Agreement did not preclude Student from challenging the new March 7, 2023 IEP offer, whether Student's circumstances changed between May 10, 2022, and March 7, 2023, is moot. The new March 7, 2023

IEP offer must be analyzed by applying the snapshot rule to determine whether San Diego considered what was objectively reasonable at the time it offered the March 7, 2023 IEP to Student, which will be discussed in Issues 2 and 3.

As analyzed in Issues 2 and 3 with other FAPE issues, San Diego considered Student's social, emotional, educational, and safety needs at the March 7, 2023 IEP team meeting.

SAN DIEGO WAS NO LONGER REQUIRED TO OFFER STUDENT A FAPE AT THE MARCH 7, 2023 IEP UNDER ISSUES 2, 3a, 3b, 3c, 3d, 3e, AND 3f WHEN PARENTS MADE IT CLEAR THEY INTENDED TO KEEP STUDENT AT NEW LEAF/EMBARK FOR THE 2022-2023 SCHOOL YEAR

Student contends Parents' request of an IEP team meeting on February 7, 2023, was evidence they intended to return Student to San Diego and would have returned had San Diego offered Student a FAPE at the March 7, 2023 IEP team meeting.

San Diego contends Parents never intended on returning Student to San Diego until the 2023-2024 school year to attend La Jolla High School. San Diego also contends Parents asked for the March 7, 2023 IEP team meeting only to have San Diego fund Student's placement at New Leaf/Embark from February 4, 2023, to the end of the 2022-2023 school year.

The Ninth Circuit Court held in *Kyrene* the school district was not obligated to continue offering student a FAPE if the parent of a privately placed student made it clear his or her intent to keep the child enrolled in an out-of-district private school. (*J.B. v. Kyrene Elementary School District* (9th Cir. 2024) 112 F.4th 1156, 1164 (*Kyrene*)). In

Kyrene, the school district held an IEP team meeting on September 19, 2023, to address the student's needs. On the same day, the student's parent informed the school district of intent to place the student in private school. On October 2, 2023, the school district held another IEP team meeting to discuss the private school placement, offered to fund the private placement for nine weeks, and proposed returning the student to the district in January 2014. On December 18 and 19, 2013, the district met with the parent again to discuss a February 3, 2014 return date, conducting evaluations, and offered to pay another month of private school. At the end of the December 19, 2013 meeting, the parent informed the school district she would consider the offer and notify it if she would permit evaluations to facilitate the student's return from the private school. However, the parent did not agree to return the student. Instead, the parent specified terms under which the student could be evaluated and requested independent educational evaluations. The school district sent a prior written notice incorrectly referencing the student's enrollment status as a reason for denying the parent's requests. Six months later, the parent filed a complaint alleging the school district did not offer the student a FAPE.

The Ninth Circuit Court affirmed the District Court's conclusion that the parent's characterization of intent to return the student to the school district was not credible, despite parent contending she would consider returning the student to the school district had it offered a FAPE. The Ninth Circuit Court held the school district was relieved of its IDEA obligations to the student because the parent:

- made clear an intent to keep the student in the private school throughout the semester;

- rejected the school district's final FAPE offer at the December 19, 2013 meeting and did not request a new offer; and
- refused consent to evaluations at the December 19, 2013 meeting.
(*Kyrene, supra*, 112 F.4th 1156, 1164.)

The Ninth Circuit Court emphasized although the school district's prior written notice focused incorrectly on the parent's failure to enroll the student, that was a harmless procedural error because the student was no longer entitled to a FAPE as the parent made clear through discussions and meetings throughout the semester that the parent intended to keep the student in private school and litigate for reimbursement. (*Id.* at 1163.) Despite the parent stating she would consider the school district's December 19, 2013 IEP offer if it offered a FAPE, the Ninth Circuit Court focused on her actions throughout the school year up to the December 19, 2013 IEP team meeting and concluded her characterization of intent to return the student to public school was not credible.

Similar to the parent in *Kyrene*, Parents consistently made clear they intended to keep Student at New Leaf/Embark for the entire 2022-2023 school year, despite their contention that had San Diego offered Student a FAPE on March 7, 2023, Student would have returned to San Diego. Student argued in the closing brief that unlike *Kyrene*, Parents never intended to keep Student enrolled at New Leaf/Embark indefinitely and would return Student to San Diego when they could do so safely. While it was undisputed Parents did not intend on keeping Student at New Leaf/Embark indefinitely, they intended to keep Student there for the duration of her eighth-grade year and communicated this intent repeatedly to San Diego throughout the 2022-2023 school year, including during the January 13, 2023 and March 7, 2023 IEP team meetings.

Although Parents stated at the March 7, 2023 IEP team meeting, they would return to San Diego when they could do so safely, Student did not offer any persuasive support, at the IEP team meeting or at hearing, it would be unsafe for Student to leave New Leaf/Embark in March 2023. Parents' statement that they would consider returning Student when safe was no more persuasive than the parent in *Kyrene* stating she would consider returning the student to the school district. (*Kyrene, supra*, 112 F.4th 1156, 1163.) Parents' statement contradicted the totality of the evidence showing an intent to retain Student at the parent preferred placement, and was not credible.

Like *Kyrene*, Parents intended on keeping Student at New Leaf/Embark until the end of the 2022-2023 school year, and litigate to have San Diego fund the parent preferred placement. Parents communicated their intent for San Diego to fund a residential boarding program as early as the May 10, 2022 IEP team meeting. Parents placed Student at New Leaf/Embark in August 2022. In November 2022, Parents directed New Leaf/Embark's academic director Josh Goldstein to use specific verbiage referencing safety in, and even edited, Goldstein's letter to San Diego, in anticipation of San Diego's offer of the Riley School to support Student's stay at New Leaf/Embark.

Additionally, when Parents enrolled Student at New Leaf/Embark in August 2022, they signed an enrollment agreement that specified they would incur a penalty and forfeit approximately 13,000 dollars if Student did not complete the entire program. Although Father opined at hearing, he believed he could avoid paying the penalty if Student returned to San Diego before program completion, Student did not offer any support for his opinion. In fact, Parents informed San Diego at the January 13, 2023 IEP team meeting that the New Leaf/Embark program was a nine-to-12-month program,

and their goal was to have Student return home at the end of her eighth-grade year upon completion of the program and intensive Eye Movement Desensitization and Reprocessing therapy.

Further, two days before the January 13, 2023 IEP team meeting, Parents shared their legal strategy to have Student remain at New Leaf/Embark with Student's evaluator Marshall and expert Maddison Montana. The strategy was to attend the January 13, 2023 IEP team meeting, ask for information, appear agreeable when San Diego offered the Riley School or a district placement, but maintain Student in the New Leaf/Embark program and file for due process to have San Diego fund their preferred placement. Their January 11, 2023 emails to Marshall and Montana each provided in pertinent part:

"[Y]ou want the District to get to the part where they make the offer of FAPE ... [Y]ou will want to have the expert go over her [independent educational evaluation] report and then try to get through to the end of the meeting. If they make another offer for Riley or for another District placement, you can say that you'd [sic] like to do a tour and get more information."

When San Diego shared the importance of least restrictive environment considerations at the January 13, 2023 IEP team meeting, Mother followed the legal strategy as coordinated through emails and stated,

"We are going to request a tour. I know it's not Riley for next year, it would be what campus ... [New Dawn]? I will definitely be doing a tour of all the facilities, to ask a lot of questions ..."

The Riley School served elementary and middle school students and was on the same campus as New Dawn, a therapeutic day school for high school students, and at times during hearing were referred to as Riley/New Dawn.

Also consistent with Parents' goal and intent of not returning Student to San Diego until high school, Parents then thanked Marshall for participating in the January 13, 2023 IEP team meeting in an email after the meeting and stated:

"You know every single parent in that room would make the same choices we made, and would not be sending their kid to a therapeutic day school through the district if they had a choice! Our lawyers just told us to sound is [sic] agreeable as possible to make our points ... [I]t's great to have you and Maddison on the record saying what you had to say ..."

On March 5, 2023, three days before the March 7, 2023 IEP team meeting, Parents made lodging reservations for a few days in June 2023 in Oregon where New Leaf/Embark was located. The New Leaf/Embark program ended in June 2023 and Parents made the lodging reservations in anticipation of rejecting San Diego's offer if it was not New Leaf/Embark and have Student remain at New Leaf/Embark for the remainder of the 2022-2023 school year. Although Father explained at hearing the lodging for June 2023 in Oregon was cancellable if Student returned to San Diego before the end of the 2022-2023 school year, his explanation was not credible to support Parents intent to return Student before the New Leaf/Embark program ended in June 2023.

Parents' emails and actions throughout the 2022-2023 school year, corroborated Parents repeatedly making clear their intent to have Student remain in New Leaf/Embark until high school, and to feign interest in returning to San Diego as part of a coordinated plan to obtain reimbursement for tuition and travel expenses.

Additionally, the Settlement Agreement required Parents to "immediately" provide San Diego authorizations for the release and exchange of information that included private assessors or private service providers, including New Leaf/Embark. Had Parents intended for Student to return to San Diego, they would have signed releases of information when the Settlement Agreement was executed on February 3, 2023, so San Diego could have updated information about Student before the March 7, 2023 IEP team meeting. Although the IDEA did not put the onus on parents for ensuring a school district had the necessary information to offer a FAPE, Parents' failure to immediately sign releases of information, despite the Settlement Agreement term requiring them to, suggested Parents did not want San Diego to have current information to develop a FAPE offer for the remainder of the 2022-2023 school year. No immediacy existed for Parents to give San Diego information to make an appropriate IEP offer at the March 7, 2023 IEP team meeting because Parents did not intend to return Student to San Diego until the 2023-2024 school year.

The Settlement Agreement also specified San Diego must convene an IEP team meeting by the last day of the 2022-2023 school year to make a FAPE offer for the 2023-2024 school year. Parents' assertion of intent to return Student to San Diego for the remainder of the 2022-2023 school year was at odds with the Settlement Agreement terms crafted by the parties to ensure an offer of FAPE for Student entering high school. Therefore, Student's characterization of touring the Riley School and asking for the

March 7, 2023 IEP team meeting as indicative of parental intent to return Student to San Diego were more indicative of Parents' efforts to go through the motions to get San Diego to fund New Leaf/Embark.

Within two to three minutes after the March 7, 2023 IEP team meeting started, Parents stated Student was not ready to leave the full boarding program at New Leaf/Embark. Approximately seven to 10 minutes into the same IEP team meeting, Parents repeated that unless San Diego offered Student a comprehensive boarding program like the one at New Leaf/Embark, which they opined was "really hard to mimic," Student would not return to San Diego. Parents reiterated the goal was to return Student home in summer 2023, and for Student to attend La Jolla High School in the 2023-2024 school year. This was the same message they had consistently communicated to San Diego throughout the January 13, 2023 IEP team meeting. The tone and substance of both the January 13, 2023 and March 7, 2023 IEP team meetings transcripts further reinforced Parents' purpose in attending the IEP team meetings was to communicate their intent to have Student stay at New Leaf/Embark until Student was in high school and, through comments from Parents and Student's experts, trigger San Diego to fund New Leaf/Embark.

Like the *Kyrene* parents, Parents rejected San Diego's offer of the Riley School at the March 7, 2023 IEP team meeting. They were not interested in a least restrictive environment placement discussion or a discussion on moving Student to the Riley School, focusing instead on the benefits for Student at New Leaf/Embark, including continuing Eye Movement Desensitization and Reprocessing therapy. Therefore, when Parents reiterated the same message minutes into the March 7, 2023 IEP team meeting, that they intended to keep Student at New Leaf/Embark until the 2023-2024 school year

for high school, Parents made clear to San Diego Student would not return in 2022-2023 school year. At that point, San Diego was no longer obligated to offer Student a FAPE.

Nonetheless, San Diego proceeded with the March 7, 2023 IEP team meeting, and made a FAPE offer to Student based on available information as discussed in Issues 2 and 3.

ISSUE 2: DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR, BY FAILING TO OFFER AN APPROPRIATE EDUCATIONAL PLACEMENT AT THE MARCH 7, 2023 IEP TEAM MEETING?

Student contends San Diego's offer of the Riley School was an inappropriate placement because it was the same placement San Diego offered in the May 10, 2022, and January 13, 2023 IEPs. Student contends New Leaf/Embark, Student's full residential boarding placement since August 2023, was the appropriate placement.

San Diego contends Student did not require a residential boarding program and the Riley School was the least restrictive environment for Student's educational needs.

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

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. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)). 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.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/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. (*Ibid.*)

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

1. 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 considers the requirement that children be educated in the least restrictive environment;
2. placement is determined annually, is based on the child's IEP and is as close as possible to the child's home;

3. unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled;
4. 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
5. a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

The continuum of the 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.)

Once the district determined the appropriate least restrictive environment where student could be educated, it was not obligated to consider and inquire into more options on the continuum. (See *M.S. v. Los Angeles Unified School District* (9th Cir. 2019) 913 F.3d 1119.)

To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate:

1. that children with disabilities are educated with non-disabled peers;
and
2. 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 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] had on the teacher and children in the regular class; and
4. the costs of mainstreaming [the student]. (*Sacramento City Unified School District 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.*)).

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If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R.*, 874 F.2d 1036, 1050.)

A school district must provide a residential placement if such a placement is necessary to provide a student with a disability with special education and related services. (34 C.F.R. § 300.104.) Residential placement is, by its nature, considerably more restrictive than day school. (See *Kerkam by Kerkam v. Superintendent, D.C. Public Schools* (D.C. Cir. 1991) 931 F.2d 84, 87; *G.D. v. Westmoreland School District* (1st Cir. 1991) 930 F.2d 942, 948; *Carlisle Area School v. Scott P. By and Through Bess P.* (3d Cir. 1995) 62 F.3d 520, 534, amended (Oct. 24, 1995).) As a result, a therapeutic residential placement is one of the most restrictive placements on the least restrictive environment continuum. (34 C.F.R. § 300.115.) Generally, the further a residential placement is located from a student's home and community, the more restrictive it is considered to be. (*Todd D. v. Andrews* (11th Cir. 1991) 933 F.2d 1576, 1582.) Given its restrictive nature, removal of a student with disabilities to a residential setting complies with the least restrictive environment mandate in only extremely limited situations for students with severe disabilities who are unable to receive a FAPE in a less restrictive environment. (*Carlisle Area School District v. Scott P., supra*, 62 F.3d 520, 523.)

A district's responsibility under the IDEA is to remedy the learning-related symptoms of a disability, not to treat other, non-learning related symptoms. (*Forest Grove School District v. T.A.* (9th Cir. 2011) 638 F.3d 1234, 1238-39 [no abuse of discretion in denying parent reimbursement where district court found parent sought residential placement for student's drug abuse and behavior problems] (*Forest Grove*).) An analysis of whether a residential placement is required must focus on whether the

placement was necessary to meet the child's educational needs. (*Clovis Unified School District v. California Office of Administrative Hearings* (9th Cir. 1990) 903 F.2d 635, 643) (*Clovis*.) If the placement is a response to medical, social, or emotional problems, quite apart from the learning process, then it cannot be considered necessary under the IDEA. (*Ibid.*; accord *Ashland School District v. Parents of Student R.J.* (9th Cir. 2009) 588 F.3d 1004, 1009.)

Reimbursement for a private placement is warranted when a court or hearing officer finds that the public school failed to provide a FAPE, and the private school is appropriate. (20 U.S.C. § 1412(a)(10)(C).)

STUDENT DID NOT PROVE THE RILEY SCHOOL WAS AN INAPPROPRIATE PLACEMENT

Student did not prove San Diego's offer of the Riley School was inappropriate or denied Student a FAPE.

First, Student's contention that San Diego's March 7, 2023 offer was inappropriate because it was the same offer as prior IEP offers was irrelevant. Under *Adams*, when considering if the March 7, 2023 offer was a FAPE, San Diego's offer must be evaluated based on what was objectively reasonable when the IEP was developed on March 7, 2023, not how closely it resembled prior IEP offers. Therefore, this Decision will analyze San Diego's Riley School offer under the Ninth Circuit Court's snapshot rule as articulated under *Adams*, and not its resemblance to other IEP offers.

Second, Student's arguments for continued placement at New Leaf/Embark were predicated on parental preference and flawed logic, without supporting credible evidence. The evidence did not establish the Riley School was an inappropriate placement for Student or that it was not the least restrictive environment.

STUDENT'S EXPERT CRYSTAL BEJARANO'S OPINION WAS UNPERSUASIVE

Student's retained expert, Crystal Bejarano, opined at hearing the Riley School was not an appropriate placement for Student as Student was not ready to transition to the Riley School during March 2023. Bejarano was an educational psychologist and held bachelor's and master's degrees in school psychology. Bejarano had her own private practice called Connect4Kids and consulted with families and school districts. She conducted independent educational evaluations including psychoeducational and educationally related mental health assessments. Parents contacted Bejarano in October 2023, pursuant to their attorney's recommendation. Bejarano received approximately 10 to 15 cases per year from Parents' attorney. Bejarano conducted an educationally related mental health assessment of Student in October 2023, when Student was attending La Jolla High School during the 2023-2024 school year. This Decision does not consider Bejarano's opinions regarding Student's status during the 2023-2024 school year as they are not at issue in this hearing.

In December 2023, Bejarano visited the Riley School in preparation for opining at hearing if the Riley School was an appropriate placement for Student on March 7, 2023. She reported an equal number of males and females attending the Riley School in December 2023. She reported each classroom had an education specialist and two rehabilitation specialists, and academic instruction would be adjusted based on each student's needs. Bejarano observed two classrooms of students with a variety of needs,

with eight students in each class. She observed some students completed classwork independently and some demonstrated externalizing behaviors such as yelling and lifting a desk. Bejarano concluded the Riley School was inappropriate for Student because of the presence of other students with externalizing behavior.

Bejarano opined that because in March 2023, Student was intentionally vomiting, called purging, and working on mental health issues including managing sexual assault induced trauma, transitioning to the Riley School could impede Student's ability to be regulated consistently when exposed to others with externalizing behaviors. Bejarano's conclusion was unsupported by credible evidence. For example, Student did not present any evidence that her ability to stay regulated was impacted by the mere presence of others with externalizing behaviors. Bejarano did not consider, inquire or opine on, the availability, or effectiveness, of other mental health and behavioral strategies the Riley School had to handle the special education needs of its therapeutic day school students including helping Student re-regulate and access her education. Even assuming Student's ability to stay regulated was impacted by the presence of others with externalizing behaviors, Student did not show the Riley School, with its low student to staff ratio and intensive therapeutic supports, did not have the resources to help Student re-regulate and access her education. Further, Bejarano's opinion was based on observations of the Riley School nine months after March 2023, during a new school year and when the student body makeup was different. Without factual support, Bejarano's conclusory opinion the Riley School was an inappropriate placement for Student in March 2023 because others with externalizing behaviors could trigger Student's dysregulation was speculative, poorly informed, an overgeneralization, and not credible.

Bejarano's opinions were also not persuasive because, in addition to not considering the Riley School's program and supports to Student's educational access, Bejarano was unfamiliar with Student's profile. Bejarano admitted she relied on Montana's opinion on Student's readiness to leave and that Student was purging in March 2023. Bejarano considered Student's purging an important factor in concluding the Riley School was inappropriate for Student in March 2023. At hearing, Bejarano acknowledged the importance of reviewing Student's master treatment plan at New Leaf/Embark to be familiar with Student's needs but did not do so before rendering her opinion. Had Bejarano reviewed the master treatment plan or other New Leaf/Embark documents before offering her opinion, she would have noticed no reported incidences of Student purging between October 2022 and April 2023. Because Bejarano's opinion on Student's purging and readiness to leave New Leaf/Embark in March 2023 was based on Montana's representations, without inquiring into the possibility Student had stopped purging when there were no corroborating documents from New Leaf/Embark, it was not accorded any weight because it was a mere echo of Montana's opinion, discussed separately below.

Lastly, Bejarano was evasive in her responses when San Diego's attorney questioned her about documents she reviewed and why certain documents were not listed in her report if she reviewed them. While it was certainly understandable for Bejarano not to remember everything about her evaluation from October 2023, Bejarano's recall was generally much better when answering questions posed by Student's attorney and not as good, or evasive and confusing, when questioned by San Diego's attorney. This adversely impacted her credibility. Further, Student's attorney referred a significant number of cases to Bejarano each year, lending to Bejarano's bias in offering broad and speculative conclusions to support Student's case.

PARENTS' AND MONTANA'S OPINIONS WERE UNPERSUASIVE

At hearing, both Parents and New Leaf/Embark therapist Montana opined Student needed to stay at New Leaf/Embark for continued work on mental health, self-esteem, body dysmorphia, and self-harm in the form of purging. At the March 7, 2023 IEP team meeting, Parents and Montana shared Student was doing well and thriving at New Leaf/Embark. They shared Student was working through trauma related to a sexual assault, had increased dysregulation triggered by Eye Movement Desensitization and Reprocessing therapy, and was highly vulnerable.

Even assuming everything Parents and Montana shared at the March 7, 2023 IEP team meeting were true, the evidence did not show Student needed an intensive level of services that could not be provided at the Riley School, or that she required a boarding school to access her education.

Parents also opined the Riley School was inappropriate because it was attended primarily by boys with behavioral issues. Parents' opinion Student would be triggered by male presence was based on:

- Student experiencing a panic attack on a plane while on a home visit from New Leaf/Embark; and
- Student's alleged statement to Parents that if she were to get a new therapist the therapist could not be male.

The two examples Parents shared to support Student's aversion to males were unpersuasive. Parents' deduction that Student's panic attack on the plane was attributable to male presence was conclusory and unsupported. Further, Student's alleged statement to Parents a new therapist could not be male was unverified; and

even if verified, unpersuasive to support Student had an aversion to males in any other context. Student revealed to her male counselor, Paul Goddard, while in the wilderness program, she had been sexually assaulted in her neighborhood. Student did not present any credible documentary support she was triggered by Goddard or males. In fact, Student trusted Goddard sufficiently as a counselor to share the sexual assault incident regardless of Goddard's gender. Further, New Leaf/Embark's academic director Goldstein was male, and it employed male staff while Student attended New Leaf/Embark. Yet, Student did not offer evidence she was triggered by Goldstein or other male presence at New Leaf/Embark or that it impacted her educational access. Finally, Student's experts did not mention any negative association or aversion Student had towards males or that such alleged aversion impacted her education.

Parents' opinion that a small, eight-female peer environment like that at New Leaf/Embark was the only appropriate placement was an understandable preference and emotional response to Student's neighborhood sexual assault. However, without data supporting Student was triggered by and unable to access her education because of male presence in March 2023, or at any time, Parents' opinion that Student needed an all-female boarding school program was unsupported, unpersuasive, and insufficient to establish the Riley School was an inappropriate placement.

Montana opined that staying at New Leaf/Embark was the healthy choice for Student to continue the trauma work, specifically Eye Movement Desensitization and Reprocessing therapy, and Student would suffer a "big setback" if she was moved in the middle of therapy. Montana also opined Student should remain at New Leaf/Embark because it provided a stable, structured program, with supportive peer relationships.

Montana held a bachelor's and a master's degree in psychology and was a licensed therapist in Oregon. She was Student's therapist at New Leaf/Embark and provided family therapy to Student and Parents. Montana was not a school psychologist or an educational specialist. Her opinion Student should stay at New Leaf/Embark in March 2023, was not persuasive because it was not based on Student's ability to access her education and did not consider the least restrictive environment. Montana's opinion was focused primarily on Student's non-educational benefits of continued Eye Movement Desensitization and Reprocessing therapy and remaining at New Leaf/Embark for consistency.

San Diego's responsibility under the IDEA was to remedy the learning-related symptoms of Student's disability, not to treat non-learning related effects of a neighborhood based sexual assault quite apart from the learning process. (See *Clovis, supra*, 903 F.2d 635, 643).) While Eye Movement Desensitization and Reprocessing therapy, continued trauma work, and work regarding an eating disorder at New Leaf/Embark was beneficial to Student, Student did not show staying at New Leaf/Embark in March 2023, was educationally related or necessary to receive a FAPE.

Montana also delivered individual, group, and family therapy to Student to help with dysregulation. Montana shared when Student was dysregulated at New Leaf/Embark, Montana and staff employed tools that included reminding Student to engage in deep breathing, mindfulness, talk therapy, journaling, going outdoors, and redirecting Student to positive activities to build self-esteem and to resolve conflict. The tools employed by Montana and New Leaf/Embark staff to help Student manage dysregulation were also offered in the Riley School's therapeutic day school environment, as discussed below. Montana did not visit the Riley School and was unfamiliar with, not qualified to, and did not opine on, the appropriateness of the Riley School.

Montana's opinion was also not persuasive because her testimony regarding Student's needs in March 2023, was inconsistent with Student's needs reflected by New Leaf/Embark's documentation. Montana shared at the March 7, 2023 IEP team meeting she was providing in-depth Eye Movement Desensitization and Reprocessing therapy to Student which resulted in Student's increased dysregulation and purging, something which had stopped well before the March 7, 2023 IEP team meeting. According to New Leaf/Embark's documents, Student purged twice in September 2022, twice in October 2022, and did not resume purging until April 2023. New Leaf/Embark's documentation, which was extensive, did not reflect a single incident of Student purging or reflect Student displaying eating disorder symptoms from October 2022, until a month after the March 7, 2023 IEP team meeting.

Montana explained the discrepancies between her testimony and lack of purging documentation by stating that some purging incidents could be undocumented. During hearing, Montana was unable to describe any purging incidences that dysregulated Student between October 2022 and April 2023. When cross-examined by San Diego's attorney, Montana described purging incidences and used examples that were documented between September and October 2022, and in April 2023, to support her opinion Student should stay at New Leaf/Embark in March 2023. Student's argument in the closing brief there could be other documents reflecting Student's purging between October 2022 and April 2023 missing from the New Leaf/Embark documents was equally unpersuasive. Student had the burden of proof in this case. To the extent any documents existed to corroborate Student's speculative arguments, Student should have introduced them at hearing. However, even if there were undocumented purging incidences between October 2022 and April 2023, Student did not show they impacted Student's ability to access her education.

At best, Montana's opinion offered information regarding Student's therapy needs, which were unrelated to Student's educational access. However, Montana's opinion was unpersuasive to support Student's broad conclusion she needed to stay at New Leaf/Embark in March 2023 to receive a FAPE, or that the Riley School could not address Student's therapeutic needs for accessing her education.

Student's argument in the closing brief she required 24-hour, seven days a week support including during spring break was unsupported by persuasive evidence. Student cited to Montana's opinions at hearing that Student would engage in unusual behavior such as doing sit-ups and jumping jacks in the middle of the living room at New Leaf/Embark; struggled to get out of bed in the mornings; and at times was dysregulated at breakfast, to support Student's need for a residential boarding placement.

However, Montana did not specify when these incidences occurred. Student did not offer any documents from New Leaf/Embark to corroborate that these incidences were so frequent and/or critical that they impacted Student's access to education in March 2023, rendering a residential placement necessary under the IDEA. There was no evidence in March 2023 Student missed school and could not access her education because of dysregulation or that the unusual behaviors described by Montana were anything more than isolated non-learning related symptoms far removed from the learning process. (See *Forest Grove, supra*, 638 F.3d at pp. 1238-1239; *Clovis, supra*, 903 F.2d at p. 643.)

In sum, Student made inconsistent contentions and arguments to justify Parents' preferred placement at New Leaf/Embark without consideration of whether a less restrictive environment such as the Riley School could meet Student's educational

needs. Student argued at hearing the Riley School did not have general education students. However, Student's argument was inconsistent with Student's contention that she required a more restrictive residential placement at New Leaf/Embark in March 2023, and inconsistent with independent psychoeducational assessor Marshall's recommendation of an intensive therapeutic setting as indispensable to her educational access. As discussed in the next section, Marshall's description of an appropriate comprehensive therapeutic placement for Student aligned with the structure and therapeutic setting/placement San Diego offered to Student on March 7, 2023.

Student also argued in the closing brief issues that were beyond those the parties agreed to for hearing, including San Diego's failure to offer appropriate present level of performance, goals, and denial of parental participation at the March 7, 2023 IEP team meeting. None of these were issues were raised in Student's complaint and agreed to at the prehearing conference, or agreed to by San Diego at hearing, and therefore, they are not addressed. (See 20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i) [A party who requests a due process hearing may not raise issues at the hearing that were not raised in his request, unless the opposing party agrees to the addition.])

THE RILEY SCHOOL WAS THE APPROPRIATE LEAST RESTRICTIVE ENVIRONMENT FOR STUDENT

San Diego successfully rebutted Student's argument she needed to stay at New Leaf/Embark by showing the Riley School was the appropriate placement for Student in March 2023.

Dr. Marshall recommended a “therapeutic milieu” with seamless communication and collaboration across settings and intensive individual and group therapy for Student. She also opined in her independent educational evaluation report Student required integrated instruction and interventions in both the home and school environments to develop self-regulation and coping skills and learn to generalize those strategies in all settings.

Student interpreted Marshall’s recommendation of a “therapeutic milieu” to be exclusively New Leaf/Embark. However, Marshall did not specifically recommend that New Leaf/Embark was the appropriate placement. In fact, at the January 13, 2023 IEP team meeting, Marshall stated that while Student responded well to New Leaf/Embark in the past, it was a very intensive and restrictive setting. Marshall did not state Student required 24-hour supervision or a residential boarding program to access her education. Marshall described the parameters of an appropriate educational therapeutic setting for Student. Because Marshall described the features of an appropriate placement in her report as opposed to specifying New Leaf/Embark as the only appropriate placement, her recommendations reflected the independence of an independent educational assessor and were persuasive.

Student was not ready to be educated full-time in a regular education environment on March 7, 2023, and therefore, no *Rachel H.* analysis is needed. Instead, a *Daniel R.R.* analysis is necessary to determine if the March 7, 2023 IEP offer mainstreamed Student with general education peers to the maximum extent appropriate at that time.

The March 7, 2023 IEP team meeting was attended by many team members familiar with Student's needs and San Diego's programs. This included

- Parents; Montana;
- San Diego's educational specialist and Student's case manager Valerie Cruz;
- school psychologist Edward Wisz from the San Diego School of Creative and Performing Arts;
- Kara Jensen, who conducted a mental health assessment of Student in 2022, and was a therapist at the San Diego School of Creative and Performing Arts; and
- Sue Solario, a representative from the Riley School, among others from San Diego.

Based on Student's needs, the Riley School was as close as possible to Student's home in San Diego. The Riley School met the description of a therapeutic setting with seamless communication and collaboration across settings, including the intensive individual and group therapy embedded in the program that Marshall recommended for Student. San Diego offered Student 30 hours weekly, six hours a day, of specialized academic instruction in a small classroom of eight to 12 students per class. Student would be assigned to one of two classrooms at the Riley School based on her needs, the total number of students in each classroom, and recommendation from Riley School's teachers, therapist, and rehabilitation specialists.

The principal of the Riley School, Pam Busch, held a master's degree in special education and education management and was familiar with the Riley School. Busch testified that the classroom placement decision team considered all students' profiles and avoided placing someone in a classroom that would trigger another student. Each classroom was staffed by one educational specialist and two rehabilitation specialists and had imbedded group therapy to gauge students' daily needs at the beginning and end of each school day. Academic instruction would be individualized and adjusted based on each student's needs and could be at grade, below grade, or above grade level. During the 2022-2023 school year, the Riley School offered five block periods of English language arts, social studies, math, science and electives which included career exploration, art, home economics and yearbook. The Riley School had therapists trained in many forms of therapy, including Eye Movement Desensitization and Reprocessing, to address students' needs.

Student would receive individualized academic instruction based on her ability and mental health needs at the Riley School. It was undisputed Student was academically capable and bright. Wisz had extensive discussions with Parents, Marshall, and Montana regarding Student's profile, and educational and therapeutic needs at both the January 13, 2023, and March 7, 2023 IEP team meetings. Wisz was familiar with the Riley School and visited it seven to eight times throughout his employment with San Diego. Wisz shared with Parents, as early as the January 13, 2023 IEP team meeting, the Riley School offered stimulating and differentiated academic instruction in a day treatment program. He also shared that if Student progressed in her therapeutic and education goals to where she could access education in a less restrictive environment while attending the Riley School, Student could be a candidate for dual enrollment.

Dual enrolled students spent part of the day in the therapeutic day program and another part of the day at a local comprehensive campus to receive academic instruction. The dual enrollment program was inappropriate for Student on March 7, 2023, and was not offered.

Student would receive the needed intensive mental health and therapeutic supports she needed at the Riley School. Janelle Chiu was the lead mental health clinician and case worker at the Riley School for eight years. She held a master's degree in counseling psychology and a bachelor's degree in psychology and was a licensed marriage and family therapist. Chiu opined the Riley School was equipped to handle students with major depressive disorder, disruptive mood dysregulation, generalized anxiety disorder, and trauma, including eating disorders. Chiu explained the Riley School offered mental health services including individual and group therapy embedded in the program in addition to assigned mental health clinician services offered through a student's IEP. The Riley School also offered imbedded behavior services to students who were supervised by rehabilitation specialists throughout the full school day including supervised trips to the restrooms.

Rehabilitation specialists at the Riley School provided emotional and behavioral supports including positive behavior support and development of social skills, daily living functional skills, and medication compliance to each student. Rehabilitation specialists at the Riley School had a combination of training, experience and/or education of three years with youths in mental health, intensive day treatment, or residential treatment settings. Rehabilitation specialists escorted students outdoors for alone time or re-regulation, talked to students, actively facilitated socialization amongst

students, summoned therapist assistance when needed and/or upon a student's request, and escorted students individually to the restroom or to get water. The Riley School offered a safe environment, with continuous supervision of students.

The Riley School's small classroom and individualized academic instruction and imbedded behavioral, social and mental health supports from rehabilitation specialists and therapists to manage dysregulation was appropriate for Student on March 7, 2023. The Riley School was the appropriate next step down from Student's more restrictive residential placement setting at New Leaf/Embark. (See *Kerkam*, *supra*, 931 F.2d at p. 87; *Westmoreland*, 930 F.2d at p. 948; *Carlisle* 62 F.3d at p. 534 [Residential placement is, by its nature, considerably more restrictive than day school].) Student needed a comprehensive therapeutic program to access her education in March 2023, because she still experienced dysregulation, engaged in therapy, and needed a high level of mental health support.

While Student was thriving and not engaged in self-harm by cutting in March 2023, Student's progress was sometimes muted with increased dysregulation while working through trauma with Eye Movement Desensitization and Reprocessing therapy. The Riley School was equipped to employ talk therapy, deep breathing exercises, mindfulness, journaling, going outdoors, and redirecting Student to positive activities to build self-esteem and to resolve conflict—the same tools that were effective when New Leaf/Embark staff employed them to manage Student's dysregulation. The Riley School could manage Student's dysregulation, eating disorder symptoms, and therapy needs.

The Riley School placement offered in the March 7, 2023 IEP was reasonably calculated to enable Student to make appropriate progress considering her circumstances, and so, offered her a FAPE. Student did not offer any credible opinions that the Riley School was inappropriate, or that Student needed a residential or boarding component to access her education on March 7, 2023.

Information the IEP team had on March 7, 2023, including information from Parents, Marshall and Montana, supported the Riley School was an appropriate placement. (See *Adams, supra*, 195 F.3d 1141, 1149.) Parental preference for Student to stay at New Leaf/Embark for consistency and to continue therapy with Montana was insufficient to meet Student's burden of proving the Riley School was inappropriate. Because Student did not show the offer of the Riley School was inappropriate, this Decision did not need to consider the appropriateness of Parents' preferred placement New Leaf/Embark for Student on March 7, 2023.

Student did not prove San Diego denied her a FAPE by not offering an appropriate placement in the March 7, 2023 IEP.

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ISSUE 3a, 3b, 3c, 3d, 3e AND 3f: DID SAN DIEGO DENY STUDENT A FAPE DURING THE 2022-2023 SCHOOL YEAR, BY FAILING TO OFFER APPROPRIATE SERVICES AND SUPPORTS AT THE MARCH 7, 2023 IEP TEAM MEETING, SPECIFICALLY: SOCIAL; EMOTIONAL; BEHAVIORAL; ACADEMIC; TRANSITION; AND SAFETY?

Student contends San Diego did not offer appropriate social, emotional, behavioral, academic, transition, and safety services and supports to Student at the March 7, 2023 IEP team meeting. Student argued San Diego did not include:

- a transition plan and activities;
- wraparound services;
- a safety plan;
- a health plan;
- sufficient mental health services; and
- Eye Movement Desensitization and Reprocessing or trauma specific services, or services to help Student manage dysregulation in the March 7, 2023 IEP.

San Diego contends it offered Student a FAPE at the March 7, 2023 IEP team meeting, that included a comprehensive educational program with imbedded social, emotional, behavioral, transition, and safety supports, and additional individual therapy for Student and Parents, based on all the information it had available on March 7, 2023.(This space is intentionally left blank. Text continues on the following page.)

Related services required to assist a student with exceptional needs to benefit from special education may include counseling and guidance services. (Ed. Code, § 56363, subd. (b)(9).) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address behaviors that impede a child's learning or that of others. (34 C.F.R. § 300.324(a)(2)(i).) The question is whether the program offered was reasonable, not whether it was ideal. (See *Endrew F.*, *supra*, 580 U.S. at p. 399.) The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. (*Id.* at p. 404.) Even if the program preferred by the parent would result in greater educational benefit to the student, that does not mean the school district's program was inappropriate. (See *Gregory K.*, *supra*, 811 F.2d at p. 1314.)

Student did not specify to which issues San Diego's alleged failures to offer a transition plan and activities, wraparound services, a safety plan and a health plan, sufficient mental health services, Eye Movement Desensitization and Reprocessing or trauma specific services, or services to help Student manage dysregulation applied. Student argued under multiple issues San Diego should have offered a transition plan and activities which included wraparound services for Student's safety and generally that Student required more mental health related services. Therefore, analysis of inappropriate social, emotional, behavioral, academics, transition, and safety services and supports were grouped by arguments of inappropriate offers of services and supports.

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Student's unsupported argument of the absence of generalized categories of services in the March 7, 2023 IEP offer did not prove that the placement and supports offered in Student's March 7, 2023 IEP, were inappropriate to meet Student's educational needs. In addition to services imbedded within the Riley School, San Diego offered the following services to Student in the March 7, 2023 IEP:

- 48 hours yearly of mental health related services with a mental health clinician at the Riley School;
- Five hours yearly of parent counseling services with a mental health clinician at the Riley School;
- 1,800 minutes, or 30 hours, weekly of mental health related services, behavior intervention, with a rehabilitation specialist at the Riley School.

STUDENT DID NOT PROVE SAN DIEGO FAILED TO OFFER APPROPRIATE SOCIAL SERVICES AND SUPPORTS TO STUDENT UNDER ISSUE 3a

Student did not present credible evidence to show San Diego failed to offer appropriate social services and supports to Student in the March 7, 2023 IEP. Student argued San Diego failed to offer services and supports to address her need for social approval. However, Student did not offer evidence of what services and supports she required to address social approval or how the absence of this generalized category impacted her educational access. Further, none of Student's experts opined Student required specific social services and supports not offered in the March 7, 2023 IEP or embedded at the Riley School to access her education.

San Diego successfully rebutted Student's arguments with Busch's explanation the Riley School program had imbedded group therapy to gauge students' daily needs at the beginning and end of each school day. Each classroom had two rehabilitation specialists to supervise and facilitate positive social interactions amongst students and summon a therapist for needed assistance. Additionally, San Diego offered Student individual therapy and Parents counseling, which could also provide support to address Student's need for social approval. For example, if Student's alleged social approval needs escalated into dysregulation or other behaviors impacting her education, the rehabilitation specialists and therapist would be available to help Student regulate and access her education. Student did not show she required services or supports beyond those embedded in the Riley School program and offered in the March 7, 2023 IEP to address her social approval needs to receive a FAPE.

STUDENT DID NOT PROVE SAN DIEGO FAILED TO OFFER APPROPRIATE EMOTIONAL SERVICES AND SUPPORTS TO STUDENT UNDER ISSUE 3b

Student argued San Diego denied her a FAPE because it did not offer Eye Movement Desensitization and Reprocessing therapy or trauma specific services. Yet, no one familiar with Student's educational needs described, provided any recommendations for, or opined on, what trauma specific services Student required to access her education. Student did not show she needed Eye Movement Desensitization and Reprocessing or trauma specific services to access her education outside of the embedded services provided at the Riley School and the mental health counseling services offered to Student and Parents in the March 7, 2023 IEP. Student presented extensive testimony from Parents and Montana that Student was working

through sexual assault trauma with Eye Movement Desensitization and Reprocessing therapy. However, no expert including Marshall, opined that Student required Eye Movement Desensitization and Reprocessing to access her education. San Diego successfully rebutted Student's unsupported conclusions regarding Student's need for Eye Movement Desensitization and Reprocessing and/or trauma specific services by showing that the Riley School was staffed with therapists and mental health professionals trained in many forms of therapy, including Eye Movement Desensitization and Reprocessing, to address Student's mental health needs for educational access.

Student also argued San Diego denied her a FAPE because it did not offer enough mental health services, specifically counseling, to help Student manage her dysregulation. San Diego offered 30 hours per week of behavior intervention and mental health related services, individual and group therapy embedded in the Riley School therapeutic day program, and 48 hours a year, approximately one hour and 20 minutes per week, of individual counseling to Student and five hours per year of parent counseling. Student argued she received more mental health services at New Leaf/Embark than San Diego offered in the March 7, 2023 IEP. Student received two individual counseling sessions per week from Montana, which included one Eye Movement Desensitization and Reprocessing therapy session, and weekly parental counseling session at New Leaf/Embark.

However, Student did not show the amount of counseling Montana provided to Student and Parents were required for Student to access her education. For example, Student did not show Eye Movement Desensitization and Reprocessing therapy was educationally related or why Parents needed more than five hours of counseling, for less than two months of the remaining 2022-2023 school year, for Student to access her

education. The fact that Student's private residential boarding program provided more private counseling sessions to Parents and Student which included Eye Movement Desensitization and Reprocessing therapy did not obligate San Diego to replicate those services unless Student proved it was necessary to receive a FAPE. (See *Gregory K., supra*, 811 F.2d at p. 1314; *Endrew F., supra*, 580 U.S. at p. 399.) No one familiar with Student's educational needs recommended or opined Student required a specific amount of mental health services or counseling to access her education. Student did not offer any persuasive evidence she required more emotional services and supports than San Diego offered in the March 7, 2023 IEP and embedded in the Riley School program to receive a FAPE.

STUDENT DID NOT PROVE SAN DIEGO FAILED TO OFFER
APPROPRIATE BEHAVIORAL AND SAFETY SERVICES AND SUPPORTS
TO STUDENT UNDER ISSUE 3c AND 3f

Student argued San Diego denied her a FAPE because it did not offer a safety or health plan to help Student manage self-harming by purging and dysregulation to keep her safe. No one familiar with Student's educational needs described, recommended, or opined what a school-based safety plan or health plan would need to include for Student to access her education. Student did not present persuasive evidence to show the 30 hours weekly of mental health related services and behavior intervention at the Riley School offered in the March 7, 2023 IEP, were inappropriate for Student to access her education.

Student also argued in the closing brief the March 7, 2023 IEP offer was inappropriate because the behavior intervention plan failed to include purging behaviors. As analyzed under Issue 2, Student did not prove she was still purging,

or that it occurred in a manner, or to an extent, that impacted her education in March 2023. Further, as discussed under Issue 2, the Riley School had rehabilitation specialists who accompanied students individually to the restrooms, and waited outside an individual restroom stall, to ensure students' safety. The Riley School staff was trained, and equipped with a low student to staff ratio, to redirect Student which included offering individual therapy, group therapy, and walking Student outside the classroom to manage any purging or dysregulation. To the extent Student relapsed into purging, or became dysregulated, the evidence did not show the Riley School's level of continuous adult supervision, including its team of rehabilitation specialists and therapists, could not keep Student safe and address any purging issues.

At hearing, Student's attorney questioned Riley staff witnesses on whether the rehabilitation specialists were properly credentialed or trained, but the responses did not prove the rehabilitation specialists required any additional credentialing or training they did not already have. The evidence established that the Riley School rehabilitation specialists had a minimum of three years education or experience with youths in a mental health setting, intensive day treatment, or residential treatment settings. They were certified in Professional Assault Crisis Training, a three-day course, every two-years, which trained and rendered them knowledgeable with anger management, applied positive behavior support, intervention techniques and instructional methodologies. Student's contention the rehabilitation specialists needed additional credentialing and training to perform their job duties and ensure Student's safety was unsupported.

Student did not prove she required behavioral or safety services and supports beyond those San Diego offered in the March 7, 2023 IEP and embedded in the Riley School program to receive a FAPE.

STUDENT DID NOT PROVE SAN DIEGO FAILED TO OFFER
APPROPRIATE ACADEMIC SUPPORTS AND SERVICES TO STUDENT
UNDER ISSUE 3d

Student did not present persuasive evidence to show the 30 hours per week, or six hours a day, of specialized academic instruction at the Riley School were inappropriate to meet Student's academic needs. At hearing, Student argued generally the Riley School did not offer challenging academics to Student but did not offer specifics as to Student's academic needs. None of Student's experts opined on what academic services and supports Student required to receive a FAPE other than stating Student was capable, bright, and needed a therapeutic setting to address her mental health issues. None of Student's experts were knowledgeable about the academic services and supports the Riley School offered. Bejarano, the only Student expert who visited the Riley School, did not opine on its academic rigor or how it related to Student. Bejarano did not dispute that the Riley School's academic instruction, which was individualized to each student's needs, was appropriate for Student.

Student's argument that San Diego did not offer appropriate academic services and supports in the March 7, 2023 IEP was not persuasive. During the March 7, 2023 IEP team meeting, Parents bemoaned the lack of academic rigor at the Riley school because it did not offer advanced placement classes. Student would be in the eighth grade if she returned to San Diego during the 2022-2023 school year. Advanced placement courses were only offered in high school and not in middle school, so Parents' criticism of the lack of academic rigor on this basis was unfounded and unpersuasive. Student did not show San Diego was required to offer advanced placement classes to Student for her to receive a FAPE.

Student did not offer any evidence to show what aspects of the Riley School's five block periods of English language arts, social studies, math, science, and electives, which included career exploration, art, home economics, and yearbook, were inappropriate for Student. Student's closing brief argued that a sentence in the Riley School handbook stating students focused on individualized remediation in academic intervention, showed the Riley School was not academically rigorous enough for Student. This sentence did not prove that Riley School failed to offer academically rigorous classes. The Riley School offered above grade level academic instructions to students when appropriate. Further, concerns of lack of academic rigor based on one sentence taken out of context in the handbook was unpersuasive, especially when the handbook also had multiple references to the Riley School's academic rigor and the delivery of grade level instruction.

San Diego successfully rebutted Student's arguments the March 7, 2023 IEP did not offer appropriate academic services and supports. Wysz and Busch opined at hearing the Riley School offered differentiated academic instruction individualized and adjusted based on each student's needs and could be at grade, below grade, or above grade level. The Riley School also included opportunities for dual enrollment at a local comprehensive campus. Wysz explained this in detail to Parents at the January 13, 2023 and March 7, 2023 IEP team meetings. The totality of the evidence did not establish the Riley School's individualized academics offerings were inappropriate for Student. Student did not prove the academic services and supports San Diego offered in the March 7, 2023 IEP at the Riley School denied Student a FAPE.

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STUDENT DID NOT PROVE SAN DIEGO FAILED TO OFFER
APPROPRIATE TRANSITION SUPPORTS AND SERVICES TO
STUDENT UNDER ISSUE 3e

Student argued San Diego denied her a FAPE by not offering a transition plan and activities, including wraparound services, a safety plan, and a health plan in the March 7, 2023 IEP, to move her from New Leaf/Embark to San Diego's Riley School.

STUDENT DID NOT PROVE SAN DIEGO WAS REQUIRED TO OFFER A
TRANSITION PLAN TO MOVE HER TO THE RILEY SCHOOL

If appropriate, an IEP is required to include, among other things, provision for the transition into the regular class program if the pupil is to be transferred from a special class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day, including both of the following: (a) a description of the activities provided to integrate the pupil into the regular education program; and (b) a description of activities provided to support the transition of pupils from the special education program into the regular education program. (Ed. Code, § 56345, subd. (b)(4)(A) &(B).)

The adequacy of transition services must be viewed as an aggregate in light of the child's overall needs. The test is whether the IEP, taken in its entirety, is reasonably calculated to enable the child to garner educational benefit. (*Lessard v. Wilton-Lyndeborough Cooperative School District* (1st Cir. 2008) 518 F.3d 18, 30.) When a transition plan fails to comply with the procedural requirements, but the individual transition plan or IEP provides a basic framework sufficient to ensure that the student receives transition services that benefit the student's education, the procedural violation is harmless. (*Virginia S. v. Department of Education* (D.Hawaii,

Jan. 8, 2007, Civ. No. 06-00128 JMS/LEK) 2007 WL 80814, at *10.) A transition plan that is procedurally deficient but does not result in a loss of educational opportunity, does not result in a denial of FAPE. (*Ibid.*)

Student only cited, *R.E.B. v. State of Hawaii Dept. of Education* (9th Cir. 2017) 870 F.3d 1025, which was withdrawn by the Ninth Circuit Court in *R.E.B. v. Hawaii Dept. of Education* (9th Cir. 2018) 886 F.3d 1288, and reversed on rehearing on the transition issue in *R.E.B. v. Department of Education* (9th Cir. 2019) 770 Fed. Appx. 796, 798 [nonpub. opn.]. The case Student cited to pre-dated subsequent Ninth Circuit Court authority regarding when transition plans were required, *N.G. by and through R.G. v. Placentia Yorba Linda Unified School District* (9th Cir. 2020) 807 Fed.Appx. 648 (*N.G.*).

In *N.G.*, the parents requested the student be placed in a full-time residential treatment program because of her behavior. The school district denied their request and parents filed for due process. The parties entered a settlement agreement, with the school district agreeing to fund the parent's unilateral placement of the student at Heartspring, a private residential treatment center. The agreement also provided the parties would proceed with an annual meeting to develop an IEP for the school year following the expiration of the settlement agreement in June 2016. At the next IEP team meeting, the school district did not offer student a residential placement, so parents enrolled her at Heartspring. The agreement was ultimately extended through December 31, 2016. The student remained at Heartspring, and at the next IEP team meeting in April 2017, the school district again declined to offer a residential placement. (*Id.* at pp. 649-650.)

Instead, it offered a nonpublic school placement. The parents filed another request for due process alleging, among other things, that the school district failed to

create an adequate transition plan to assist the student in moving back to a nonpublic school from Heartspring, relying on Education Code section 56345, subdivision (b)(4). (See *N.G. v. Placentia-Yorba Linda Unified School District* (C.D.Cal., Oct. 5, 2018, No. SACV17-02121AG (DFMx)) 2018 WL 6137196, at *5, *aff'd sub nom. N.G., supra*, 807 Fed.Appx. at p. 651[nonpub. opn.])

In its opinion, the District Court explained,

"This argument is a nonstarter, because N.G. transitioned from a residential facility to a nonpublic school, not to a 'regular class program' or 'a regular class in a public school' under [Education Code] section 56345(b)(4). Consequently, the transition plan requirement of that section wasn't triggered." (*N.G. v. Placentia-Yorba Linda Unified School District, supra*, 2018 WL 6137196, at *5.).

The Ninth Circuit Court affirmed the district court's determination the student did not require a residential placement and that Education Code section 56345, subdivision (b)(4), did not apply to a transition from Heartland, a private residential treatment center, to the offered non-residential placement. (*N.G., supra*, 807 Fed.Appx. at pp. 650-651.)

Here, like *N.G.*, San Diego did not offer Student a transition into a regular class in a public school for any part of the school day in the March 7, 2023 IEP. San Diego offered Student a transition from her residential boarding program at New Leaf/Embark to a therapeutic day program at the Riley School. None of the Riley School program would be in a regular class in a public school, for any part of the day, to trigger the applicability of Education Code section 56345, subdivision (b)(4). Student failed to show the March 7, 2023 IEP offer of the Riley School therapeutic day program satisfied the

narrow provisions of Education Code section 56354, subdivision (b)(4). Therefore, Education Code section 56345, subdivision (b)(4), did not apply. Student did not prove San Diego was required to offer a transition plan in the March 7, 2023 IEP, for Student to transition from the New Leaf/Embark to the Riley School.

Nonetheless, as discussed in the next section, San Diego offered appropriate services and supports based on information it knew about Student on March 7, 2023.

SAN DIEGO OFFERED APPROPRIATE SERVICES AND SUPPORTS TO MOVE
STUDENT TO THE RILEY SCHOOL BASED ON AVAILABLE INFORMATION
ON MARCH 7, 2023

Student did not offer any support or expert opinion to explain what a transition plan and activities, including wraparound services, a safety plan and a health plan would entail to successfully transition to the Riley School. At the March 7, 2023 IEP team meeting, Parents described their preference for having San Diego send staff into Parents' home to get Student to school and labelled it as a safety related service so Parents would feel safe bringing Student home. A FAPE was dependent on whether the program San Diego offered was reasonable, not unsupported references to safety for justifying parental preference. (See *Gregory K., supra*, 811 F.2d at p. 1314; *Endrew F., supra*, 580 U.S. at p. 399.) Student argued she required in-home services that included sending someone into Parents' home in the morning to get Student up and ready for school including transporting to and from school, and going into the home after school when Parents were at work to safely return Student from New Leaf/Embark to San Diego. The in-home services Parents wanted were essentially 24-hour services offered by the New Leaf/Embark residential boarding program, which as analyzed under Issue 2, Student did not demonstrate was required for a FAPE. Student did not offer any

credible evidence to support the in-home services Parents described at the March 7, 2023 IEP team meeting and at hearing was necessary for Student to receive a FAPE.

Wisz, Busch and Chiu all opined at hearing the Riley School had embedded parent counseling as part of the home and school collaboration that included incorporating home strategies and supports for Student to access her education. Chiu and Busch opined Riley School staff was available to talk to Parents outside regular school hours and conducted in-home visits but typically did not enter a student's home. Chiu explained the Riley School's embedded home supports included tailoring a coordinated home plan with parents so students could access their education at school. Additionally, Wisz opined the mental health related services offered to Parents in the March 7, 2023 IEP could be used to coordinate services Student required to move from New Leaf/Embark to the Riley School until San Diego received more information that Student required more mental health related services and supports.

Further, Busch explained a move to the Riley School typically involved two phases. The first phase involved having a Riley School representative attend an IEP team meeting regarding a student. Typically, parents would meet with an educational specialist at the Riley School. The educational specialist would answer parents' questions, review the Riley School handbook, obtain general information about the student, and provide a tour of the Riley School. The second phase usually occurred after parents toured the Riley School. During the second phase, parents would meet with a therapist to discuss details about a student's needs for transitioning. This second phase required parents to sign releases of information to obtain progress reports from the residential placement.

Because Parents were not interested in the Riley School, preferred and intended for Student to remain at New Leaf/Embark for the remainder of the 2022-2023 school year, they never proceeded to the second phase after they toured the Riley School. Had Parents entered the second phase to sign releases of information, the Riley School's nurse would have contacted Student's doctors/medical team to determine the need for customizing a health plan to handle any existing eating issues. The Riley School staff and Parents would have also determined the frequency for communication, including if communication logs were needed, Student's and the family's therapy needs, and transportation needs to/from the home. At hearing, Busch explained school bus transportation would be provided to students if needed after discussions with parents, even if not specified in an IEP. Parents did not provide authorizations to, or communicate with, the Riley School staff after the tour regarding Student's needs for moving to the Riley School. It was undisputed Parents never advanced to the second phase to transition Student to the Riley School.

San Diego's March 7, 2023 IEP team meeting agenda, given to Parents in advance of the March 7, 2023 IEP team meeting, included a transition supports discussion item. Cruz opined at hearing that when Parents made clear Student would not attend the Riley School during the March 7, 2023 IEP team meeting, the IEP team did not discuss specific details about moving Student from New Leaf/Embark to the Riley School. Nonetheless, San Diego offered Student a FAPE based on information San Diego had on March 7, 2023. Student did not prove San Diego failed to offer appropriate services and supports in the March 7, 2023 IEP, to move Student to the Riley School.

Student did not show San Diego failed to offer appropriate social, emotional, behavioral, academic, transition, and safety services and supports to Student in the March 7, 2023 IEP.

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:

San Diego did not deny Student a FAPE in the 2022-2023 school year, by failing to consider Student's changed circumstances, specifically social, emotional, educational, and safety needs at the March 7, 2023 IEP team meeting.

San Diego prevailed on Issue 1.

ISSUE 2:

San Diego did not deny Student a FAPE during the 2022-2023 school year, by failing to offer an appropriate educational placement at the March 7, 2023 IEP team meeting.

San Diego prevailed on Issue 2.

ISSUE 3a:

San Diego did not deny Student a FAPE during the 2022-2023 school year, by failing to offer appropriate services and supports at the March 7, 2023 IEP team meeting, specifically social.

San Diego prevailed on Issue 3a.

ISSUE 3b:

San Diego did not deny Student a FAPE during the 2022-2023 school year, by failing to offer appropriate services and supports at the March 7, 2023 IEP team meeting, specifically emotional.

San Diego prevailed on Issue 3b.

ISSUE 3c:

San Diego did not deny Student a FAPE during the 2022-2023 school year, by failing to offer appropriate services and supports at the March 7, 2023 IEP team meeting, specifically behavioral.

San Diego prevailed on Issue 3c.

ISSUE 3d:

San Diego did not deny Student a FAPE during the 2022-2023 school year, by failing to offer appropriate services and supports at the March 7, 2023 IEP team meeting, specifically academic.

San Diego prevailed on Issue 3d.

ISSUE 3e:

San Diego did not deny Student a FAPE during the 2022-2023 school year, by failing to offer appropriate services and supports at the March 7, 2023 IEP team meeting, specifically transition.

San Diego prevailed on Issue 3e.

ISSUE 3f:

San Diego did not deny Student a FAPE during the 2022-2023 school year, by failing to offer appropriate services and supports at the March 7, 2023 IEP team meeting, specifically safety.

San Diego prevailed on Issue 3f.

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.

Sabrina Kong,
Administrative Law Judge
Office of Administrative Hearings