

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2014010664

DECISION

Student filed a due process hearing request (Complaint) with the Office of Administrative Hearings, State of California, on January 21, 2014, naming the Los Angeles Unified School District. The matter was continued on March 4, 2014.

Administrative Law Judge Stella L. Owens-Murrell heard this matter on April 29, 30, and May 1, 2014, in Van Nuys, California.

Arlene Bell, Attorney at Law, represented Student. Student's parents (Parents) were present throughout the hearing and Student attended the hearing for approximately thirty minutes on the first day of hearing.

Susan Winkelman, Attorney at Law, represented District. Francine Metcalf, due process specialist for District, attended the first and last days of the hearing on behalf of District. Binh Nguyen, due process specialist for District, attended the second day of the hearing on behalf of District.

At the close of the hearing, the matter was continued to May 15, 2014, to permit the parties to file written closing arguments. Upon timely receipt of written closing arguments, the record was closed and the matter was submitted for decision on May 15, 2014.

ISSUES¹

1. Whether District denied Student a free appropriate public education (FAPE) from January 21, 2012, through October 14, 2013, including the 2013 extended school year, by failing to provide an appropriate placement; and

2. Whether District denied Student a FAPE from October 14, 2013 through the 2014 extended school year and part of the 2014-2015 school year by failing to provide an appropriate placement.

SUMMARY OF DECISION

Issue One concerns whether Student was denied a FAPE from January 21, 2012 through October 14, 2013, because her placement at Bridgeport School was not appropriate to address her aggressive behaviors and her social and emotional goals. The evidence showed that Student made academic progress and her behaviors were being addressed at Bridgeport during this time period. Accordingly, Student did not establish that District failed to provide a FAPE from January 21, 2012 to the end of the 2012-2013 school year including the 2013 extended school year, and the beginning of the 2013-2014 school year.

Issue Two concerns whether Student was denied a FAPE from October 14, 2013, through the 2013-2014 school year, 2014 extended school year, and part of the 2014-2015 school year because District offered continued placement at Bridgeport despite

¹ The issues are those presented in Student's complaint and framed in the Order Following Prehearing Conference. The ALJ has revised the issues without changing their substance, for purposes of organizing this decision. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

escalation in Student's aggressive behavior and failure to make progress on her academic goals. Student contends Academy for the Advancement of Children with Autism (Academy) would be an appropriate placement for Student. The evidence showed that beginning in August of 2013, Student's aggressive and self-injurious behaviors intensified and she was no longer making progress, such that by the time of the October 14, 2013 and January 8, 2014 IEP's, District's offer of placement at Bridgeport was no longer a FAPE. As a result, Student is awarded compensatory education and prospective placement at Academy for the 2014 extended school year and the 2014-2015 school year.

FACTUAL FINDINGS

1. Student was 15 years of age at the time of the due process hearing. At all relevant times, she lived with Parents in the jurisdictional boundaries of District.
2. Student was diagnosed with autism when she was three years and 11 months old. District determined Student was eligible for special education services under the disability category of autism when she was four years old.
3. She attended a District elementary school from 2004-2005. Thereafter, District placed Student at Bridgeport, a certified nonpublic school operating under the auspices of the Help Group,² in July 2006. Student was subsequently placed in the Bridgeport Plus program, designed for children with behavioral challenges.

² The Help Group is a nonprofit educational organization with multiple nonpublic schools operating in Los Angeles serving children with special needs related to autism spectrum disorder, learning disabilities, attention deficit hyperactivity disorder, developmental delays, abuse, and emotional problems.

4. At the time of the hearing, Student was in the ninth grade. Her program consisted of placement in a special day class with a functional skills curriculum including community-based instruction. Student had limited verbal communication and required constant supervision from a 1:1 aide in order to maintain a safe environment.

5. Behavior analyses conducted in January 2007 and October 2011 by Mary A. Bauman, Ph. D., Behavior Intervention Case Manager, and Director of Clinical Programs at the Help Group, established Student had a lengthy and pervasive history of physical aggression within the classroom, on school transportation, and at various locations around the school. The data collected in the 2007 analysis showed that Student averaged as much as 18.85 aggressive behaviors per day. In contrast, the October 18, 2011 functional behavior analysis noted that Student averaged 10.32 aggressive behaviors per day, consisting of either one or more of the following: biting, scratching, kicking, screaming, pinching, pushing, hitting, punching, and banging her head and/or body into stationary objects.

6. Functional behavior analysis results indicated that Student's aggression was triggered by either frustration when introduced to a new concept, anger over having to perform a non-preferred activity, or sensory issues which manifested in difficulty self-regulating behavior, controlling fear/anxiety, or quenching her need for strong sensory input. Student also had a tendency to be self-abusive by pinching, biting, or banging her own body into the walls or doors during play, and she frequently hurt other children while playing. The 2011 functional behavior analysis noted that although Student's aggressive behaviors had reduced in frequency over time, the intensity and duration of them had increased, especially when Student became upset and frustrated.

7. The 2011 functional behavior analysis noted that Student's escalating aggression impeded access to the curriculum because it interfered with work production, disrupted other students, and interfered with instruction time, and caused

negative interaction with peers. Dr. Bauman therefore proposed a behavior support plan to provide Student communication tools, sensory breaks, priming prior to new events or changes in Student's routine, utilization of a sensory diet, sensory area and tools incorporated into the school day, a transportation plan, and a 1:1 aide for the school day and to accompany Student on transportation to increase self-regulation and safe behavior. The behavior support plan further proposed weekly data collection to be provided to the behavior intervention case manager, and conferences with the parents, teachers, 1:1 aide, and the behavior intervention case manager if the frequency of Student's aggression did not decrease. Finally, the behavior support plan proposed behavior goals and objectives. The functional behavior analysis results and proposed behavior support plan were presented at the October 19, 2011 triennial review IEP meeting.

8. The October 19, 2011 IEP documented Student's unique needs in the areas of sensorimotor, functional reading, functional writing, functional mathematics, vocational, language and language/pragmatics, social skills, and behavior. As noted in the IEP, Student's autism significantly impaired her ability in the areas of sensorimotor, social skills, and behavior, which impacted her involvement and progress in the general education curriculum to such a degree that her instruction was based on alternate curriculum standards using the alternate curriculum. As of the time of October 2011 IEP, Student had not met her goals in functional mathematics because she needed more practice with a variety of coins, in social skills because the frequency of her behaviors were too high, or in behavior because Student needed more time to progress in this area.

9. Student demonstrated difficulties in the area of sensory input. The impact on her disability and overall academic and educational performance was that she had difficulty controlling her impulse to hit and often sought proprioceptive input in an

apparent attempt at self-regulation. In the area of social skills, Student tended not to wait for others to participate in class. She often answered questions without raising her hand and shouted out when it was not her turn. The effect of this behavior was disruptive and caused negative relationships with her peers. Regarding her behavior needs, the IEP identified aggressive behaviors such as biting, scratching, kicking, screaming, pinching, and hitting.

10. The October 2011 IEP established goals in all areas of need, provided continued placement at Bridgeport in a special day class with a low teacher-to-student ratio for the 2011-2012 school year including extended school year and part of the 2012-2013 school year, related services in speech and language (collaborative 90 minutes per week), occupational therapy (collaborative 30 minutes per week), transportation between home and school, 1:1 adult assistance for the duration of the school day and during transportation to and from school due to safety concerns, accommodations, modifications, and supports, including a Parent/Teacher Communication Log (Communication Log) to be provided to Parents, and a behavior support plan. Parents consented to the IEP.

11. There was no evidence for the period of January 2012 to the end of the 2011-2012 school year and extended school year that Student's placement did not provide educational benefit or that Student's behaviors escalated to the point of denying Student educational benefit.

12. By the time of the October 11, 2012 annual IEP team meeting, Student made some academic progress. Student met her goals and objectives in language/pragmatics, functional reading, functional writing, and occupational therapy. She did not meet her goals in functional mathematics because she needed more practice with a variety of coins, in social skills because the "frequency of behaviors was too high," or in behavior because more time was needed to address and improve

Student's behaviors. The October 11, 2012 IEP established goals in all areas of need including vocational, offered the same related services, modifications and supports, and behavior support plan as in the prior IEP, and offered continued placement at Bridgeport for the 2012-2013 school year, extended school year, and first part of the 2013-2014 school year. Parents consented to the IEP.

13. Student did not have a permanent special day class teacher at the beginning of the 2012-2013 school year. Student experienced a succession of substitute teachers, disruption in her routine, and inconsistency in her program during the 2012-2013 school year until a permanent credentialed teacher was hired in February 2013. Although Student's mother stated that Student's behaviors escalated during this time, no incident reports or Communication Logs were produced to show that the instability in teaching staff and lack of consistent structure caused Student's behaviors to escalate to unsafe levels in school or that she did not receive educational benefit in that school year or during the summer of 2013.

14. Communication Logs and Student's reports to Parents established that Student's behaviors escalated, beginning in August 2013 to December 2013, and continued into January 2014.

15. Communication Logs were prepared by Student's teachers and provided to Parents on a daily basis in accordance with the IEP. The Communication Logs provided teacher comments and a behavior rating scale of one to five, with one being the lowest rating and five the highest rating. Student also received behavior services through another state agency to address her behavior at home. Parents reported that for an extensive period of time Student's behaviors escalated at home such that the in-home behavior therapists wore protective gear during behavior therapy with Student.

16. On August 26, 2013, the beginning of the 2013-2014 school year, Student was involved in an incident on the morning school bus. Student became agitated and

shattered a bus window after banging her head into the window in the presence of her 1:1 aide. Bridgeport failed to immediately inform the Parents of the incident or report it in a Communication Log to Parents. Parents were not made aware of the incident until Student arrived at home and told them of the incident. Parents notified Bridgeport they no longer felt confident the Help Group had the ability to provide a safe and academically productive environment for Student.

17. On September 26, 2013, Student became aggressive and disruptive in class and was required to take a break from Math class and work in a separate room.

18. On September 30, 2013, Student had a tough morning. She showed a little aggression and some banging during warm ups in her special day class classroom. Student recovered and did well the rest of the day. However, she did not attend her Math class that day because of her behavior.

19. On October 2, 2013, Student had to finish her work during Language Arts outside the classroom because she became aggressive towards a peer and staff. She had already taken a break before the incident, and when she returned to class she did not want to correct the morning work. She was rated good and fair on the behavior scale in Language Arts and fair in Math because she did not participate in money skills and word problems and was not on task.

20. As of the October 14, 2013 IEP, Student met her goals in functional reading and two of her vocational goals. She did not meet the goals in language/pragmatics and functional writing, and had regressed in these areas. She still had not met her goals in functional math because she continued to struggle with a variety of coins; in social skills because she needed maximum prompting; in behavioral support because her behavior and need for support had not decreased; or in sensory because she required more than one prompt. The October 2013 IEP contained the same FAPE offer made in the prior year's IEP but for a period including the 2014 extended

school year and a portion of the 2014-2015 school year. The IEP team emphasized the need for extended school year for provision of FAPE because “based upon review of the pre and post-goal achievement data in reading, writing, mathematics, and social emotional Student demonstrates evidence of significant regression corresponding with limited recoupment after instructional breaks.” Parents consented to the IEP.

21. On October 23, 2013, Student had some aggressive behaviors in the morning and in her Math class when she was required to do mathematical computations. She was required to leave the class and take a break outside, though her overall conduct was rated as fair. The Language Arts teacher reported that Student had “an okay day” in Language Arts later in the day.

22. On November 15, 2013, Student was on a community-based instruction outing to a Goodwill Industries store with her class and three staff members. The purpose of this outing was to teach budgeting and independence. Student was prompted by a staff member to wait in line behind another student when they were ready to pay for their items. Student did not want to wait and became upset. She threw some of the items. Student then got behind another staff member and head-butted her in the back. The first staff member reminded Student to “have safe hands” so she could pay for her items. Student turned and bit the second staff member on the forearm and kept biting until the first staff member intervened and took the items out of Student’s hands. The first staff member took Student outside. Once she was outside the store, Student kicked the wall and banged her head against the storefront window and continued her aggression against the staff. A third staff member walked Student away from the store and toward the bus stop. Student was transported back to Bridgeport where she was placed in the quiet area. Bridgeport prohibited Student from participating in the next community-based instruction outing. Bridgeport also considered switching the 1:1 aide and reevaluating Student’s behavior support plan.

23. Sometime following this incident, Bridgeport replaced Student's 1:1 aide with a larger, stronger woman. However, no modifications were made to Student's behavior support plan to address the escalating aggressive behavior.

24. On November 22, 2013, Parents wrote to Bridgeport's Principal and requested an emergency IEP meeting to address Student's severe ongoing behavioral episodes at the school. Although Parents had previously consented to placement at Bridgeport, they believed Bridgeport could no longer provide effective supports and services for Student to receive academic benefit.

25. An amendment IEP meeting was held at Parents' request on January 8, 2014. The IEP team discussed Student's aggressive behaviors across all settings. Parents expressed concern that Student's aggressive behaviors had escalated to dangerous levels and she required more capable adult assistance at school and in transit between home and school for her safety and the safety of others. Parents believed that Student's needs would be better met in a smaller educational setting with a more individualized focus on her behavioral needs. Parents requested placement at Academy. Despite Student's regression, the intensity of her aggression on staff and her self-injurious behaviors, District IEP team members believed Bridgeport could meet Student's needs and continued to offer placement at Bridgeport. Parents disagreed that Bridgeport was an appropriate instructional setting because it could no longer meet Student's behavioral and academic needs. Parent disagreed with District's conclusions and did not consent to the placement offer in the January 2014 amendment IEP.

26. Bridgeport did not reevaluate or revise Student's behavior support plan in the January 2014 amendment IEP.

27. Within two weeks following the amendment IEP meeting, Student was involved in yet another incident of physical aggression. On January 23, 2014, Student became violently aggressive while working on a project in Art class. She was seated at a

table next to a staff member when she began to bang the table with a closed fist. Student was reminded by another staff member to have a safe body towards staff and classmates. The first staff member asked Student to move to a different table. Once Student moved to a different table, she banged the table with a closed fist again. The second staff member asked Student to take an outside break. When Student walked outside the classroom, she kicked the classroom door. The second staff member followed Student outside the classroom and told her she needed to be safe in order to return to Art class. When the staff member turned to walk back into art class, Student hit the staff member with a closed fist on the shoulder blade. Student was removed from Art class and sent back to another classroom.

BRIDGEPORT SCHOOL

28. Bridgeport served special needs students from Kindergarten-age through 22 years old. There were a total of 300 Students on the campus Student attended. The campus also housed the Village Glen School, Sunrise School, and Pre School, in addition to Bridgeport. The Bridgeport program provided academic curriculum, life skills training, and vocational services for children with mild cognitive delays and challenges in the areas of social communication and/or language development, including autism spectrum disorder. Student attended a special day class with an academic and a therapeutic component that included behavior intervention, speech and language, and occupational therapy. She had a functional curriculum with functional mathematics, reading, and writing, pre vocation and vocational skills, taught in both a classroom and community based setting. A social skills program was embedded in the curriculum.

29. Dr. Bauman was the Director of Clinical Services for the Help Group for 15 years. She oversaw some school activities, conducted behavior assessments and developed behavior support plans. She also conducted weekly training of teachers,

aides, therapists and parents in areas including "the ABC's" (antecedent, behavior, consequence) of behavior, behavior management, Crisis Prevention Institute training on safe management of disruptive behavior, support plans, and applied behavior analysis. She supervised the behavioral staff including board certified behavior analysts and behavior intervention case managers. Dr. Bauman assessed Student in 2007 and 2011 and was familiar with her behavior needs. She frequently greeted Student on campus in the mornings and observed her during the morning warm up activity. She acknowledged that Student continued to struggle with delayed gratification and in dealing with her frustrations. She had seen Student push other students during the morning warm up activities. She was aware Student had several biting incidents in the 2012-2013 and 2013-2014 school years and that Student reacted aggressively to staff or an aide taking corrective action against her. She had received all incident reports involving Student but she did not know if Student's behavior support plan was ever reevaluated or modified to address the escalating aggressive behavior. She was also aware of Student's head butting behaviors and had addressed it in trainings with school staff, including the aides. She believed that even with Student's continuing behavioral challenges, Bridgeport was an appropriate placement and had provided Student a FAPE because Student was exposed to social opportunities such as movie night, fun Fridays, and school dances, and Student had achieved academic benefit by learning to transition to other classes with the support of a 1:1 aide. Dr. Bauman admitted that in the area of vocational and functional skills, Student was not ready to fully participate in the program but that she would benefit in the future from exposure to pre vocational and vocational skills by working on campus.

30. Andi Ambartsumyan was employed with the Help Group for 12 years. She was an Assistant Principal for eight years and at the time of the hearing was the Assistant Principal for the elementary and middle schools and the Bridgeport Plus

program. Her duties included supervising teachers and their classes, supervising the implementation of behavior support plans, implementing accommodations, assisting teachers, attending IEP meetings, and overseeing crisis intervention behavior training. Student was in one of the classes she supervised. Ms. Ambartsumyan saw Student daily but she did not teach or provide any instruction to Student. Student's behavior supports included a full time 1:1 aide, asking Student what behavior she wished to work on during the school day to earn rewards, access to the computer room, walks around the campus, a sensory diet, and visits to the sensory room three to four times per week with her occupational therapist and daily to deescalate after lunch before attending Math and Language Arts classes. Ms. Ambartsumyan attended the January 8, 2014 amendment IEP meeting where the IEP team discussed reevaluating and modifying Student's behavior support plan because of Student's escalating behaviors, but she confirmed after reviewing the behavior support plan that it was not modified. She was aware of the incidents involving Student but could not recall if those incidents were discussed at the January 8, 2014 IEP meeting. She was uncertain whether Student needed a smaller structured classroom environment but she believed Student had made academic progress at Bridgeport, Student had more social opportunity than could be derived from a smaller, more structured classroom setting, and that Bridgeport could meet her academic, social, and behavioral needs.

31. Valeria Garay was Student's special day class teacher since February 2013. She had a Mild/Moderate teaching credential and a Preliminary Special Education teaching credential. She had been employed at Bridgeport as a teacher specialist since February 2013. The special day class was a middle school/high school mixed class consisting of nine students with four adults including one teacher, two 1:1 aides, and a general aide. Student's courses in social skills, Science, Social Studies, vocational combined with life skills, community-based instruction, and Physical Education were

taught in Ms. Garay's classroom. Student transitioned with the support of her 1:1 aide to other classrooms for Math and Language Arts. Ms. Garay reviewed Student's IEP and behavior support plan and was familiar with her needs. Student did not have a specifically defined behavior program other than scheduled breaks and the ability to take additional breaks as needed.

32. Ms. Garay's classroom was not located on the high school campus. It was located in the elementary and middle school building. The class was highly structured to provide for positive reinforcement with breaks and activities and a positive rewards system. Data was collected daily by Student's 1:1 aide and reviewed by the teacher and a behaviorist. Other behavior strategies included redirection, verbal prompting, and sensory breaks. Student received approximately 15 sensory breaks per day as needed, during which she could go to the Refocus Room, Quiet Area, or Observation Room. The sensory room was provided to Student three to four times per week to work with the occupational therapist after lunch. Student's behavior was also affected by her menstrual cycle and her behaviors increased around those dates. Student was the most aggressive child in the special day class, which generally interfered with her learning, interaction with peers, and participation in community-based instruction. She engaged in banging with a closed fist, hitting walls, kicking, biting, pinching, punching, hitting stationary objects with her head, and screaming in the classroom. Her aggressive behaviors lasted throughout the day at different times. Student kicked, scratched, punched, and bit Ms. Garay. Ms. Garay believed these behaviors impeded Student's access to the curriculum and impeded her overall academic progress at Bridgeport. Ms. Garay was able to redirect Student to complete assignments in her class and although she worked with Student to insure completion of her special day class classwork, she was frustrated with Student's behaviors and their negative impact on the other students in the classroom.

33. Various incidents involving Student over the 2013-2014 school year resulted in Student's removal from Math and Language Arts classes on numerous occasions. During the 2013-2014 school year, the Math teacher effectively banned Student from the class because of concern for the safety of the other students in the class, and despite the assignment of a new aide and the involvement of a behaviorist, Student's behaviors still interfered with her learning and socialization. Ms. Garay opined that Bridgeport was an appropriate placement but she agreed with Parents that Student may need a placement with more structure and support. Ms. Garay's testimony carried more weight than the Clinical Director's and Assistant Principal's on the issue of appropriateness of placement because she had day-to-day contact with Student in the classroom and was knowledgeable of the effect of student's disruptive behaviors, the safety concerns to staff and other students, and how it resulted in loss of educational benefit to Student.

PARENTS' PROPOSED PLACEMENT AT ACADEMY FOR THE ADVANCEMENT OF CHILDREN WITH AUTISM

34. Sometime prior to the January 8, 2014 amendment IEP meeting, Parents and Student visited and observed Academy. Mother observed that the classrooms were small with some students receiving 1:1 instruction. She observed some student interaction. She also observed Student's positive response to the school setting.

35. Leslie Michel Ghrist was the Administrator for Academy, a nonpublic school certified by the California Department of Education. Academy served children with special needs and a variety of challenges in grades K through 12, up to 22 years of age. Academy had contracts with various school districts throughout Southern California, but did not have a contract with District. However, District had placed other students there pursuant to settlement agreements. The academic program met State standards and offered both a core curriculum and alternate curriculum that mirrored the

programs offered by District. There were two core curriculum classes and two alternate curriculum classes, for a total of four classes (one class each for elementary school students and one class each for middle and high school students combined). There were no more than eight students for each class and there were opportunities for social interaction with all students and social activities. The student teacher ratio was either 2:1 or 1:1, depending on the child's unique needs. Academy's program provided all related services in addition to individually designed therapeutic and behavior programs for each Student. All instructors were certified and credentialed in their subject matter area. All instructors were trained in applied behavior analysis and Crisis Prevention Institute protocols. The alternate curriculum also included a vocational and functional skills program with community-based instruction. Community-based instruction programs were tailored to each student's individual needs. All adults and clinicians assigned to the classroom accompanied students on their community-based instruction outings. Generally there were four community-based instruction outings per month and possibly more if required by a student's IEP.

36. Ms. Ghrist met and observed Student at Academy. She also reviewed Student's current IEP and was informed of Student's aggressive behaviors. Ms. Ghrist was pending certification as a Behavior Analyst at the time of the hearing. She opined that Academy was an appropriate placement and could meet Student's unique needs, including safety. Student would be placed in the alternate curriculum class with middle and high school students. There were six students in the class with six adults, which would afford Student the 1:1 educational and behavior support she needed.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are (1) to ensure that 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 employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34 (2006); Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals

³ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals (Ninth Circuit) has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. 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, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511 (2006); Ed. Code, §§ 56501, 56502, 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. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this case, Student, as the complaining party, bears the burden of proof.

ISSUE ONE: APPROPRIATENESS OF PLACEMENT JANUARY 21, 2012 THROUGH OCTOBER 14, 2013

5. Student contends District denied her a FAPE because it failed to provide a placement appropriate to meet her needs from January 21, 2012 through October 14, 2013. Student argues that placement at Bridgeport was not appropriate and was not based on Student's unique individual needs because Student failed to meet her behavior and social and emotional goals and Student's aggressive behaviors escalated and resulted in the loss of educational benefit to Student. District disagrees and contends that the placement District provided at Bridgeport by the October 2011 and October 2012 IEP's were appropriate and provided Student a FAPE in the least restrictive environment.

6. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203, fn. 25.) A student may derive educational benefit under *Rowley* if some of her goals and objectives are not fully

met, or if she makes no progress toward some of them, as long as she makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with her abilities. (*Walczak v. Florida Union Free School Dist.* (2d Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *M.H. v. Monroe-Woodbury Central School Dist.* (S.D.N.Y. March 20, 2006, No. 04-CV-3029-CLB) 2006 WL 728483, p. 4; *Houston Indep. School Dist. v. Caius R.* (S.D.Tex. March 23, 1998, No. H-97-1641) 30 IDELR 578; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp. 442, 449-450.)

7. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) 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 must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

8. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that

education in general education classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).) In 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 takes into account 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.)

9. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) “the educational benefits of placement full-time in a regular class”; 2) “the non-academic benefits of such placement”; 3) “the effect [the student] had on the teacher and children in the regular class”; and 4) “the costs of mainstreaming [the student].” (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette’s Syndrome].)

10. If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. Indeed, the continuum of program options ranges from the least restrictive to the most restrictive, from general education settings to institutional settings. (Ed. Code, § 56361.)

11. Student's complaint presents no issue regarding the appropriateness of her educational placement along the continuum of program options. Student did not dispute that a special day class at a nonpublic school was the appropriate setting for her and raised no argument about any lack of appropriate inclusion with or exposure to the general education curriculum or typically developing peers. Student's complaint focuses on the inadequacy of the behavior supports, aides, and programs Bridgeport afforded Student, and requests that OAH award her placement at a different nonpublic school, which she contends has a program more appropriate to serve her unique needs. Therefore, as shown by the evidence, Student's placement in a special day class at a nonpublic school is the least restrictive environment.

12. Student failed to show that placement at Bridgeport from January 2012 to the end of 2011-2012 school year, the 2012 extended school year, and the 2012-2013 school year denied her a FAPE for two reasons. First, by October 11, 2012, Student met the goals and objectives of her prior IEP in language/pragmatics, functional reading,

functional writing, and occupational therapy. Therefore, Student made some academic progress, even though she had not met her goals in functional mathematics, social skills, or behavior. A student may derive educational benefit under *Rowley* even if some of her goals and objectives are not fully met, or if she makes no progress toward some of them, as long as she makes progress toward others. Second, Student presented no substantial evidence that the failure to have a permanent teacher in the 2012-2013 school year denied her a FAPE. Although Mother testified that Student's behaviors escalated during the 2012-2013 school year, no Communication Logs were produced to show that the instability in teaching staff and lack of consistent structure or adequate behavior support caused Student's behaviors to escalate to unsafe levels in school and that she did not receive educational benefit in that school year. Student did not meet her burden of demonstrating that she was denied a FAPE from January of 2012 through October 14, 2013. (Factual Findings 1 through 13; Legal Conclusions 1-12).

ISSUE TWO: APPROPRIATENESS OF PLACEMENT AND OFFERS FROM OCTOBER 14, 2013 THROUGH THE 2014-2015 SCHOOL YEAR

13. Legal Conclusions 1 through 10 are incorporated by reference.

14. Student contends District denied her a FAPE because it failed to provide an appropriate placement from October 14, 2013 through the 2014 extended school year and part of the 2014-2015 school year. Student argues that continued placement at Bridgeport was not appropriate and was not based on Student's unique individual needs because Student's behavior became much more aggressive starting on August 26, 2013 and the Bridgeport program was not adequate to address her needs. Further, Student's continued failure to meet her academic and social goals indicated the Bridgeport program was not meeting her unique needs. District disagrees and contends that the placement District provided and offered at Bridgeport by the October 2013 and January 8, 2014 amendment IEP's were appropriate and provided Student a FAPE.

16. Student had especially unique needs. Student had a long history of aggressive behaviors, failure to comply with teacher instructions, and disrupting the classroom. Further, the nature of Student's social skills and communications deficits and inability to transition required the constant support of a 1:1 aide. Student's aggression was triggered by either frustration when introduced to a new concept, anger over having to perform a non-preferred activity, or sensory issues which manifested in difficulty to self-regulate behavior, controlling fear/anxiety, or quenching her need for strong sensory input. Student also had a tendency to be self-abusive, pinching, biting, or banging her own body into the walls or doors during play, and frequently hurting other children while playing.

17. Communication Logs and Student's reports to Parents established that Student's behaviors were escalating based on incidents occurring from August 2013 to December 2013 and continuing into January 2014. Student's behaviors escalated in intensity and duration. The testimony of Dr. Bauman, Ms. Garay, and Mother established that Student attacked, bit, scratched, kicked, punched, and pushed adult staff, her teacher, her 1:1 aide, and her peers. She also head butted adult staff and engaged in dangerous self-injurious behaviors by banging her head through the transport bus window and into a store front window while on a community-based instruction outing.

18. By the October 14, 2013 IEP meeting and the January 8, 2014 amendment IEP meeting, Student still had not met her social skills, behavior support, or sensory goals, which were essentially the same goals she had since her October 2011 IEP. She needed maximum prompting in social skills, still needed a high level of behavioral support, and required several prompts to address her sensory goals. District's argument that Student received educational benefit at Bridgeport after October 14, 2013 is not supported by the evidence. Contrary to District's witness' testimony, the evidence indicated that, overall, Bridgeport's behavior and social skills programs were inadequate

to meet Student's behavior needs. Student was the most physically aggressive child in her class and Student's behaviors impeded her access to the curriculum and her overall academic progress. Academically, Student had not met her language/pragmatics goal or her functional math goal and still struggled with coins. Student had experienced regression over the instructional break before the beginning of the 2013-2014 school year. Student was no longer making adequate academic progress. Student's behaviors frequently caused her removal from Language Arts class and her permanent removal from Math class. Student required a more structured small classroom environment.

19. In sum, based upon what the IEP team knew about Student's aggressive behaviors, disregulation, and academic struggles at the time of October 14, 2013 and January 8, 2014 IEP meetings, it was not objectively reasonable to offer continued placement at Bridgeport. Accordingly, the October 14, 2013 IEP and January 8, 2014 amendment IEP offers of placement at Bridgeport denied Student a FAPE.

20. Student proved by a preponderance of the evidence that District's offer of placement from October 14, 2013 for the remainder of the 2013-2014 school year, 2014 extended school year, and the beginning of the 2014-2015 school year did not provide Student a FAPE. (Factual Findings 1 through 12 and 14 through 36; Legal Conclusions 1 through 10 and 14 through 20.)

REMEDIES

1. Student prevailed on Issue Two, in that District did not provide Student an appropriate placement from October 14, 2013 through the end of the 2013-2014 school year and did not offer Student an appropriate placement for the 2014 extended school year and the beginning of the 2014-2015 school year. As a remedy, Student requests placement at Academy for the 2014 extended school year and the 2014-2015 school year. District contends Student is not entitled to the remedy because District provided a

FAPE and, if Student prevails, Student failed to request placement at Academy as compensatory education.

2. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496). These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student v. Puyallup School District*, (9th Cir. 1994) 31 F.3d 1489, 1497.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

3. Academy is a small nonpublic school that provides 1:1 or 2:1 instructional services for special needs children with behavioral challenges. Academy is a certified nonpublic school with a small campus that has 18 students and provides curriculum compliant with State standards. The staff are certified and credentialed teachers and clinicians. Because Student has autism and severe behavioral challenges, she would be placed in an alternate curriculum class and provided programs that mirror District and Bridgeport. Although Academy had class sizes similar to Bridgeport, Academy would provide a more highly structured intensive behavioral program for Student.

4. There is no evidence of inappropriate conduct or delay on the part of the Student. Equitable factors support an order of placement at Academy as compensatory

education for District's denial of FAPE from October 14, 2014 through the remainder of the 2013-2014 school year. Further, because District did not have an appropriate offer in place prior to the start of the extended school year during summer of 2014, or prior to the beginning of the 2014-2015 school year, a prospective placement award through the end of the 2014-2015 school year is appropriate. (Factual Findings 1 through 12 and 14 through 36; Legal Conclusions 1 through 10; 14 through 20, and 1 through 4.)

ORDER

1. District is ordered to fund Student's placement at Academy for the Advancement of Children with Autism for the 2014 extended school year and the 2014-2015 regular school year.
2. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to 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. Here, District prevailed on Issue One, and Student prevailed on Issue Two.

RIGHT TO APPEAL THIS DECISION

This decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it (Ed. Code, § 56505, subd. (k).)

Dated: June 13, 2014

/s/

STELLA L. OWENS-MURRELL

Administrative Law Judge

Office of Administrative Hearings