

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

TEMPLE CITY UNIFIED SCHOOL DISTRICT,

OAH Case No. 2018060785

---

TEMPLE CITY UNIFIED SCHOOL DISTRICT

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2018070829

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on June 18, 2018, naming Temple City Unified School District. On June 27, 2018, Temple City served its written response to the complaint on Student. On July 19, 2018, Temple City filed its complaint with OAH, naming Student. On July 26, 2018, OAH granted Temple City's motion to consolidate the complaints, making Student's case the primary case. OAH granted a joint request for continuance on July 31, 2018.

Administrative Law Judge Cole Dalton heard this matter in Temple City, California, on February 5, 6, 7, 2019, and March 6, 2019.

David German, Attorney at Law, represented Student. Mother attended each day of hearing. Father attended the first day of hearing.

Meaghan Kinsey, Attorney at Law, represented Temple City. Mindy Arnold,

Director of Special Education, attended each day of hearing on behalf of Temple City.

At the parties' request, the matter was continued until March 20, 2019, to permit the parties to file written closing arguments. Upon timely receipt of closing arguments on March 20, 2019, the record was closed and the matter submitted for decision.

## ISSUES<sup>1</sup>

### DISTRICT'S ISSUE

(1) Did Temple City offer Student a FAPE in its spring 2018 IEP, such that the IEP may be implemented over lack of Parental consent<sup>2</sup>?

### STUDENT'S ISSUE:

(2) Did Temple City deny Student a free appropriate public education for the 2018-2019 school year, as set forth in his spring 2018 individualized education program, developed at IEP team meetings on February 5, 2018, March 6, 2018, April 4, 2018, and June 1, 2018, by failing to offer placement with his typically developing peers to the

---

<sup>1</sup> On January 21, 2019, Student filed a Notice of Withdrawal of Issue 2, regarding provision of speech and language services. The remaining issues have been rephrased and reorganized for clarity. The ALJ has reworded and clarified some issues stated in the Parties' prehearing conference statements as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made.

<sup>2</sup> The parties stipulated that goals and services were not in dispute. Their written, signed stipulation was made part of the record at hearing.

maximum extent appropriate under 20 U.S.C. § 1412(a)(5)?

## SUMMARY OF DECISION

Student did not meet his burden of proving that full inclusion in fourth grade general education with appropriate supports offered him a placement in the least restrictive environment appropriate in light of his circumstances. While Student met most of his academic goals, the evidence showed that progress was tied to instruction received from his aide and resource provider. Student's general education academic instruction bore little resemblance to instruction received by his peers. At the same time, Student demonstrated that he received other benefits that support mainstreaming in a general education classroom during group-based or hands-on projects. Student demonstrated increased language, social interaction, and behavior modeling benefits from inclusion.

Though Temple City conducted a functional behavior assessment and drafted a behavior intervention plan as part of Student's spring 2018 IEPs, the plan did not include functionally equivalent replacement behaviors. Moreover, the plan did not specifically define either Student's target behaviors or staff response to such behaviors during times of early escalation, problem behaviors, de-escalation, or post incident. Therefore, the plan was incomplete and could not be implemented as written.

Further, the spring 2018 IEPs did not constitute a clear written offer regarding Student's inclusion in general education. Temple City did not define the courses or frequency and duration of inclusion, but simply identified inclusion in electives, core classes, recess, lunch, and physical education. The IEPs offered inclusion for 12 percent of Student's school day, which did not provide sufficient time for Student to attend instruction in a general education classroom.

Temple City will not be allowed to implement its spring 2018 IEPs. Rather, Student shall remain in his last agreed upon and implemented placement and Temple

City must develop an individualized education program to address the deficits outlined in this decision.

## FACTUAL FINDINGS

1. Student was a nine-year-old, third grader who qualified for special education and related services under the eligibility category of intellectual disability at the time of hearing. He resided with Parents within Temple City's boundaries at all relevant times.

2. Student was diagnosed with Down Syndrome and demonstrated significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior. He was legally blind, wore glasses, and used accommodations such as large print materials, a bookstand, and dark lined paper. He communicated by using short utterances and pointing to pictures on his iPad.

3. Student attended third grade, during the 2017-2018 school year, fully included in general education with the support of a one-on-one aide. He received related services in assistive technology, speech and language, occupational therapy, adaptive physical education, specialized vision services, inclusion specialist support, and pull-out specialized academic instruction with a resource specialist.

4. Student's goals addressed fine motor needs, which affected his ability to manage clothing and his backpack, writing, copying, and cutting; and gross motor needs including jumping.

5. Student demonstrated difficulty transitioning from one activity to another and from one class or service to another, often saying "no" before every transition. Student made moaning or grunting noises and said "no" during class. Temple City successfully implemented picture cards, timers, and visual schedules to help Student transition and remain on task. Student also responded to first-then statements, such as suggesting that he first complete the task and then receive time on his iPad or other

preferred activity as reinforcement.

#### FEBRUARY 5, 2018 IEP TEAM MEETING

6. Temple City properly noticed and conducted an IEP team meeting on February 5, 2018, to develop Student's annual IEP. All necessary Temple City team members attended the meeting. Mother attended with advocate Bridgette Ammons.

7. During the meeting, the team reviewed Student's present levels of performance and progress on goals. Student enjoyed using technology, was adept at using his iPad, and demonstrated recent improvement in transitions. He used two- to four-word phrases verbally and on his iPad to communicate wants and needs. Student inconsistently completed assignments using a preferred activity for motivation. Mother expressed concern over the amount of Student's pull-out service time and the effect that it had on his ability to participate with typically developing peers in his general education classroom.

8. Overall, Student met 16 of 22 goals in the areas of academics, vision impairment, occupational therapy, adaptive physical education, speech and language, inclusion, and social behavior. Student met five of seven academic goals, in the areas of reading vocabulary, comprehension, and decoding; and math concepts for addition and subtraction. He did not meet his goal for recalling and sequencing beginning, middle, and end of major story events using core reading curriculum. He performed some sequencing, using pictures and short phrases. He could not complete sequencing because he lost focus during instruction using modified curriculum. In math, he could count independently from one to 15, but did not reach his goal of counting to 30. He counted from 15 through 20 during half of his trials, but required prompting for correct numbers.

9. The meeting adjourned after a review of progress on goals. The team agreed to reconvene to review pending assessments.

## TEMPLE CITY'S MARCH 5, 2018 PSYCHOEDUCATIONAL ASSESSMENT

10. School psychologist Jonathan Hsu conducted Student's psychoeducational assessment, completed on March 5, 2018. Mr. Hsu held a bachelor of arts in psychology and masters of science in clinical psychology. He held educational psychology and pupil personnel services credentials and worked as a school psychologist for over two years at the time of hearing. Mr. Hsu testified knowledgeably about his assessments, opinions, and conclusions regarding Student.

11. Mr. Hsu reviewed Student's records; obtained input from Mother, Student's general education teacher Kristen Shore, and resource specialist teacher Ellen Luu; observed Student across school settings; and administered a variety of standardized assessments. Mr. Hsu reported observations in his functional behavior assessment.

12. Mother reported that Student developed a resistance to coming to school during the 2017-2018 school year. He had difficulty transitioning from one activity to another, even at home. To support inclusion with typically developing peers, Mother suggested giving Student classroom tasks such as door monitor or erasing the whiteboard to encourage engagement, participation, and interaction. Mother shared motivating strategies used at home, such as making tasks like tooth brushing into games and using pictures of a preferred item (such as pizza) for positive reinforcement. The team incorporated a pizza icon into Student's token reinforcement system.

13. Mr. Hsu interviewed Ms. Shore. Ms. Shore held a bachelor of arts in history and a masters of education in both special education and educational technology. She held a clear multiple subject teaching credential and several credentials, certificates, and specialized training, which allowed her to work with a wide variety of students, including those with behavior issues, special needs, and gifted and talented. Ms. Shore's testimony demonstrated an in depth familiarity with Student and his needs. Her testimony was

clear, consistent with Student's educational records, and undisturbed on cross-examination. She was a credible witness and her testimony was given much weight.

14. Ms. Shore worked with Student's aide, Ms. Tam, to develop Student's independence in general education classes by tasking Student to pass out papers to peers, hold the door open, and learn to greet peers and adults by their names. She observed Student's improvement in transitions both between class and related services and from one task to another.

15. At hearing, Ms. Shore described Student's participation in her third grade general education classroom. Student missed academic instruction due to the amount of pull-out services required in his IEP. He worked on tasks aligned with his IEP goals but different from academic instruction being received by typically developing peers. Classroom discussions were difficult for him to follow based upon his limited attention and cognition. When not motivated to participate, Student became playful, tried to engage his aide, reached for his plush toy animal, or put his head down on his desk.

16. Ms. Shore described Student as, generally, functioning at or below beginning kindergarten. While third grade peers engaged in literary analysis, Student sounded out consonant-vowel-consonant words, learned to use plurals, and began to read. During math lessons, she engaged Student by counting, while others worked on multiplication. Peers moved from one activity to another in a more rapid fashion, while Student's aide prompted him to new activities. She correlated Student's progress in third grade to his related services and modified curriculum, rather than exposure to general education curriculum.

17. During her interview with Mr. Hsu, Ms. Luu explained her use of highly preferred reinforcements during resource sessions to maintain Student's compliance. Ms. Luu held a bachelor of arts and sciences in psychology and a masters of art in teaching. She held a mild to moderate preliminary credential and a clear education

specialist credential. She worked as a resource specialist teacher for approximately six years at the time of hearing. Her testimony was direct, clear, and not overreaching. She demonstrated significant knowledge of Student's needs and was found credible.

18. During assessment, Ms. Luu explained that Student's attention level varied daily. Student's noncompliance prevented him from accessing services and classroom curriculum. Ms. Luu opined that Student struggled with comprehension of grade level text even with modified instructional material. For example, he answered comprehension questions with one-word responses or by pointing at pictures. In math, Student worked on adding and subtracting within five, relying on use of pictures or manipulatives.

19. At hearing, Ms. Luu explained that Student struggled with modified material in his third grade general education classroom. Fourth grade curriculum involved more academic rigor. She opined that Student would have more time to work on academic goals addressed in a special day class. She described Student's off-task behaviors, in general education, such as drawing, playing with fidget toys, or taking breaks during instruction. He enjoyed stuffed animals and puppets, which he would line up, and pretend teach. Problem behaviors included work refusal, transition refusal, crying, and laying on the floor. She found that Student cooperated more during related services, where he was taught at his level, sat close to the instructor, obtained more reinforcers, and had frequent breaks.

20. Mr. Hsu administered Woodcock-Johnson Tests of Achievement, Fourth Edition, over several sessions, in 30-minute increments, to address Student's attention issues. Student demonstrated limited conversational proficiency, and was often distracted or uncooperative. He required enlarged print material, re-reading and rephrasing of test questions, and use of his iPad for writing samples. Student obtained scores in the extremely limited range in all areas, which included achievement, broad



reading, broad mathematics, basic reading skills, math calculation skills, broad written language, written expression, and academic applications.

21. Mr. Hsu administered Vineland Adaptive Behavioral Scales, Third Edition, to assess Student's ability to perform daily activities required to care for himself and interact with others. Mr. Hsu provided rating scales to Mother, Ms. Shore, Ms. Luu, and Ms. Tam. All raters scored Student in the low range across domains, which included communication, daily living, socialization, and motor skills.

22. Mr. Hsu compared Student's 2018 and 2016 Vineland results. Overall, skills across domains and raters decreased, though remaining within the low range.

23. Mr. Hsu provided rating scales for Behavior Assessment System for Children, Third Edition, to Mother, Ms. Shore, Ms. Luu, and Ms. Tam. Overall, compared to 2016 testing, Mother's ratings showed an increase in clinical scales in all areas except conduct problems and withdrawal. Student's scores, compared to 2016 teacher reports, remained within the same ranges, some dropping, some increasing, except in areas of somatization and learning problems, which reached into the clinically significant range. Adaptive behavior scores dropped slightly across all areas of adaptability, social skills, leadership, study skills, functional communication, and adaptive skills, but remained in the at-risk range.

24. Mr. Hsu made no conclusions about general education inclusion in his report, leaving the decision to the IEP team.

#### TEMPLE CITY'S MARCH 5, 2018 FUNCTIONAL BEHAVIOR ASSESSMENT

25. Concurrent with the psychoeducational assessment, Mr. Hsu conducted a functional behavior assessment of Student, resulting in a report dated March 5, 2018. He defined off-task behaviors as Student leaving his seat, wandering around the classroom, talking to a peer or staff, or turning away from instruction. Non-compliance was defined as intentional refusal of a task such as saying "no," walking away, turning away from

instruction, or pushing materials away. Student's behaviors in general education class ranged from refusing to work by sitting on the ground to putting his head on the desk and falling asleep. Various assessed behaviors lasted from 30 minutes to over two hours.

26. Mr. Hsu administered Behavioral Observation of Students in Schools, a measure designed for direct observation of academic skills. Mr. Hsu collected data every 30 seconds on active and passive academic engagement and off-task behavior. He collected data on peers for comparison.

27. Mr. Hsu observed and collected data during general education teacher lectures, teacher reading to class, and independent work. Ms. Shore's class contained 20 students and Student was supported by his one-on-one aide. During a resource session, Mr. Hsu observed Student receiving spelling and reading lessons from Ms. Luu. He also observed Student and seven to eight others engaging in adaptive physical education.

28. Student was on-task nearly 70 percent of the time during an art project to make a standing person from a pipe cleaner and a lifesaver. He was on task over 90 percent of the time during adaptive physical education, where he was stretching, warming up, throwing foam balls at peers and staff, and chasing peers around the classroom. During resource sessions, he was on task 85 percent of the time while he was reading, writing on his worksheet, and cutting paper for an art project.

29. Student engaged in off-task behavior frequently during general education teacher instruction, specifically, from 70 percent during independent work to 100 percent during teacher-led reading and vocabulary work. In contrast, typically developing peers demonstrated on-task behaviors 80 to 100 percent of the time.

30. Mr. Hsu determined Student's off-task behaviors functioned to avoid or escape non-preferred tasks or demands. His report did not identify specific functionally equivalent replacement behaviors, meaning replacement behaviors that meet the same identified function as the problem behavior. Rather, Mr. Hsu concluded that Student's

on task behaviors could be reinforced through the use of a token system. The token system was already in place and not wholly effective. The report did not offer any new insight into what may help Student stay on-task.

### MARCH 6, 2018 IEP TEAM MEETING

31. Student's IEP team continued his annual meeting on March 6, 2018, with proper notice and all appropriate Temple City members. Mother and Ms. Ammons attended the meeting. The team reviewed Mr. Hsu's recent psychoeducational and functional behavior assessments.

32. Parents expressed concern over the amount of Student's pull-out services affecting interaction with typically developing peers; Student's need for visual supports; the pace of homework, specifically, spelling words that are very long and difficult for Student; and her desire that Student be fully included.

33. Ms. Shore shared Student's good progress and slightly increased attention to tasks. However, Student continued to demonstrate prompt dependence. She described Student's improvement during library time, though he still required help. Student followed the physical routine of peers by obtaining paint sticks to mark where to put books back on the shelves, getting in line to check out, and giving the librarian his library card. Peers encouraged and invited him to participate and helped carry his books. Student found the experience motivating and learned through physical and verbal examples provided by his peers.

34. At the IEP meeting, Ms. Shore supported placing Student in a special day class with inclusion in a general education classroom for part of his school day. She explained, at hearing, that's Student's curriculum in third grade general education was extremely modified and that fourth grade classes were larger and moved through academic tasks more quickly. Ms. Shore opined that Student would make greater gains in a smaller class setting due to his ability level and attention issues.

35. Mr. Hsu reviewed findings from Student's psychoeducational and functional behavior assessments. Temple City recommended development of a behavior intervention plan to implement specific interventions to address Student's problem behaviors with a consistent, unified approach across staff, teachers, aides, and service providers. The plan was never fully developed, in that it did not identify functionally equivalent replacement behaviors, strategies to learn the replacement behaviors, or procedures needed for establishing, maintaining, or generalizing the replacement behaviors. Moreover, the plan was left blank where it called for a description of staff response to various phases of problem behavior.

36. Dr. Paula Santos, was critical of Mr. Hsu's reports at hearing, and found the team fell short of creating an effective behavior intervention plan. Temple City retained Dr. Santos, who conducted a record review, observations, and treatment plan for Student.<sup>3</sup> Dr. Santos held a bachelor of arts in psychology and a masters and doctorate degree in clinical psychology. She was board certified as a doctoral level behavior analyst. She was extensively experienced in the areas of psychology and behavior as an adjunct professor, clinician, and director of clinical services. She was careful and specific in her testimony, which was undisturbed on cross-examination. She was a credible witness and her testimony was given significant weight.

37. Dr. Santos found the behavior intervention plan lacking for several reasons. First, reactive strategies were not identified in the plan. Reactive strategies meant what to do when Student engaged in problematic behavior. Reactive strategies included interrupt and redirect at earliest stage of the escalation cycle, focusing on the

---

<sup>3</sup> Dr. Santos developed a report and behavior intervention plan in October 2018, subsequent to Student's spring 2018 IEPs, which are not considered as part of Temple City's FAPE offer in this Decision.

positive, compliance training and follow through to extinguish escape; blocking and redirecting; withholding desired activities or items for access extinction; requiring Student to restore his environment; and data collection. Access extinction meant not providing Student with positive reinforcers, which unintentionally served to reinforce problem behaviors rather than eliminating them.

38. Second, Dr. Santos opined, prevention and teaching strategies, to help Student avoid escalation at the outset, were not described. Dr. Santos recommended priming, visual schedules, choices, first-then, behavior specific social praise or attention, functional communication training, focus on positives and redirection, structured reward system, and use of daily communication logs with family feedback.

39. Third, the plan did not identify functionally equivalent replacement behaviors. The plan merely stated that once Student was on task, that behavior should then be reinforced using his token system. Dr. Santos described functionally equivalent replacement behaviors. For example, at the earliest sign of problem behavior, staff can prompt Student to ask for a break using functional communication instead of using target or problem behavior like swiping instructional materials off his desk.

40. Dr. Santos described antecedents and consequences of Student's behaviors. For example, when presented with an academic task in general education, Student would say "no" or put his head down. When prompted to comply, Student would escalate by sliding under his desk and laying on the floor. Peers provided positive reinforcement by going over to him and laughing. Student's aide would attempt to offer choices or rewards and repaired the environment while Student remained on the floor. Escalation of the maladaptive behavior resulted in Student obtaining attention and escaping academic tasks. Student would lay on the floor until the avoided activity ceased. This cycle served to reinforce maladaptive behaviors, since Student obtained what he sought and did not have the consequence of repairing his own environment.

41. Dr. Santos visited Student's general education classroom approximately three weeks prior to the hearing. She observed a decrease in Student's more disruptive behaviors, though she opined that he engaged in behaviors that impeded his learning and that of others. She also observed that his aide required further training in use of behavior intervention strategies early, rather than after Student escalated.

42. Dr. Santos was familiar with the special day class offered to Student in his spring 2018 annual IEP. The class consisted of eight to 10 children of varying grade levels, working on individualized goals. The special education teacher differentiated instruction toward students' ability levels, rather than teaching individual students in a secluded manner. Behavior supports were embedded in the classroom and the teacher and aides were trained to use preventative strategies, reinforcers, extra recess time, special treats on Fridays, and individualized reward systems. The special education teacher presented tasks in more engaging or fun ways. Both special and general education fourth grade classes worked on core competency, but Dr. Santos opined the special education class had more flexibility to address individualized student needs and use methods of instruction more interesting to students. She did not recommend placement for Student, but opined that if he remained in general education, he required aide support.

43. At the IEP meeting, the speech language pathologist reported that Student made strong gains in communication. Student used total communication, which included speech, gestures, augmentative communication devices, to express his needs across settings. He continued to demonstrate significant delays in receptive and expressive language, and speech production skills. However, he was motivated to work on speech and had increased expressive communication to simple one to three-word phrases. Moreover, his functional oral communication had improved. He relied on his iPad to clarify communication and personal events and was able to communicate with

peers.

44. The IEP team did not complete Student's IEP on March 6, 2018. The team members agreed to reconvene, and the meeting was adjourned.

#### APRIL 4, 2018 IEP TEAM MEETING

45. Student's annual IEP team meeting was reconvened on March 6, 2018, with proper notice and all appropriate Temple City members. Mother and Ms. Ammons attended the meeting.

46. Temple City reviewed draft goals. Mother and Ms. Ammons asked questions, provided input, and obtained modification to proposed goals. The team reviewed Student's services, supports, accommodations, and placement.

47. Temple City team members expressed concern that general education was not the proper setting in light of Student's behaviors and social emotional well-being. They opined behaviors stemmed from his struggles accessing modified grade-level curriculum. Student showed more success in smaller settings where the program was taught at his skill and instructional level.

48. Temple City made an offer of FAPE at the conclusion of the meeting, consisting of 1390 minutes per week of specialized academic instruction in a special day class; 1800 minutes per week of intensive individual services (one-on-one aide); 30 minutes per month of specialized vision services; three sessions per week of 30-minute pull-out speech and language therapy; 30 minutes per week of push-in speech and language therapy; 60 minutes per week of occupational therapy; two sessions per week of 30 minute adaptive physical education; 1800 minutes per year of assistive technology for consultation and collaboration; 60 minutes per week of inclusion support.

49. Temple City offered extended school year services to prevent regression of Student's skills. Such services included specialized academic instruction with a one-on-one aide; speech and language; adapted physical education; and occupational therapy.

50. Mother verbally agreed to goals and related services, but did not sign consent for implementation of any portion of the IEP.

#### JUNE 1, 2018 IEP TEAM MEETING

51. Temple City properly noticed an IEP team meeting, held on June 1, 2018, to discuss Student's transition to fourth grade at a new school. All appropriate Temple City team members, Parents, and Ms. Ammons attended the meeting.

52. Parents visited the proposed special day classroom. They did not agree to a change of placement from general education to a special day class. They believed Student made progress in communication and socialization because of his past exposure to typical classmates and that research showed that children like Student benefitted from such exposure, which could not be gained in a special day class. They believed that Student's progress on goals and other areas demonstrated benefit from attending general education.

53. Special education teacher Heather Kincart, attended the meeting and discussed her special day class at Cloverly, where Student would attend fourth grade. At hearing, Ms. Kincart described her class and recommendations for Student's placement. Ms. Kincart taught 10 students in 4th, 5th, and 6th grade with assistance from one general aide and three one-on-one aides. The one-on-one aides worked with other students while not attending to the health needs of assigned students. Students in her class were taught core curriculum, at their level, in small groups of four to five, and, when needed, one-on-one.

54. Ms. Kincart tutored Student in previous years and was familiar with his needs and learning style. Student required a good deal of redirection and worked best when materials were highly motivating to him. This meant teaching with hands-on projects, using pictorial prompts, and providing token rewards for preferred items. In her special day class, Ms. Kincart was able to slow down academics by spending several



days, even weeks on a topic, to address student needs. By contrast, general education 4th grade students move through academic curriculum more quickly and cannot pace the class to Student's needs.

55. At hearing, Ms. Kincart described inclusion, facilitated play with general education peers, and use of compassionate peers for socialization of her students. Based upon her experience and training as a special education teacher and her specific knowledge of Student, she testified that Student would benefit from inclusion in social studies or science while the general education class worked on group activities with hands-on projects. Student was able to benefit from social interaction with typically developing peers during such activities. Student was not motivated to engage in pencil and paper style instruction during mainstreaming.

56. Student's fourth grade general education teacher, Andrea Saldana, agreed at hearing that Student benefitted from inclusion during hands-on science activities and coding, which she described as core academic subjects. She was not aware of any electives in 4th grade, though Student's IEP offered mainstreaming in electives, core classes, and unstructured time.

57. Ms. Kincart recalled extensive discussion on inclusion during the June 2018 IEP. Temple City's team discussed various mainstreaming opportunities, while Parents sought full inclusion in general education. The team did not offer a specific amount of time for mainstreaming. Typically, the offer was placed on the notes page or described as a percentage of time Student would spend in general education. Temple City offered Student mainstreaming for 12 percent of his school day. Based upon the testimony of Ms. Kincart and Ms. Saldana, 12 percent of the school day did not provide sufficient time for mainstreaming in a 4th grade general education class. That amount of time covered only recess and lunch.

58. Special education director Mindy Arnold opined, both during the meeting

and at hearing, that Student's modified work would be even more difficult in fourth grade and that Student would have opportunities to interact with typically developing peers in electives, some core classes, and unstructured time including lunch and recess. A recording of the June 2018 IEP team meeting corroborated the testimony of Temple City team members, in that the team described various general education subjects that would be available for mainstreaming Student. The team did not, ultimately, offer mainstreaming in specific subjects, during specific times of day, for specific amounts of time during the day or week. The IEP did not offer a sufficient percentage of mainstreaming time to allow for inclusion in a general education classroom. Parents did not consent to the IEP.

#### STUDENT'S INCLUSION EXPERTS

59. Dr. Mary Falvey provided expert testimony on inclusion at hearing. Dr. Falvey held a bachelor's degree in social sciences and master's and doctoral degrees in special education. She was a special education teacher who became a professor of special education for nearly 40 years, served as Dean of the Charter College of Education for California State University Los Angeles from 2006–2013, and worked as a consultant building inclusive programs for school districts throughout California. She wrote several peer reviewed published works on the development of education programs and inclusion of students with disabilities.

60. Dr. Falvey described studies since the early 1980s, which demonstrated that children with access to general education curriculum have better outcomes, socially and academically, than similarly situated students exposed only to an alternate curriculum in a special day class. Alternatively, no peer reviewed research demonstrated that children with special needs performed better socially or academically when only attending a special day class. Children spending part of their day in a special day class or resource room, she opined, have difficulty feeling welcome in their general education

settings and should, therefore, have all academic instruction in general education. The determining factor, she concluded, was the ability of adults to provide appropriate supports for inclusion, not a student's abilities or needs.

61. Dr. Falvey met Student the week before testifying. She observed Student for one hour and thirty minutes in his fourth grade general education classroom, at recess, and for a few minutes in the resource specialist program. He interacted with typically developing peers on the playground. He did not meaningfully interact with peers in the classroom because they were not working in cooperative groups at the time.

62. Dr. Falvey reviewed Student's spring 2018 annual IEP and opined that Student's IEP could be implemented in a general education setting. Though she thought Student required more inclusion support, she could not say how much, given her admittedly limited review of records and knowledge of Student. She had no familiarity with Temple City's inclusion programs and had no conversation with Student's former or current general education teachers.

63. Nancy Franklin held a bachelor and masters of science in elementary education. She worked extensively with Los Angeles Unified School District as a special and general education teacher and in several other positions, ultimately acting as director of least restrictive environment programs and professional development. Thereafter, she worked as a board certified behavior analyst and inclusion consultant.

64. Ms. Franklin consulted with Temple City during the 2016-2017 school year and had knowledge of Student's program, at that time. Her testimony on the benefits of inclusion paralleled that of Dr. Falvey. She described students as being role models for each other, more so than adults, in learning academic and social or casual communication.

65. Ms. Franklin observed Student, briefly, the week before testifying. Both Dr.

Falvey and Ms. Franklin opined that classroom modifications during a showing of the movie Winn Dixie could have been improved, specifically, by using picture icons from the movie and not generic icons of objects similar to what was shown in the movie. The icons were used by Student's aide to help Student follow along with classroom conversation about the movie. She opined that Student's transitions from class to recess or related services could be improved by front-loading Student with information about what was going to happen next and when.

66. Because Student had difficulty in math, Ms. Franklin recommended he receive specialized academic instruction, then receive modified work in his 4th grade general education classroom. She did not provide specific recommendations on how Student's goal to count numbers one through 30 could be made to align with general education core curriculum in math. Ms. Franklin opined, generally, that students needing special skills taught in a special way that may be distracting to general education students, could be taught in a special education classroom, then follow up work could be done in the general education class.

67. Student's experts focused on the social and communication benefits of inclusive principles applying generally to all students. Neither had specific knowledge of Student's spring 2018 IEP goals, accommodations, or modifications and did not address how Student could be successfully included in general education during core curriculum.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>4</sup>

1. This hearing was held under the Individuals with Disabilities Education Act

---

<sup>4</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

(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)<sup>5</sup> 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 free appropriate public education (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 individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; 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; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [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 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

---

<sup>5</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*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 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 Sch. 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. 951, fn. 10.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’...” (*Endrew F. v. Douglas Sch. Dist. RE-1* (2017) 137 S.Ct. 988, 1000 (*Endrew*)). The Supreme Court in *Endrew* stated that school districts must “offer a cogent and responsive explanation for

their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” (*Id.* at p. 1002.)

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) & (f); 34 C.F.R. 300.511; 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).)

5. 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, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Thus, each party had the burden of proof on the issues raised in their respective complaints.

#### ISSUE 1: TEMPLE CITY’S OFFER OF FAPE

6. Temple City contends that placement in a special day class with inclusion during recess, lunch, physical education, and some portion of the general education class offers Student a FAPE in the least restrictive environment. Student contends Temple City denied Parents’ participation in the development of his spring 2018 IEP because it did not make a clear written offer of FAPE. Student further contends Temple City did not provide an appropriate behavior intervention plan.

#### Procedural Compliance

7. There are two parts to the legal analysis of a school district’s compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second,

the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

8. Procedurally, the parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(b) & (c); Ed. Code, §§ 56304, 56341.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

#### Clear Written Offer

9. The Ninth Circuit has observed that the formal requirements of an IEP are not merely technical, and therefore should be enforced rigorously. A district has an obligation to make a formal written offer in the IEP that clearly identifies the proposed program. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints with respect to any matter relating to the educational placement of the child. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526; *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 459-460.)

10. A formal written offer provides parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. Even if a district is convinced that a parent will not agree to the district's proposed IEP, the district



must still hold the meeting, give the parent the opportunity to discuss the placement and services, and make the offer. A school district cannot escape its obligation to make a formal placement offer on the basis that the parents had previously “expressed unwillingness to accept that placement.” (*Union Sch. Dist. v. Smith, supra*, 15 F.3d at p. 1526.)

11. A decision regarding a school district’s offer of FAPE shall not be based solely on a nonsubstantive procedural error, unless the error resulted in loss of an educational opportunity to the pupil or interfered with the opportunity of the parent of the pupil to participate in the formulation process of the IEP. (Ed. Code, § 56505, subd. (j).)

12. Here, throughout the development of Student’s spring 2018 IEPs, Parents expressed their intent interest in Student’s full inclusion in general education. They believed inclusion would expose Student to appropriate role models, be consistent with his natural environment outside of school, and better prepare him for life after school. Parents’ desire to have Student fully included in general education did not obviate Temple City’s need to make a clear written offer of FAPE.

13. Temple City did not identify Student’s inclusion in a clear manner, such that Parents would reasonably be able to interpret and understand what placement was being offered. The spring 2018 IEPs did not identify any specific “classes” Student would attend. The IEPs did not specify how much time each day or each week Student would be included in a general education class. Discussions held during the IEPs did not clarify the amount of time or portion of day Student would be included in general education class. The recording of Student’s June 2018 IEP team meeting corroborates the general nature of Temple City’s offer of inclusion.

14. Moreover, the IEPs inconsistently identified inclusion. On the “least restrictive environment” page, Temple City offered placement in general education for

12 percent of his school day. Temple City witnesses clarified at hearing that this small percentage would allow only time for Student to participate in lunch, recess, and other unstructured time with typically developing peers, and was not sufficient for inclusion in general education classes as well. When a school district seeks to prove that it provided a FAPE, it must show that it complied with the procedural requirements of the IDEA. (*Rowley, supra*, 48 U.S. at pp. 200, 203-204, 206-607.)

15. Here, the IEP included diametrically opposed offers of inclusion in general education, and a schedule without time in which Student would be able to participate in general education classes. Such a contradictory and confusing offer is inherently unclear. The IDEA's structure relies upon parental participation to ensure substantive success in providing quality education to disabled students. (*Rowley, supra*, 458 U.S. 176, 205-206.)

16. Parents were not provided with the opportunity to decide whether the offer of placement was appropriate and whether to accept the offer. Accordingly, Temple City interfered with Parents' opportunity to participate in the formulation process of the IEP, resulting in the denial of a FAPE.

#### Behavior Intervention Plan

17. When developing the IEP, the IEP team shall, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports and other strategies to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Cal. Educ. Code, § 56521.2, subd. (b).) The IEP must include a statement of the "special education, related services, supplementary aids and services, and program modifications or supports" that will be provided to the child. (20 United States Code 1414(d)(1)(A)(i)(IV).) There are no unique requirements regarding the documentation of any positive behavioral interventions and supports and other strategies that are identified in state or federal law. Further, there is no requirement that positive behavioral interventions and supports for a child whose

behavior impedes the child's learning or that of others be based on a functional behavioral assessment. (34 C.F.R. 300.324.(a)(2); 71 Federal Register 46683, August 14, 2006.)

18. However, an IEP that does not appropriately address behaviors that impede a child's learning denies a student a FAPE. (*Neosho R-V Sch. Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *County of San Diego v. Calif. Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-68.)

19. Interspersed between the series of IEPs comprising Temple City's spring 2018 offer of FAPE, Temple City conducted a functional behavior assessment and determined that Student required a behavior intervention plan, which was made a part of his IEP. The assessment correctly identified the function of Student's behaviors as escape and avoidance, and Mr. Hsu's data demonstrated that Student engaged in problem behaviors during general education class, but was on task substantially longer during resource, speech and language, and adaptive physical education. Mr. Hsu's findings were consistent with testimony of Student's third grade teacher Ms. Shore and resource teacher Ms. Luu.

20. However, the resulting behavior intervention plan was fatally flawed in that it did not correctly identify functionally equivalent replacement behaviors, specific target behaviors during stages of escalation through de-escalation, or strategies to reduce the problem behaviors. Dr. Santos described the behavior intervention plan as incomplete and determined it could not be implemented as written.

21. Staff did not consistently address Student's problem behaviors during the earliest stages of escalation. Student moved from having his head on the table, to falling under the table, and laying there for some time. This reinforced problem behaviors, since Student obtained what he sought-avoidance and escape. The stated purpose of the behavior assessment and plan was to identify such strategies to develop consistency

between Student's providers so that problem behaviors would decrease.

22. Temple City's IEP offer did not offer Student appropriate behavior intervention services, because the behavior plan was incomplete and could not be implemented as written. Accordingly, Temple City denied Student a FAPE.

#### Substantive Compliance

23. The evidence established that Temple City violated procedural mandates of the IDEA, resulting in denial of a FAPE in that the spring 2018 IEPs did not constitute a clear written offer of FAPE, which thereby denied parental participation in the development of Student's educational program. Moreover, Temple City did not develop an appropriate behavior intervention plan, which resulted in continued inconsistent administration of behavior intervention and inadvertent reinforcement of problem behaviors. Temple City's spring 2018 IEPs did not appropriately address behaviors impeding Student's learning, which resulted in a loss of educational opportunity and denied Student a FAPE.

24. Accordingly, it is not necessary to address other procedural or substantive aspects of the offer. Temple City may not implement the placement identified in the spring 2018 IEPs over lack of parental consent. Temple City did not prevail on Issue 1.

#### ISSUE 2: LEASE RESTRICTIVE ENVIRONMENT

25. Student contends he requires full inclusion in general education to receive a FAPE. Student argues that he can learn appropriate behaviors, make gains in speech and language development, and progress in the general education curriculum if fully included. Temple City contends placement in a special day class for academics and some amount of inclusion in a general education classroom offers Student a FAPE. Temple City argues that Student's behaviors reflect his frustration with the academic rigor of general education and that he can obtain modeling from typically developing

peers by inclusion in non-academic portions of a fourth grade general education class.

26. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).) School districts must offer an IEP reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Id.* at p. 1002.)

27. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged exclusively 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, supra*, 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

28. The IDEA expresses a clear policy preference for inclusion to the maximum extent appropriate as an aspiration for all children with special needs. (See 20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. §§ 300.114 & 300.116.) School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

29. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular

classroom. (*Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

30. 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.<sup>6</sup> (*Daniel R.R. v. State Bd. of Educ.* (5th Cir. 1989) 874 F.2d 1036, 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. (Ed. Code, § 56361.)

31. Student did not demonstrate that he required full inclusion in general education in order to receive a FAPE. Dr. Falvey's nearly unfettered opinion, that all students should receive academic instruction in general education, was not tailored to meeting this Student's unique needs and was contrary to special education law. The IDEA requires mainstreaming to the maximum extent appropriate, not to the maximum extent imaginable.

32. Dr. Falvey and Ms. Franklin pointed out minor imperfections seen during Student's general education inclusion while briefly observing Student on a given day. Nonetheless, the weight of the evidence demonstrated that, even with extensive modification of his curriculum and appropriate supports and services, Student did not

---

<sup>6</sup> "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way Sch. Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

gain academic benefit from inclusion in core curriculum instruction.

33. As to the first *Rachel H.* factor, the evidence demonstrated that Student's academic progress on goals resulted from one-on-one work with his aide and small group instruction with Ms. Luu. He functioned, generally, at kinder level in academics. In general education, Student worked on assignments that bore little relation to the work of his typical peers. In English language arts, typically developing peers engaged in literary discussion of third grade text. Student learned beginning reading by sounding out consonant-vowel-consonant words.

34. Student did not attend to paper and pencil tasks due to limited attention and cognition. While peers worked on multiplication and other mathematics using symbols, Student worked with his aide counting by using manipulatives and pointing. By the end of third grade, Student was able to count between 10 and 20 with only fifty percent accuracy. Student did not demonstrate that he benefitted from inclusion in third grade core academic curriculum or could engage in more rigorous fourth academics.

35. Dr. Falvey and Ms. Franklin opined that even mathematics could be appropriately modified for Student to work alongside typical peers. Neither explained how working on different curriculum in the same general education classroom served to benefit Student, academically. Moreover, Student presented no evidence that he could not obtain appropriate educational benefit working together, not in parallel, with peers in special day class.

36. The evidence demonstrated that 4th grade curriculum demanded greater academic rigor. Instruction moved more quickly to keep pace with state standards. Student did not understand 3rd grade level academics, even though highly modified.

37. Testimony from Student's providers, Ms. Luu, Ms. Shore, and Ms. Kincart persuasively demonstrated that he could not keep up with typically developing peers in third grade core academics and was less likely to do so in 4th grade. Their testimony

carried more weight than Student's experts, as providers worked with Student on a daily basis, used a variety of strategies to keep his attention and provide motivation to engage, and demonstrated a depth of knowledge of his needs and concern for meeting them. Their testimony was consistent with recent assessment results.

38. Assessments conducted in 2016 and 2018 demonstrated that, academically, Student falls within the extremely limited range in broad reading, writing and mathematics. His ability level supports placement in a special day class for core academic curriculum. Student required repetition, use of manipulatives, and moving slowly through instruction in order to access his education. Dr. Santos and Ms. Saldana described how a special day class would provide such methods of instruction in a setting where Student could work with peers in small groups or one-on-one when needed.

39. As to the second *Rachel H.* factor, the evidence demonstrated that Student obtained some non-academic benefit from inclusion. Typically developing peers modeled language and social skills. Student began using up to three words to describe wants and needs, during his 3rd grade school year. The evidence showed that peers helped him during group activities in class and some peers sought him out on the playground.

40. Mr. Hsu observed that Student attended well during an art project building a pipe-cleaner figure. Student was motivated to engage in library excursions, where peers modeled the process for and helped him obtain and check out library books. Student's speech and social development weighs in favor of some inclusion.

41. Taken as a whole, the testimony of Ms. Shore, Ms. Luu, Mr. Hsu, and Dr. Santos demonstrated that Student worked well with others, attended, and benefitted from inclusion during on simple hands-on tasks. The evidence demonstrated that Student would be appropriately included in portions of the general education school



day where he could continue to learn social skills, social language, and develop friendships with typically developing peers.

42. On the other hand, Student did not obtain educational benefit from inclusion in core academic curriculum and the third *Rachel H.* factor dovetails into Student's problem behaviors, which escalated during such instruction. Student did not attend well during direct teacher instruction or lecture time, or during paper and pencil tasks such as working on math problems or when Students read and answered comprehension questions during literacy instruction. During these more academically intense tasks, Student engaged in crying, work refusal, swiping items off his desk, putting his head on the table, falling asleep, or laying on the floor, from 30 minutes to two hours at a time.

43. Dr. Santos, who became involved with Student during 4th grade, reported that Student's behaviors impeded his learning and that of others. His behaviors were generally consistent throughout both 3rd grade and 4th grade in type and duration. During problem behaviors, other students would come over and joke or laugh at Student's escape behavior. In this way, peers provided Student with unintended reinforcement of problem behaviors, since he enjoyed attention from peers.

44. Student did not engage in particularly physically aggressive behaviors during 3rd grade such that his providers, at the spring 2018 IEPs, believed he required placement solely in a special day class. The team discussed his behaviors during the June 2018 IEP, as reflected in the recording. Temple City offered placement in a special day class with some inclusion in general education based upon a combination of Student's cognition, performance levels, and behaviors. His behaviors demonstrated frustration with the level of instruction being provided during 3rd grade core academics and his inability, consequently, to understand and attend. Mr. Hsu's data collection demonstrated Student was off-task for 70-percent of his general education academic

instruction. Likewise, Student struggled with transitions between services and general education class to the extent he missed out on several hours of instructional time during the course of the school year. While Student's behaviors had more of an overall impact on his own learning, that fact weighs in favor of placement in a special day class for core academic instruction.

45. There was no evidence that cost was a factor in Temple City's decision against full inclusion in a 4th grade general education classroom. Student was offered a full-time aide for attention and behavior support throughout the school day, and across all environments.

46. Balancing the *Rachel H.* factors, it cannot be said that Student would derive educational benefit from full inclusion in general education. Student did not demonstrate that he "received substantial benefits from regular education and that all of [his] IEP goals could be implemented in a regular classroom with some modification to the curriculum and with the assistance of a part-time aide," as was the case in *Rachel H.*

47. Rather, the evidence showed that Student required specialized academic instruction in core curriculum. His progress toward goals in 3rd grade reflected his work with his aide and resource teacher, not on his presence in the general education classroom or on curriculum being taught to typically developing peers. Accordingly, Student did not prevail on Issue 2.

## REMEDIES

1. Temple City's spring 2018 IEPs failed to offer a FAPE because they did not constitute a clear written offer of placement and included an incomplete behavior intervention plan. Dr. Santos persuasively demonstrated deficiencies in the behavior intervention plan, as described above. Moreover, Dr. Santos observed Student in his placement prior to hearing and determined that providers were not consistently implementing appropriate behavior intervention strategies. Moreover, Temple City's

offer of mainstreaming for 12 percent of the school day was both inconsistent with the offer to mainstream Student in electives, core curriculum, recess, and lunch and insufficient to offer him a FAPE.

2. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a child with a disability. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); *see School Committee of the Town of Burlington, Mass. v. Dept. of Educ.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996] (*Burlington*); *Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*)). This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove Sch. Dist., v. T.A.* (2009) 557 U.S. 230, 240 [129 S.Ct. 2484].)

3. In remedying a FAPE denial, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3); *Burlington, supra*, at p. 374 [the purpose of the IDEA is to provide students with disabilities "a free appropriate public education which emphasizes special education and related services to meet their unique needs."].) Appropriate relief means "relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Puyallup, supra*, 31 F.3d. 1489, 1497.)

4. Temple City shall hold an IEP team meeting within 30 days of the date of this decision to review Student's placement and incorporate a new behavior intervention plan as part of Student's IEP. Temple City shall adopt and incorporate Dr. Santos' recommendations into a complete behavior intervention plan. The plan shall specifically identify target behaviors and functionally equivalent replacement behaviors. The plan shall describe reactive, prevention, and teaching strategies, through phases of problem behaviors, escalation, and de-escalation, consistent with Dr. Santos' October 2018 report.

5. Thereafter, by the end of the 2018-2019 extended school year, Temple City shall conduct 20 hours of additional staff training on implementation of Student's updated behavior intervention plan, to be conducted by a board certified behavior analyst, such as Dr. Santos.

6. By the end of the 2018-2019 extended school year, Temple City shall conduct 8 hours of training to staff who serve as administrative designees at IEP team meetings on the subject of making a clear written offer of FAPE.

7. As part of the 30-day IEP, Temple City shall offer placement in the special day class described by Ms. Kincart and Dr. Santos at hearing, and previously offered as part of the June 2018 IEP. Student shall receive core academic instruction, including reading, writing, and mathematics, in a special day class. Additionally, Temple City shall identify with specificity Student's mainstreaming in a general education fourth grade class. Specificity means identifying the subjects during which Student will be mainstreamed; identifying the correct percentage of time for mainstreaming; stating the frequency and duration of mainstreaming on a daily or weekly basis; or a combination of the foregoing. The IEP must be clear enough that, if Student transferred into a different school district, that district would understand the precise details of Student's placement. Student shall be mainstreamed during portions of general education instruction not including core academic curriculum, but including hands-on or group activities during subjects such as science, coding, and social studies. District shall continue to provide a one-on-one aide to support Student during general education inclusion. Temple City shall provide goals, supports, and services already agreed upon by the parties in their joint stipulation. These remedies sufficiently address District's failure to offer an appropriate placement for the 2018–2019 school year, based upon the evidence presented at hearing.

## ORDER

1. Temple City shall offer Student placement in a special day class for teaching core academic curriculum in reading, writing, and mathematics, along with general education mainstreaming for non-core academic instruction with the support of a one-on-one aide for the remainder of the 2018–2019 school year, with the supports and services already agreed upon by the parties in their joint stipulation.

2. Temple City shall hold an IEP team meeting within 30 days of the date of this Decision to offer the above-referenced placement and adopt a complete behavior intervention plan as referenced in Remedies, paragraph 4.

3. Temple City shall provide 20 hours of staff training by a board certified behavior analyst on behavior intervention strategies and implementation of the completed behavior intervention plan by the end of the 2018-2019 extended school year.

4. Temple City shall provide 8 hours of staff training to staff required to act as administrative designees during IEP team meetings on the subject of making a clear written offer of FAPE.

## PREVAILING PARTY

Pursuant to 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. Student prevailed on Issue 1. District prevailed on Issue. 2.

## RIGHT TO APPEAL

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: April 17, 2019

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

COLE DALTON

Administrative Law Judge

Office of Administrative Hearings