

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022080306

RIVERBANK UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

NOVEMBER 18, 2022

On August 9, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Riverbank Unified School District, naming Student. On August 25, 2022, OAH granted the parties' joint request for a continuance. Administrative Law Judge Cole Dalton heard this matter by videoconference on October 4, 5, 6, and 11, 2022.

Attorney Kaitlyn Tucker represented Riverbank. Director of Student Services Barbara Brown attended all hearing days on Riverbank's behalf. Parent represented Student.

Parent provided oral argument at the end of the hearing. At the parties' request the matter was continued to October 28, 2022 for written closing briefs, which only Riverbank provided. The record was closed, and the matter was submitted on October 28, 2022.

ISSUE

Did Riverbank offer Student a free appropriate public education in the May 17, 2022 individualized education program?

JURISDICTION AND BACKGROUND

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

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

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

Student, 16 years old, attended 11th grade at Riverbank High School at the time of hearing. Student resided within Riverbank's geographic boundaries at all relevant times. Student received special education under the eligibility category of other health impairment due to cerebral palsy, which resulted in muscle spasticity and quadriplegia. Student was wheelchair bound, fed through a tube, and communicated nonverbally using facial expressions, nodding or shaking his head, laughing, and moving his body. Riverbank provided Student with a Tobii communication device, which allowed Student to use eye gaze to activate a keyboard and icons and produce speech output. He had been using the Tobii for several years at the time of the hearing.

As Student's educational career progressed, the gap between his abilities and those of his peers widened. During the 2021-2022 school year, Student attended Riverbank in a mild to moderate special day class for personal care, English language

arts, social studies, science, and inclusion services. As he could not keep pace with the curriculum, whether in his special day class or general education, he worked toward a certificate of completion, after which he would attend adult transition classes.

Riverbank High School prepared to move to a full inclusion model for the 2022-2023 school year. The full inclusion model eliminated separate special education classrooms and placed all special education students in general education with supports, making Student's special day class no longer available. Because of the change in available programs at Riverbank High School, in combination with Student's need for increased individualized instruction, Riverbank offered Student a change in placement to a moderate to severe special day class at Waterford High School, a general education campus. Riverbank offered the proposed change in an August 27, 2021 IEP amendment meeting, Student's October 6, 2021 annual IEP, and a November 9, 2021 amendment. On December 10, 2021, Riverbank filed for due process on the October 6, 2021 annual IEP, as amended November 9, 2021. After mediating the matter in February 2022, the parties agreed to conduct early triennial reassessments and Riverbank dismissed that complaint. In the interim, Student underwent surgery for placement of a steel plate in his hip.

Riverbank and Parent agreed to the timeline for triennial reassessments, which Riverbank conducted in April and May 2022. Riverbank and Stanislaus County Office of Education personnel conducted assessments in

- psychoeducation for academics,
- adaptive behavior,
- social emotional development,
- cognition,

- mainstreaming inclusion support,
- inclusion support for the physically handicapped to determine the need for specialized equipment,
- adapted physical education,
- health, and
- assistive technology.

Riverbank held an IEP review meeting on May 17, 2022. Parent agreed to the May 17, 2022 IEP except for an offer to change placement to the moderate to severe special day class at Waterford High School.

ISSUE: DID RIVERBANK OFFER STUDENT A FREE APPROPRIATE PUBLIC EDUCATION IN THE MAY 17, 2022 INDIVIDUALIZED EDUCATION PROGRAM?

Riverbank contends it complied with all procedural requirements in the development of the May 17, 2022 IEP. Specifically, Riverbank contends it

- timely convened the IEP,
- obtained attendance of all required team members,
- offered Parent rights and procedural safeguards,
- provided Parent the opportunity to meaningfully participate in the IEP, and
- developed a clear written offer of FAPE based upon recent assessments and Parent input.

Parent does not contend that Riverbank violated any procedural requirements.

Substantively, Riverbank contends that the offer of placement in a severely handicapped special day class on the general education Waterford High School campus meets Student's unique needs in the least restrictive environment appropriate for him. Riverbank contends that Student produced little work, could not keep up with the pace of his mild to moderate special day class and fell further behind once in general education full inclusion, and requires a functional skills program with mainstreaming. Parent contends Student should be allowed to continue developing intellectually by remaining in the Riverbank High School full inclusion program.

When a school district seeks to demonstrate that it offered a FAPE to a particular student, it must first show that it complied with the procedural requirements of the IDEA. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S.176, at pp. 206-207)(*Rowley*.) Second, the school district must show that the IEP developed through those procedures was designed to meet the child's unique needs and reasonably calculated to enable the child to make progress appropriate in light of their circumstances. (*Ibid.*; *Andrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386, [137 S.Ct. 988, 998-999])(*Andrew F.*)

RIVERBANK MET ALL PROCEDURAL REQUIREMENTS IN DEVELOPING THE MAY 17, 2022 IEP

Riverbank conducted early triennial reassessments in all areas of suspected need in April and May 2022 in preparation for the May 17, 2022 IEP, with parental consent. (Ed. Code, § 56341.1, subds. (a)(3), (b)(5).) On April 28, 2022, Riverbank sent Parent notice of the IEP meeting. Parent signed the notice that same day, indicating she would

attend. Riverbank provided timely and appropriate notice for Parent to attend Student's May 17, 2022 IEP meeting. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.322; Ed. Code, § 56341.5.)

On May 17, 2022, Riverbank held Student's IEP meeting to review the triennial assessments, which it called an eligibility evaluation. All necessary IEP team members attended, including Parent, general education teacher Ashley Estaque, special education teacher and case manager Jason Herrera, and program specialist and Riverbank representative Shelly Dressell. Riverbank assessors attended, including inclusion teacher Tammie Kabeary, school psychologist Amy Buchanan, adapted physical education specialist Harold Hathaway, and school nurse Heather Grossman. (34 C.F.R. § 300.321(a); Ed. Code, § 56341, subds. (a), (b).) Stanislaus County Office of Education assessors attended, including assistive technology specialist Jared Anderson, and physically handicapped inclusion specialist Kirk Peterson. (*Ibid.*) Waterford program specialist Letty Ayala attended to explain Waterford's special day class program.

Riverbank explained Parental Rights and Procedural Safeguards to Parent and offered her a copy. (Ed. Code, § 56500.1.) Riverbank provided an interpreter in Parent's native language of Spanish. (34 C.F.R. § 300.322(e); Ed. Code, § 56341.5, subd. (i).) Parent did not want the meeting interpreted and expressed the ability to proceed in English. Parent did not require interpretation, though the interpreter remained present throughout the meeting. Parent historically refused interpretation services as she could speak, read, and write English.

When developing an IEP for a student, the IEP team must consider

- student strengths,
- parent concerns for enhancing their child's education,
- recent assessment results, and
- the academic, developmental, and functional needs of the student. (Ed. Code, § 56341.1, subd. (a).)

Specifically, the team must consider the results of any reassessments of a student completed by the school district. (Ed. Code, § 56341.1, subd. (d)(2).)

Riverbank considered Student's strengths and Parent concerns for enhancing her child's education. Student, by all accounts, worked hard, had a sense of humor, enjoyed being around peers, and was delightful. He demonstrated a relative strength in math, being able to add certain numbers in his head. Student learned to access his Tobii, an assistive technology device that connected to the Internet, to watch YouTube videos and listen to music. The Tobii also allowed him to write and produce speech output, but it was a long and laborious process that typically required adult assistance. He worked hard on object control skills during adapted physical education, always trying to better his last best results. Parent did not have any educational concerns about her son. She observed that he always smiled, was happy, strong, and tried his best.

Student's IEP team considered the results of recent assessments and the academic, developmental, and functional needs of Student at the May 17, 2022 IEP meeting. Inclusion teacher Kabeary conducted an inclusion assessment resulting in an April 1, 2022 report. Kabeary had extensive training and experience as an educational specialist and program manager before becoming an inclusion specialist for Stanislaus

County Office of Education. Kabeary worked with Student for two years by the time of hearing. She demonstrated an understanding of Student and knowledge of his needs. She presented evidence in a straightforward manner, without overreaching and her testimony went uncontradicted. For these reasons, she was found credible, and her testimony given much weight.

Kabeary administered a social emotional learning assessment, conducted teacher and Student interviews, reviewed IEP documents, and collected data while observing Student on campus. During her observations, Student did not use his Tobii to socialize with peers, which proved consistent with what all other assessors and teachers reported. Student did not initiate conversations or respond to questions or comments, other than by using nonverbal gestures. Kabeary observed Student respond to his aide in class nonverbally and using the Tobii. Student had difficulty keeping pace with the rest of the class. In Herrera's special day class, Student would begin to answer a question and get approximately one word written while the class moved on to another question. At the IEP meeting, Parent shared that Student sometimes would not do his best during assessments when he got nervous and frustrated. Parent agreed with Kabeary's inclusion report.

Kabeary worked with Student three times monthly in 30 minute sessions on his social communication goal. She stressed the importance of developing relationships with peers outside the classroom to build and carry that over into the classroom. She observed that Student had friends but struggled to be part of the classroom environment. Her work with him focused on helping him to communicate in a meaningful way to be able to contribute to a classroom, work in a group, or socialize

with his peers. Kabeary established at hearing that the slower pace and increased supports of the moderate to severe special day class would appropriately meet Student's functional needs.

Special education teacher Herrera used a standardized assessment to test Student's academic skills. Herrera worked with Student since the 2019-2020 school year. He worked extensively with Student to adapt curriculum and demonstrated a thorough knowledge of Student's academic needs. Based upon his knowledge, training, and experience, combined with his fondness for Student and demeanor at hearing, his testimony was found credible and given great weight. Herrera accommodated Student by testing over several days, allowing breaks and a significant time to respond to questions. Student's ability fell within the very low range across all areas of

- reading comprehension,
- math calculation skills,
- math problem solving,
- written and oral expression,
- broad written language,
- academic fluency,
- broad mathematics, and
- academic applications.

Student scored one point above the very low range in one subtest requiring Student to identify the missing number in a series of numbers.

Student's slow progress on academics in the classroom proved consistent with standardized testing. Student could not keep pace with instruction in special day class history with Herrera or in art with Rathbun. Rathbun did not testify at hearing but provided input as part of the inclusion and psychoeducational assessments. Rathbun taught Student English, math, and science in Student's mild to moderate special day class. Student enjoyed math and could recall some math facts. However, Rathbun could not estimate his abilities beyond that because Student produced so little work, could not communicate verbally, and had limited nonverbal communication. Student completed one of four math warm up problems weekly but turned in no other assignments. In reading, Student could write a few words in his journal two of five days weekly. His aide transferred words he wrote using his Tobii into his journal. He listened to stories, read in class, and answered simple comprehension questions with 50 percent accuracy. He produced little work with many inaccuracies. In science, Student participated even less and did not produce work. Student fatigued as the day progressed and he attended science class at the end of the school day. Rathbun opined that Student required support to modify or provide instructional strategies throughout his school day, even in a mild to moderate special day class.

Similarly, Herrera taught Student's United States history special day class, which had fewer students, extra supports, and curriculum designed for teaching at a slower pace than general education classes. Student could not keep pace with the class. Herrera minimized Student's work, grading him on work completed rather than on what Herrera required the class to do. On average, it took Student five minutes to write a basic sentence related to the content being taught. The work proved very difficult for Student even with the help of his aide. Parent agreed with Herrera's academic reporting of Student's needs and present levels of functioning.

Cognitive testing by school psychologist Buchanan demonstrated consistency with Student's academic achievement. Buchanan's training, education, and experience underscored her credibility as a witness. She demonstrated knowledge of Student, having assessed him three times over a five year period. She provided uncontroverted testimony in a detailed and forthright manner and her testimony was given significant weight. Buchanan administered the standardized comprehensive test of nonverbal intelligence. She adapted the multiple-choice test by writing large numbers under each choice and confirming with Student he made the desired selection using his Tobii. Student scored below the first percentile, with a standard score of 54, falling in the very poor range, under the below average range. He demonstrated a relative strength in solving number patterns, consistent with academic testing. He demonstrated weakness in comprehension of information, solving math facts, and understanding synonyms and antonyms. Student received A's and B's on his report card, but Riverbank modified his grades to his ability and effort level rather than on his understanding of grade level curriculum or on the amount of work teachers expected other students to produce.

Buchanan observed Student over various classes. She observed Student sometimes began writing an answer using his Tobii but had not finished before the class moved on. Other times Student could answer with one word but did not. Often, his aide guided him to an answer or wrote an answer out for him that he copied into his Tobii. Buchanan's observations corroborated cognitive testing and reports from teachers, and other assessors.

Buchanan assessed Student's adaptive behavior in the areas of communication, daily living skills, and socialization using Parent and teacher questionnaires. Student scored in the low range across domains and across reporters. Based upon Buchanan's

assessment, Student demonstrated needs in functional academics and functional life skills. Buchanan recommended Student continue receiving instruction at his level

- in a small group setting,
- using simple oral directions with one-step directions, supplemented with visual aids,
- allowing for extra time to complete academic assignments, and
- modified tests including multiple choice options instead of open-ended questions.

She recommended the IEP team consider the least restrictive environment to address Student's needs, given increasing demands of general education.

Stanislaus County Office of Education physically handicapped inclusion specialist, Peterson, observed Student at school, interviewed Parent, IEP team members, and Student's physical therapist regarding current needs. Over the past nine years, Peterson and his team made recommendations, purchased, and maintained specialized equipment to address Student's orthopedic impairments. They also provided staff training on equipment use. Peterson recommended continued use of Student's transfer lift, motorized changing table, adapted desks, and, once Student recovered from hip surgery, his gait trainer.

Adapted physical education specialist Hathaway formally

- assessed Student's gross motor skills,
- reviewed Student's progress toward goals,
- observed Student during adapted physical education, and
- obtained Parent input.

Student made progress on his object control or gross motor skills goal, by knocking down balls on a course using a swim noodle, while in his wheelchair. Student made progress on his second goal for pushing a bowling ball from a ramp to knock down a set of pins. Herrera and Student's aide, Laura Robertson, reported that Student participated in general physical education primarily by watching others, being pushed around the track by his aide, and sometimes being greeted by a peer. Parent had no questions regarding Hathaway's adapted physical education report.

School nurse Grossman developed a May 2, 2022 health information summary. Student had no known hearing or seeing issues that prevented him from accessing his education. Grossman could not complete vision screening due to Student's muscle spasticity, but she noted that Student accessed computer work without issue. Other assessments reported that Student's aide put glasses on Student when needed. Student continued to heal from hip surgery. Parent and a Stanislaus County Office of Education physical therapist discussed Student's recent surgery sharing that Student still had some knee pain but no doctor restrictions.

Assistive technology specialist Anderson conducted four observations of Student and interviewed Parent and Student, resulting in a report dated May 10, 2022. Anderson did not interview Student's teachers. Student demonstrated below average receptive language skills, testing below the first percentile at an age equivalence of six years and five months. Student's comprehension of grammatical morphemes tested at a similar level. Student showed both a lower and higher level between five and nine years of age, on testing of comprehension of elaborated phrases and sentences. Anderson trialed different devices and software, concluding that Student should continue use of his Tobii with Windows Access control and Communicator 5 applications, which provided access to YouTube, Pandora, Tubi, Google Chrome and

Google Classroom. Anderson reviewed Student's goals over time, concluding that Student required more help from his aide as the goals became more academically intense, such as composing paragraphs and researching topical information. Student demonstrated the ability to navigate to music and video applications independently. He recommended that Student using his Tobii at home as practice may help him work more quickly at school. Generally, Student did not use the Tobii at home.

Anderson opined at hearing that Student could sequence several icons to produce lengthy utterances, while admitting it may take Student a class period or more to create multiple sentences depending on the content. Anderson's assessment included an informal measure of expressive language, which involved asking simple questions to elicit responses from Student using his Tobii. Questions included asking Student's name, what he liked to watch on television, and what he liked to do at school. Student responded by chaining icons together, typing, and using icons and typed words. Anderson omitted some questions due to time constraints. Overall, Student answered 10 questions in 75 minutes.

The weight of the evidence demonstrated that even with aide support and instructional modifications and accommodations, Student did not create lengthy utterances in class, during unstructured time, or when communicating with adults or peers. Student never asked questions or requested clarification during peer interactions.

At hearing, Anderson opined that the Waterford placement would not be appropriate for Student. He reasoned that Student listened and paid attention in class, though at a much lower level than classmates, that he may need additional class periods to respond, but was working to the best of his ability. Since Student would

have someone taking care of him his whole life, he should continue focusing on a higher level of academics at a location where he already knew his peers rather than learning life skills. Anderson's opinion on placement was given less weight than other witnesses for several reasons. First, placement conclusions did not flow logically from Anderson's own testimony or assessment information provided on Student's ability and achievement at school. Second, he did not consider teacher input on Student's ability to access academic instruction. Third, he based his opinion on Student and Parent preferences, not on how Student performed at school either academically or socially.

Parent did not contest the results of any of the assessments either during the IEP meeting or at hearing. Assessment results mirrored Student's academic, developmental, and functional needs seen at school.

As one of Student's teachers and his case manager, Herrera discussed Student's continued difficulty understanding classroom curriculum and assigned work, even with modifications and accommodations. Student continued to complete only minimal work. Herrera reduced Student's required work by 75 percent compared to what was expected from other students with mild to moderate disabilities. Compared to other students in his special day class, Herrera found Student to be in the low range of functioning. Even with Herrera and Student's aide and implementing Student's many accommodations and modifications in the mild to moderate setting, Student could only complete one portion of each assignment given to others in class. More importantly, Student was not demonstrating mastery of the material in the limited work he did complete.

Rathbun, who instructed Student in several classes, believed Student understood math but had not turned in any work. With extended time, Student could answer a few concrete comprehension questions about a current book of discussion in English language arts. In sixth period science, Student did not produce any work. Student typically appeared exhausted and needed rest during classes.

General education teacher Estaque observed that Student appeared in less pain and a better mood since returning from his surgery. However, he demonstrated limited abilities even with extreme modifications to the curriculum. Estaque based Student's grade on completely different work than that produced by the rest of the class. Student participated in art by taking photographs with his Tobii or directing his aide in art-making projects.

In summary, Student's IEP team

- considered Student's strengths, Parent's concerns for enhancing Student's education, recent assessment results, and
- correctly identified Student's academic, developmental, and functional needs.

Riverbank complied with the procedural requirements for developing an IEP.

RIVERBANK OFFERED APPROPRIATE ANNUAL GOALS

An annual IEP must contain a statement of measurable annual goals related to meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum and meeting each of the child's other

educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(1), (2); Ed. Code, § 56345, subd. (a)(1), (2).) The IEP must also contain a statement of how the goals will be measured. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs, tit. 5, § 3040, subd. (c).)

Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, U.S. Dept. of Education, Office of Special Education and Rehabilitative Services, March 25, 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 Regulations).)

Based upon recent assessments and input from teachers and Parent, the IEP team determined that Student had ongoing needs in

- academics,
- functional skills,
- communication,
- social-emotional and behavior development,
- gross motor development,
- vocational skills,
- adaptive and daily living skills, and
- health.

Riverbank addressed these needs by offering goals in reading, math, gross motor development, social interaction, and communication. To assist Student in meeting those goals, the IEP team offered

- accommodations addressing Student's physical and cognitive needs,
- modifications to academic output and grading, and related services in specialized academic instruction,
- a full-time aide,
- adapted physical education,
- inclusion,
- assistive technology,
- health and nursing,
- transition planning, and
- services for students with low incidence disabilities, as discussed below.

Student's IEP team reviewed Student's progress on annual goals from the October 6, 2021 IEP. Goals contained objectives and reporting dates on the objectives varied from goal to goal. Riverbank did not explain the variance, but the evidence did not show this impacted Student's ability to receive a FAPE. Since Student had not fully met his annual goals and they remained appropriate, the team agreed to continue the goals. In reading comprehension, Student's goal required him to analyze relationships among concepts or key terms in text with 80 percent accuracy, using ninth grade text. In January 2022, Student met his first objective by completing one of two trials at 50 percent accuracy, with supports and given a lot of extra time. By April 29, 2022, Student could not meet his second objective at 60 percent accuracy. Student required a lot of extended time to identify key terms and to analyze how those terms related to the content being learned.

In math calculation, Student could solve simple math problems in his head but had difficulty with word problems and multi-step equations. His goal required him to use substitution to determine whether a given number in a specified set made an equation or inequality true. By January 2022, Student met his first objective for 50 percent accuracy with a lot of extended time and supports. By March 31, 2022, Student could not reach his second objective for 60 percent accuracy. He struggled with problems requiring more than one step.

In classroom communication, Student had limited opportunities to participate in curriculum discussions because it took so long for him to complete sentences using his Tobii. His goal required him to have advance notice of a discussion topic and text from which to gather information so he could write and record three sentences and present the information to the class. Student partially met his first objective by February 9, 2022. Student used accommodations including his scribe, reduced, or shortened assignments, alternate response options, and extended time to write short sentences using his Tobii, and could write at least one sentence regarding the given topic using his Tobii. He did not meet the requirement that he share the response with the class. Riverbank witnesses did not explain why Student was unable to share his output with the class during the reporting period.

Student also struggled to socialize with peers because of the length of time it took to write and speak sentences using his Tobii. His social interaction goal required him to initiate or respond to peers using short sentences during lunch, breaks, or free time in class. Student did not make progress on this goal. Student could initiate short responses on his Tobii. He could not keep pace with conversations using his Tobii and preferred to use nonverbal communication. Students familiar with him asked questions requiring a yes or no response, which he could answer by shaking or nodding his head.

For object control skills, Student had not been able to use his gait trainer consistently due to hip pain pending the upcoming surgery. His goal required him to complete a designed course with his gait trainer or wheelchair with a noodle, hockey stick, or other striking implement in hand or chair to knock down five of six balls on an obstacle course. By October 22, 2021, Student met his first objective using his wheelchair and knocking down three of six balls on the course. By March 14, 2022, Student met the goal of knocking down balls or targets with 80 percent accuracy using his wheelchair. The team continued the goal, waiting for clearance from a doctor for Student to attempt the goal using his gait trainer.

Riverbank witnesses Dressel, Herrera, Buchanan, Kabeary, and Hathaway persuasively demonstrated that Riverside drafted appropriate goals based upon Student's present levels of academic achievement and functional performance that were measurable, and which Student could be expected to meet or make significant progress towards within a year's time. Waterford credentialed special education teacher, Erick Gomez, and Riverbank witnesses also testified the goals could be appropriately implemented at the Waterford placement. The goals in the IEP had a direct relationship to Student's present levels of performance and the educational services offered. Parent agreed the team identified Student's educational needs and drafted appropriate goals.

In summary, Riverbank's May 17, 2022 IEP contained a statement of annual goals related to Student's needs resulting from his disability, which enabled Student to be involved in and make progress in the general curriculum. The goals met each of Student's other educational needs resulting from his disability. The goals identified who would test Student's progress on goals, how that progress would be measured, and provided progress reporting periods.

RIVERBANK OFFERED APPROPRIATE SUPPLEMENTAL AIDS, PROGRAM MODIFICATIONS, AND SERVICES

Considering a child's academic, developmental, and functional needs, an IEP must include a statement of the special education and related services that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) That includes a statement of supplementary aids and services and other supports that are provided in education-related settings to enable the student to be educated with nondisabled children to the maximum extent appropriate. (20 U.S.C. § 1401(33); 34 C.R.F. § 300.42; Ed. Code § 56033.5.) Accommodations and modifications necessary for the student to receive a FAPE must also be included in the IEP. (Ed. Code § 56341.1, subd. (c).)

Based upon the assessments, review of progress toward annual goals, teacher reports, and Parent input, Riverbank offered Student special education and related services, supplementary aids, and services, which the evidence demonstrated were appropriate. In the May 17, 2022 IEP, Riverbank offered

- extended time to complete assignments,
- large print materials,
- note taking by Student's aide,
- calculation devices for math,
- assistive technology,
- a text to speech device for reading passages aloud,
- multiplication tables for grade four and higher,
- audiobooks,
- alternate response options for reading, writing, and listening,

- highlighted textbooks and study notes, and
- a location to increase physical access or use special equipment such as the lift or changing table.

Modifications included reduced or shortened assignments and a pass-fail or alternate grading system, which addressed Student's academic ability and progress on his certificate of completion.

Riverbank offered health and nursing services for 30 minutes, two times daily, to administer nutrition through Student's feeding tube. Specialized services for low incidence disabilities for 30 minutes monthly provided Student with specialized equipment needed to access his education including desks accommodated to Student's wheelchair, his Tobii and a mounting system to attach it to his wheelchair. Riverbank also provided special equipment, such as the lift and motorized changing table for Student's diapering needs. Peterson credibly testified that the time allotted for these specialized services allowed for consultation with Student's providers regarding functioning and use of the equipment.

Riverbank offered inclusion services for 90 minutes monthly to work with Student on goals for classroom participation and increased social interaction using his Tobii. The inclusion specialist collaborated with Student's teachers and aide in determining ways to accommodate instructional materials so that Student could produce speech output during class instruction and to engage in interactive conversations with peers. Kabeary worked on Student's goal for social communication during one-to-one pull out services. He continued to prefer peer interaction without using his Tobii. Teachers provided

some instructional content in advance so that Robertson could press a button on the Tobii for Student to share his typed response. Kabearly collaborated with teachers to provide multiple choice questions, which Student could answer in class.

Riverbank offered adapted physical education for 90 minutes monthly to address Student's gross motor development goals while accessing state physical education curriculum. Adapted physical education also provided socialization opportunities for Student.

Riverbank considered Student's needs for assistive technology devices and services. (Ed. Code, § 56341.1, subd. (b)(5), (c).) Based upon the recent assistive technology assessment, Riverbank continued to offer Student a dynamic screen display communication device using eye gaze technology, the Tobii, with 120 minutes of monthly assistive technology services. Assistive technology services included providing Student with appropriate applications and collaboration with Student's providers to increase Student's access to functional communication, academic participation, and social interaction. Student used his Tobii for functional communication such as wanting to eat or use the bathroom. He used the Tobii for academic participation to work on the curriculum whether with his aide or by providing prewritten responses in the classroom. He continued to prefer engaging socially without using his Tobii.

Riverbank offered Student appropriate transition services. (34 C.F.R. §§ 300.43(b), 300.320(b); Ed. Code, §§ 56345, 56345.1.) Riverbank offered a coordinated set of activities designed within a results-oriented process focused on improving Student's academic and functional achievement to facilitate his movement to postschool activities. Riverbank based transition planning on Student's individual needs, considering Student's strengths, preferences, and interests.

The May 17, 2022 IEP noted that Student attended the meeting at which Riverbank

- discussed transition services,
- administered an age-appropriate transition assessment or testing instruments, and
- obtained input regarding Student's preferences, which included watching shows and sports, and listening to music.

Riverbank offered goals for post-secondary training or education and employment. Goals focused on passing his classes, meeting with the school counselor and service providers, to learn and research about local programs or activities available after high school. To implement these goals, Riverbank offered college and career awareness for 30 minutes monthly. Riverbank also offered access to learn about programs outside of high school through specialized academic instruction and through class assemblies with school counselors and administrators. Placement in the moderate to severe special day class at Waterford would increase Student's access to transition activities because of the smaller, more structured environment, the focus on functional academics, and opportunities for generalization during community based outings and work or volunteer activities embedded in that program.

Riverbank increased the offer of specialized academic instruction to 200 minutes daily to accommodate four classes in the moderate to severe special day class at Waterford. Riverbank offered Student core academics in the special day class with general education participation in electives, physical education, lunch, recess, and other unstructured time. Gomez, Dressel, Herrera, and Kabeary persuasively demonstrated at hearing that the amount of specialized academic instruction offered

would appropriately support Student's academic needs considering his physical difficulty responding to instruction. Gomez explained his class at Waterford used instruction based on California state standards for high school, modified to an academic level appropriate to meet the needs of each child. Student would be taught at his academic level in each subject matter and build skills for generalization before moving on to more difficult matters. Generalization meant that Student would be taught to use the skill not just to answer questions in the classroom but applied outside of the classroom and during community outings. For example, Student would create a budget in class and stick to that budget when purchasing items in a store or practice counting money and receiving change, followed by practicing that at a store. Once Student mastered that skill, he could learn to calculate sales tax and add that into his budgeting or shopping experience. Student would learn to read items on a menu, then order those items at a restaurant. By contrast, in Riverbank full inclusion, Student's work bore little resemblance to the work of his general education peers and Student had no opportunity to reinforce what he did learn by generalizing the information outside the classroom or in community based outings.

Waterford's moderate to severe special day class typically had 11 students with three independent facilitators or aides in addition to a credentialed special education teacher. They maintained a three-to-one student to teacher ratio working on foundational reading skills, math skills, and brain games or fun facts. Some students had science curriculum, as Student had at Riverbank. They worked on functional and vocational skills, such as counting money, reading menus, budgeting, social skills, and communication. They learned to

- write essays,
- address or mail a letter,

- use the restroom,
- cook,
- clean,
- create a menu and shopping list,
- wash clothes, and
- fold laundry.

The class mainstreamed in the middle of the day during breaks and lunch. Mainstreaming is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.) Students could also mainstream into general education classes for art, physical education, Spanish, theater, leadership, and yearbook.

At hearing, Gomez credibly described how activities in the special day class could be modified or accommodated to meet Student's needs given his physical challenges. For example, though Student could not physically cook, he could find a recipe, create a shopping list, locate a grocery store with the needed ingredients, and create a route to the store. From there, Student could engage in transition activities with his classmates, such as shopping for the ingredients, waiting in line at check out, and making the purchase with the assistance of his aide.

Riverbank offered transportation to and from Waterford. The evidence showed, generally, that transportation to and from Waterford by school bus would take less than an hour in each direction, travelling approximately 13-15 miles. Parent expressed concern at hearing that she could not transport Student this distance because of her

other childcare responsibilities. As demonstrated below, Student attended extended school year at Waterford in summer 2022, transported by bus, and displayed no adverse reactions from doing so.

Riverbank offered Student extended school year placement in the Waterford special day class from June 2, 2022 through June 29, 2022 with health and nursing services for 30 minutes twice daily, assistive technology for 60 minutes monthly, a full-time aide, and specialized academic instruction for 240 minutes daily.

Riverbank offered

- inclusion services,
- adapted physical education,
- health and nursing services,
- assistive technology,
- specialized services for low incidence disabilities,
- college and career awareness transition services,
- a full-time one-to-one aide, and
- extended school year services.

Riverbank's May 17, 2022 IEP included a start and end date for services and modifications and identified the frequency, location, and duration of all services offered. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).) Parent expressed no confusion regarding the IEP offer either during the meeting or at hearing. Riverbank's formal written offer created a clear record of the placement and services offered. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.)

Each assessor persuasively demonstrated that collectively they identified Student's areas of needs, and made appropriate recommendations for accommodations, modifications, and related services in an amount appropriate to meet those needs. Each witness, at hearing, testified that Student required no other modifications, accommodations, or supports and services to meet his needs. Parent agreed with assessment reports, conclusions, and recommendations and with the supplemental aids, program modifications, accommodations, and services Riverbank offered in the May 17, 2022 IEP both at the IEP and at hearing. Parent consented to placement at Waterford during the extended school year but not for the 2022-2023 school year.

Riverbank afforded Parent the opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of Student and the provision of a FAPE to the Student. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A 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. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Board of Education* (3rd Cir. 1993) 93F.2d 1031, 1036.) Parent attended the IEP meeting during which the triennial assessments were reviewed, was informed of Student's needs, provided input, and expressed disagreement with Riverbank's offer of placement at Waterford. Parent's meaningful participation was evidenced through the IEP meeting notes and testimony from Parent, Dressell, Herrera, Kabeary, and Buchanan.

That the parties disagreed regarding placement does not undermine Parent's meaningful participation. Parent requested that Student remain at Riverbank High School, which would mean moving into general education classes as part of the full inclusion program for the 2022-2023 school year. Parent believed that general education classes would stimulate Student's mind, even if he could not perform the work or comprehend the

material. Riverbank had no obligation to adopt Parent's preferred placement. Instead, Riverbank was responsible for ensuring the IEP offered Student an appropriate program. (See, *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 421.)

Here, the evidence demonstrated, and Parent did not dispute, that Riverbank met procedural requirements in the development of the May 17, 2022 IEP. Applying the *Rowley* standard, as restated and affirmed in *Andrew F.*, the weight of the evidence also established that the supplemental aids, program modifications, and special education and related services offered in the May 17, 2022 IEP were designed to meet Student's unique needs and reasonably calculated to enable him to make progress appropriate in light of his circumstances. Student's IEP could be appropriately implemented at Waterford with Student's placement in the moderate to severe special day class but could not be implemented at Riverbank High School in general education classes.

2022 EXTENDED SCHOOL YEAR PLACEMENT AT WATERFORD

Student's participation at Waterford for the 2022 extended school year, though not dispositive, provided relevant, noncumulative, and useful evidence in evaluating the reasonableness of Riverbank's placement offer, made just weeks prior to his attendance at Waterford. (See, *Adams v. Oregon*, *supra*, 195 F.3d 1141, 1149.) Overall, the evidence of Student's extended school year experience supported placement in the Waterford moderate to severe special day class both academically and socially.

Gomez credibly described his experience with Student in the extended school year placement. Student, academically, fit right into the class. Though exhibiting the highest math skills in class, Student's math skills were not high enough to warrant placement in a different setting. Student worked well with his classmates and collaborated on research for brain games. Student worked on vocabulary and

read short stories using his favorite soccer player, Portugal, and other geographic information. He worked on math and reading at a table with his aide. He worked at a pace appropriate for him, in a small, structured setting, and was not left behind by the academic demands of the class. Nor did he show fatigue, though extended school year meant shortened school days. Student demonstrated no issues taking the bus to and from school.

Student shared answers in class using his Tobii, something that proved too demanding at the Riverbank placement. He attended community-based outings involving trips to a local store and a flea market. Gomez described the outings as important to learn daily living skills, such as traveling, waiting in a line, making a purchase while others wait behind you, saying please and thank you. They also provided an opportunity to generalize skills learned in the classroom. Gomez opined that Student enjoyed coming to school, interacting with his peers, and being involved in community-based outings.

Parent took issue with the Waterford placement in two respects. First, she testified that Student wanted to remain at Riverbank because of his friends. Student had known others at Riverbank, having attended several years of school with them. These students would say hello and include Student in conversations they were having.

Parent believed Waterford could not properly care for her child because of an incident involving Student's feeding equipment. On a community outing, someone disconnected his monitor while Student was being placed in the van. The monitor was left on the sidewalk. After discovering the mistake, Gomez retrieved the monitor and took it to Parent's home. Gomez explained the incident as a simple mistake. In another incident, Parent asked Gomez whether Student had money to make a purchase while

shopping at one of the stores. Gomez explained that he sent paperwork home for Parents well in advance to prepare for needed expenses, but that Parent had not responded. He added that he provided students with money on occasion, but that Student did not ask to purchase anything while at the store. Neither of the two incidents made Waterford an inappropriate placement for Student.

LEAST RESTRICTIVE ENVIRONMENT

Riverbank contends Student could not access his education in full inclusion at Riverbank High School, even with all the accommodations, modifications, and other supports and services provided. Riverbank also contends that Student required a program focused on functional academics and daily living skills in order to meet his educational needs. Parent contends Student had more to learn academically in high school and did not want him placed in a special day class with a focus on functional life skills until he finished high school. Parent argues that Student will always need someone to help him with daily living skills and did not see the need for an education focused on such skills until he began his adult transition program.

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); 34 C.F.R. §§ 300.114 & 300.116; Ed. Code, § 56031.) 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.)

When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced:

- the educational benefits of full-time placement in a regular classroom,
- the non-academic benefits of full-time placement in a regular classroom,
- the effects the presence of the child with a disability has on the teacher and children in a regular classroom, and
- the cost of placing the child with a disability full-time in a regular classroom.

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

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 Education* (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 and 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.)

As to the first *Rachel H.* factor, the evidence demonstrated that Student's academic progress on goals resulted from one-to-one work with his aide and special day class teachers. He had difficulty even with small group instruction in his mild to moderate special day class. Student did not work on grade level curriculum. He worked on assignments that bore little relation to the work of his typically developing peers both in substance and in quantity.

Student did not receive educational benefit from full-time placement in general education. The evidence demonstrated that Riverbank provided Student with all the accommodations and modifications they could, in order to provide access to his education. Still, Student could not keep pace with academics taught even in his mild to moderate special day class. Student began having more trouble once Riverbank High School adopted the full inclusion model. Robertson worked with Student during his "free" classes to catch up on work he missed during academic classes. At the same time, Robertson tried to provide Student with frequent breaks, knowing that he fatigued during his school day trying to keep up with academics. Student required instruction at his own pace, which could be accommodated in the moderate to severe special day class at Waterford. Student's needs could no longer be accommodated in general education or a mild to moderate special day class at Riverbank.

General education English teacher Monte Wood testified about what a joy it was to have Student in his class during the 2022-2023 school year and to see general and special education students working together. Wood's appreciation of the inclusion

model, generally, did not speak to Student's need for a different placement, specifically. For example, Wood explained that Student and his aide did individual work unrelated to the instruction and materials presented to the rest of the class. Student participated in group discussions when Wood provided content and questions in advance, allowing the aide and Student to input answers into the Tobii. Student's aide would push a button for voice output during class discussions. Wood was not familiar with Student's prior mild to moderate special day class, the Waterford moderate to severe special day class, or Student's performance in either.

Parent argued that Student should be allowed to remain in a full inclusion placement at Riverbank throughout high school, to receive more academic stimulation. She acknowledged that student would require a significant level of care throughout his life and needed to learn functional academics and life skills but wanted him to wait to attend a functional program after Student finished high school.

The persuasive opinions of assessors Kabeary, Buchanan, and Herrera and Student's teachers and service providers, demonstrated that Student's cognitive levels, processing deficits, communication difficulties and resultant slow learning pace created the need to begin instruction in functional skills as soon as possible. The moderate to severe special day class embedded instruction and community-based activities were designed to foster Student's ability to

- engage in volunteer or work opportunities,
- navigation, and travel training,
- making purchases,
- taking care of personal needs, and
- acquisition of other daily living skills.

No credentialed educator or licensed service provider opined at the May 17, 2022 IEP team meeting or at hearing that teaching Student these vital life skills should be delayed for two years during Student's remaining high school years.

Notably, the evidence from both parties demonstrated that Student required extensive support to engage in all activities and had a slow rate of learning. Riverbank's offer of a special day class focused on functional academics and daily living skills provided a framework for Student to gain more independence within the level of support he continued to require. The first *Rachel H.* factor weighs heavily in favor of placement at Waterford, the moderate to severe special day class.

As to the second *Rachel H.* factor, the evidence demonstrated that Student engaged in little interaction with peers in his classes. Student's aide programmed responses into Student's Tobii when she received instructional content before classes. Teachers were sometimes able to modify questions into a yes or no or other multiple-choice format, enabling Student to provide an answer in class. Student would then need to push one button in order to output a verbal response to a question. Even so, Student rarely completed this task. Using sentence starters proved more difficult as Student had to navigate to different screens to input responses.

Student took two to five minutes to develop full sentences on the Tobii. By the time Student had an answer, the class moved on to different content. When engaged in critical thinking questions, it could take Student several days to develop an answer. Student continued to develop his skills using the Tobii, which proved to remain an appropriate device for him. The limitations circled more around Student's unstable head movements, particularly when fatigued. Student became fatigued daily trying to

keep pace with the academic rigor required both during the 2021-2022 school year in his mild to moderate special day class and during the 2022-2023 school year in full inclusion.

Outside of class, while Student enjoyed being around peers, he did not engage in reciprocal conversations with them. He would listen to conversations of others and respond nonverbally, but did not use his Tobii to provide input, respond to questions, seek clarification, or ask questions. During the 2022-2023 school year, Student did not make progress on his goal to improve socialization with peers by using his Tobii.

The second *Rachel H.* factor weighs heavily in favor of placement at Waterford, where Student would not only have access to typically developing peers but have more time to communicate with peers in interactive conversations. Student's special day class at Waterford contained fewer students, with more aides and had peers at or near Student's developmental level. Because of the slower pace of academics, Gomez and his aides had more time to work with Student one-to-one and in small groups on Student's communication goal, providing adequate time for him to prepare and share voice output responses with peers. Student demonstrated this skill while he attended extended school year at Waterford. After developing the skill within class, providers would help Student generalize the skill outside the classroom communicating with his classmates and others on community-based outings and eventually during mainstreaming with typically developing peers. Learning to become more independent and engage in the community outside of school constitute skills that will carry Student throughout his adult life. The ability to engage in reciprocal conversation, however limited, comprises the centerpiece of self-care and social interaction. Student requires a placement appropriate to foster development of these crucial skills.

As to the third *Rachel H.* factor, the impact of Student on peers and his teachers, all of Student's teachers at Riverbank High School worked hard to accommodate Student and modify his curriculum so that he could participate in class. At the same time, all who testified agreed that Student generally worked with his aide on modified work far behind the grade level curriculum being presented or sat in class appearing to listen but rarely providing input. Though Student sometimes distracted others by making noises or coughing, the evidence did not support a finding that Student disrupted the class enough to weigh against placement at Riverbank. The third factor applies neutrally in this case, as Student's academic and social functioning were the main reasons for offering a change in placement.

Neither party presented evidence on the costs of a change in placement, making the fourth *Rachel H.* factor moot.

Here, the evidence demonstrated that Student could not be educated satisfactorily in a regular education environment. Student demonstrated low academic skills and cognition, which precluded him from learning grade level curriculum, even with specialized academic instruction and intensive supports. Therefore, the least restrictive environment analysis turns to whether Riverbank offered mainstreaming to the maximum extent appropriate in light of the continuum of program options. The IEP team, a group of knowledgeable team members, made a placement decision based upon

- recent assessments, after a detailed discussion of Student's needs,
- consideration of the potential harmful effects on Student, and
- the supports necessary to place Student in the least restrictive environment.

Riverbank offered placement at Waterford only after concluding that it identified an appropriate moderate to severe special day class, in a location closest to Student's home. Lastly, the IEP team carefully reviewed Student's accommodations before recommending removal from age-appropriate general education classes and minimized the time Student spent outside of general education, considering Student's needs. In summary, the evidence demonstrated that the May 17, 2022 IEP offer of special education classrooms across academics with participation during unstructured activities, offered the least restrictive environment appropriate to meet Student's needs.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

ISSUE:

The May 17, 2022 IEP offered Student a FAPE.

Riverbank prevailed on the sole issue for hearing.

ORDER

1. Riverbank's claim for relief is granted. Riverbank may implement Student's May 17, 2022 IEP without parental consent if Parent wants Student to continue receiving special education services.

RIGHT TO APPEAL THIS DECISION

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

/s/

Cole Dalton

Administrative Law Judge

Office of Administrative Hearings