

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

GARDEN GROVE UNIFIED SCHOOL DISTRICT,

V.

PARENT ON BEHALF OF STUDENT.

CASE NO. 2023070868

DECISION

JANUARY 3, 2024

On July 26, 2023, the Office of Administrative Hearings, called OAH, received a due process hearing request from Garden Grove Unified School District, naming Student. OAH granted continuances for good cause on August 14, and September 21, 2023. Administrative Law Judge Judith Pasewark heard this matter via videoconference on November 28, 2023.

S. Daniel Harbottle represented Garden Grove. Assistant Superintendent of Special Education and Student Services Valerie Shedd attended on behalf of Garden Grove. Neither Parent nor Student appeared for hearing. OAH notified Parent of the prehearing conferences and due process hearing. Parent did not appear for the prehearing conference on August 14, 2023. OAH notified Parent of the continuance

of the prehearing conference and due process hearing. Parent did not appear for the prehearing conference on September 21, 2023. OAH notified Parent of the second continuance of the prehearing conference and due process hearing. On November 20, 2023, the ALJ held the prehearing conference on this matter. Parent did not appear for the prehearing conference. On November 21, 2023, OAH provided Parent with a copy of the Order Following Prehearing Conference, which indicated the due process hearing would be held on November 28, 2023. OAH issued Parent an electronic invitation link to attend the due process hearing via videoconferencing. Neither OAH nor Garden Grove received any communication from Parent regarding Garden Grove's request for a due process hearing. Therefore, the due process hearing commenced on November 28, 2023, without Parent or Student present.

At Garden Grove's request, the ALJ continued this matter to December 12, 2023, for a written closing brief. The record closed, and the matter was submitted on December 12, 2023.

ISSUE

Was Student's May 18, 2023 individualized education program, referred to as an IEP, appropriate such that Garden Grove may implement the IEP without parental consent?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations. (20 U.S.C. § 1400 et. seq.; 34 C.F.R.

§ 300.1 (2006) et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.)

The main purposes of the Individuals with Disabilities Education Act, referred to as the IDEA, are to ensure:

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

The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, assessment, or educational placement of the child, or the provision of a free appropriate public education, referred to as 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).) Garden Grove bore the burden of proof in this matter.

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, an eleven-year-old sixth grader, attended New Hope Elementary School within Garden Grove at the time of hearing. Student resided within Garden Grove's geographic boundaries at all relevant times. Student qualified for special education under the primary category of autism and secondary category of other health impairment due to manifestations of attention deficit hyperactivity disorder which adversely impacted his educational performance.

ISSUE: WAS STUDENT'S MAY 18, 2023, IEP APPROPRIATE SUCH THAT GARDEN GROVE MAY IMPLEMENT THE IEP WITHOUT PARENTAL CONSENT?

The parent refused to consent to any modification of Student's IEP since December 19, 2018. Therefore, Student's December 19, 2018 IEP constituted his last agreed upon and implemented IEP and was the operative IEP for purposes of this Decision. The IEP provided Student placement in Garden Grove's STRIVE program, a special day class for students with mild to moderate disabilities, and contained a behavior intervention plan, as well as educationally related mental health services in the form of family counseling.

Garden Grove contended the goals and services contained in the December 19, 2018, IEP were outdated, and Student's placement in the STRIVE special day class could no longer support Student's educational needs. Garden Grove further contended the May 18, 2023, IEP met legal requirements and offered Student a FAPE in the least restrictive environment.

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent or

guardian. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) Parents and school personnel develop an IEP for an eligible student based upon state law and the IDEA. (20 U.S.C. §§ 1401(14), 1414(d)(1); and see Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363, subd. (a); 34 C.F.R. §§ 300.320, 300.321, and 300.501.)

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204; *Endrew F. v. Douglas County School Dist. RE-1* (2017) 137 S.Ct. 988, 1000.)

When, in the school district's judgment, the child is not receiving a FAPE, Education Code, section 56346, subdivision (f), requires the school district to "act with reasonable promptness to correct that problem by adjudicating the differences with the parent." (*I.R. v. L.A. Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164, 1170.)

In implementing the IDEA, California requires that when a parent refuses consent to components of an IEP, and the school district determines those components are necessary to provide a FAPE to the child, the school district shall initiate a due process hearing. (Ed. Code, § 56346, subd. (f).) In this matter, Garden Grove established that the May 18, 2023 IEP offered Student a FAPE in the least restrictive environment.

PARENTAL PARTICIPATION IN THE IEP PROCESS

The parent of a pupil identified as an individual with exceptional needs shall be afforded the opportunity to participate in meetings with respect to the identification, assessments, and educational placement of the pupil with respect to the provision of a

FAPE. (Ed. Code, §§ 56304, 56342.5; 34 C.F.R § 300.501(b)(c).) Garden Grove attempted to schedule Student's annual IEP team meeting on April 21, 2023. After six attempts to schedule the meeting by telephone and email, on April 7, 2023, Garden Grove provided Parent, in person, with the invitation to the IEP team meeting scheduled for April 21, 2023. Once scheduled, Parent subsequently cancelled the meeting shortly before commencement of the meeting on April 21, 2023. Parent requested the IEP team meeting be rescheduled. District members of the IEP team signed the April 21, 2023 IEP for attendance purposes only and rescheduled the IEP team meeting for April 28, 2023. Garden Grove made three attempts to confirm the new date with Parent. Parent confirmed her attendance for the April 28, 2023 IEP team meeting and requested she attend virtually via videoconference. Parent failed to show up for the IEP team meeting and could not be reached. Therefore, Garden Grove sent Parent a May 4, 2023, written notice that the IEP team meeting was rescheduled for May 18, 2023, and would take place with or without Parent in attendance. Garden Grove established it attempted to obtain Parent's attendance at Student's annual IEP team meeting and provided ample opportunity for Parent's participation in the IEP process.

MAY 18, 2023 IEP

An IEP is a written document that states the child's present levels of academic achievement and functional performance, creates measurable annual goals for the child, describes the child's progress toward meeting the annual goals and explains the services that will be provided to the child to help him advance toward attaining his goals. (*Timothy O. v. Paso Robles Unified School Dist.*, (9th Cir. 2016) 822 F.3d. 1105, 1111.)

The IEP must comprehensively describe the child's educational needs and the corresponding special education and related services that meet those needs. (*School*

Comm. of Burlington v. Department of Educ. (1985) 471 U.S. 359, 368 [105 S.Ct. 1996] (*Burlington*.) The IEP must identify the special education and related services and supplementary aids and services, including program modification or supports. (*Id.*, 471 U.S. at 368; 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.324(a)(2)(iv); Ed. Code, § 56345, subd. (a)(4).)

The IEP is put together by the IEP team, consisting of a group of school officials, teachers, and parents. (*Fry ex rel. E.F. v. Napoleon Cmty. Schs.* (580 U.S.154, 137 S. Ct. 743, 749.) Each IEP team meeting shall include the parent, no less than one general education teacher if the student is participating in general education, and not less than one special education teacher of the student. The IEP team shall include a representative of the district who is qualified to provide specially designed instruction, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of resources. The team shall also include an individual who can interpret the instructional implications of the assessment results. (Ed. Code, § 56341.)

The IEP documents the child's current levels of academic achievement, specifies measurable annual goals for how the child can make progress in the general education curriculum and lists the special education and related services to be provided so the student can advance appropriately towards those goals. (20 U.S.C. § 1414(d)(1)(A)(i)(I), (IV)(aa).) The IEP team must consider the strengths of the child; the concerns of the parent for enhancing the education of the child; the most recent evaluation of the child; and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A), citing, *Capistrano Unified School District v. S.W. and C.W. on behalf of their minor child B.W.* (9th Cir. 2021) 21 F. 4th 1125, 1129, 1130.)

The actions of a school district with respect to whether it had knowledge of, or reason to suspect, a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (citing *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1041).)

IEP TEAM PARTICIPANTS

The May 18, 2023 IEP appropriately consisted of Student's

- case manager and education specialist,
- program supervisor,
- speech and language pathologist,
- occupational therapist,
- school principal, and
- school psychologist.

Except for Parent who chose not to participate in the IEP process, all required members of the IEP team attended the meeting. The team included teachers, staff, and service providers familiar with Student's goals, services, and areas of need.

MOST RECENT ASSESSMENT INFORMATION

The May 18, 2023, IEP team considered the reassessment findings and recommendations contained in Student's written triennial reassessment report dated May 5, 2022. Garden Grove used the results of this reassessment to assist in determining Student's strengths and weaknesses for creation of the May 18, 2023, IEP. Although invited to participate in the assessment process, Parent did not provide any information requested by the reassessment team.

Alejandro Quirarte, a credentialed school psychologist, led the 2022 reassessment team, and attended the May 18, 2023 IEP team meeting. Quirarte held a master's degree in counseling and school psychology. As a school psychologist, Quirarte was qualified to conduct Student's assessments and report his findings to the IEP team. Quirarte's testimony was persuasive, uncontroverted, and supported by other witnesses' testimony.

The 2022 reassessment utilized

- Student's cumulative school records,
- a health and development history,
- teacher feedback,
- observations during assessments,
- class time, and
- unstructured playground time.

The reassessment team administered the

- Universal Nonverbal Intelligence Test, second edition,
- Adaptive Behavior Assessment System, third edition,
- Autism Spectrum Rating Scales, Behavior Assessment System for Children, third edition, and
- the Brigance Inventory of Early Development.

Garden Grove utilized a full range of assessments in all areas of Student's suspected disabilities.

The report contained a significant concern regarding Student's school attendance record. During the 2021-2022 school year, Student had 135 full-day absences and 18 tardies. The assessors agreed Student's lack of school attendance hindered his educational growth in all areas.

During the reassessment, Student's cooperation was atypical for his age, and he was underdeveloped in conversational proficiency for his age.

Student's intelligence quotient, called IQ, fell in the delayed range when compared to peers of the same age. Academically, Student scored in the delayed range in reading, math, writing, oral language, and listening comprehension. Student's classroom performance needed improvement or was unsatisfactory in all areas. Student, at age 10, in the fourth grade, could identify letters and numbers; however, his teacher expressed concerns in his knowledge of basic math facts, foundational reading skills, and writing.

Student scored limited adaptive behavior skills in the extremely low range in all domains. Student demonstrated very elevated characteristics associated with autistic-like behaviors. Student presented with verbal communication deficits, inconsistencies in eye contact, and little to no reciprocity with engagement.

Student fell within the clinically significant range for aggression, learning problems, atypicality, withdrawal, adaptability, social skills, leadership, study skills, functional communication, and activities of daily living, and at risk for hyperactivity, anxiety, depression, and attention.

Student exhibited receptive and expressive language skills in the deficient range when compared to same-aged peers. Student struggled with vocabulary and language

structure skills. Student severely struggled with social language and pragmatics. Student presented with limited communicative intentions and social communication skills in both structure and unstructured school settings.

PRESENT LEVELS OF PERFORMANCE

The May 18, 2023 IEP team members discussed Student's present levels of performance. As reported in the 2022 triennial reassessment, supplemented with the fifth-grade special education teacher's reports and observations, Student continued to meet eligibility requirements for autism and secondarily qualified under other health impairment, due to behaviors related to attention deficit hyperactivity disorder. Student continued to present with elevated to very elevated levels of characteristics consistent with autism. Student exhibited a developmental disability which significantly affected his verbal and nonverbal communication, and exhibited social interaction deficits that adversely affected his educational progress based upon his academic achievement in relation to his cognitive abilities. Student also continued to exhibit elevated levels of attention deficits and at-risk levels of hyperactivity and impulsivity in the classroom and during assessments.

A general education screening assessment conducted during the school year, called WONDERS, indicated that as of the second trimester of the 2022-2023 school year, Student was not meeting grade-level expectations in language arts and math. Student continued to have difficulty holding appropriate conversations with peers and staff in both academic and social settings.

The IEP team discussed Student's lack of school attendance. As of the May 18, 2023 IEP team meeting, Student attended only 32 days of school during the 2022-2023 school year, with 131 unexcused absences and 28 tardies. Student's lack of attendance greatly impacted his academic progress, social progress, and understanding of the classroom routine and expectations. His absences also affected his IEP services. For example, Student's occupational therapy goal which sought to increase Student's legibility in writing letters and decrease reliance on prompts, could not be implemented or measured, because Student attended school for a total of nine days on which occupational therapy services were scheduled.

Teacher observations of Student's social-emotional behaviors indicated Student was motivated by using his Chromebook and would comply with short tasks to earn more usage time. Otherwise, Student became easily frustrated with academic assignments. Student only worked two to three minutes at a time during academics and required lots of encouragement and staff support to participate in classroom activities. Student engaged with peers when they engaged him but became frustrated if peers were too loud or too close to him. Student often responded to peers and adults with inappropriate language and threats. During lunch or recess, Student eloped from staff and required adult support to remain in the area and follow rules.

Garden Grove established the IEP team considered relevant information regarding Student's strengths and weaknesses, and accurately reported his present levels of academic achievement and functional performance based on the information available at the time of the May 18, 2023 IEP team meeting.

ANNUAL GOALS AND RELATED SERVICES

Garden Grove contended that the annual goals contained in the May 18, 2023, IEP comported to Student's unique needs in academics, attendance, behavior, occupational therapy, and speech and language based on reassessment results and discussion of Student's present levels of performance.

An IEP requires a statement of measurable annual goals including academic and functional goals, designed to meet the needs of the student that result from the disability to enable the student to be involved in and make progress in the general education curriculum, and meet each of the other educational needs of the student that result from the disability. (Ed. Code, § 56345, subd. (a)(2)(A)(B).)

The IEP team must determine and specify in the IEP the type of related services a student will receive. (34 C.F.R. § 300.320(a)(4).) The IEP must also include a statement of the anticipated frequency, location, and duration of related services that will be provided. (34 C.F.R. § 300.320(a)(7).)

Student did not meet any of his IEP goals in the nearly five years Garden Grove implemented the December 19, 2018 IEP. Although Student's IEP team drafted new goals in 2022, they were not implemented as Parent refused consent to the 2022 IEP. The IEP team drafted new goals for the May 18, 2023 IEP, which sought to accurately reflect Student's current academic and functional needs and enable Student to make meaningful educational progress.

Educational specialist Megan Sanders attended the May 18, 2023 IEP team meeting. Sanders held a bachelor's degree in elementary education and special education. She held an autism authorization and had experience utilizing applied behavior analysis strategies. As the STRIVE special day class teacher, Sanders provided intensive behavior intervention for students exhibiting challenging behaviors.

Sanders updated Student's present levels of performance and goal baselines for the May 18, 2023 IEP. Based upon WONDERS scores utilized in the STRIVE program, Student did not meet any curriculum standards. For example, STRIVE students worked on algebraic fractions; Student still struggled with adding and subtracting in 10's. Due to Student's lack of school attendance, little data was available to measure progress on goals. Therefore, based upon assessments and classroom observations, Sanders updated Student's existing goals as they remained unfulfilled. Sanders opined the updated goals reflected Student's current abilities.

Goal One addressed Student's need for foundational reading skills. On WONDERS testing, Student read only five out of 10 consonant/vowel/consonant words in lists, and 16 out of 20 in text. The goal, implemented by the teacher, sought to increase Student's reading accuracy to 80 percent.

Goal Two addressed Student's need for school attendance. The goal, implemented by the teacher, sought to improve Student's school attendance from 18 percent to 80 percent by April 2024.

Goal Three addressed Student's writing deficiencies. Student could not write simple sentences modeled on the board using correct letter formation, spacing, and

proper spelling. The goal, implemented by the teacher, sought to develop Student's ability to correctly copy a complete simple sentence modeled on the board, in four out of five trials measured by Student's work samples.

Goal Four addressed Student's need to increase phonological awareness. Based on the WONDERS test, Student could not produce rhyming words. The goal, implemented by the teacher, sought to develop Student's ability to rhyme five-of-five words over three opportunities.

Goal Five addressed Student's behavioral needs. The goal, implemented by the teacher, sought to increase Student's ability to respond and participate in appropriate peer conversations by engaging in at least two exchanges with less than two verbal prompts in four-of-five opportunities measured by teacher-charted observations and data collection.

Goal Six addressed Student's need for foundational math skills. Student could solve basic addition problems with counters and staff support. Student could not solve subtraction problems with math manipulatives and staff support. The goal, implemented by the teacher, sought to increase Student's ability to fluently add and subtract using manipulatives and strategies based upon place values, 80 percent of the time in four-of-five trials, measured by Student's work samples and teacher records.

Based upon Student's present levels of performance, the IEP team determined Student's functional language arts and math curriculum required program modifications

which could not be implemented in the STRIVE special day class. The IEP team determined the six academic goals required 1,550 minutes per week of specialized academic instruction provided by a special education teacher in a special day classroom for students with moderate to severe disabilities.

Goal Seven addressed Student's fine motor and visual motor integration. When direct line copying a four-word sentence, Student displayed a 59 percent accuracy for letter sizing, 77 percent accuracy for line adherence, 68 percent accuracy for legible letter formation, and 77 percent accuracy for word spacing. Implemented by the occupational therapist, the goal sought to improve Student's fine motor and visual motor skills by increasing his legible copying of sentences to 75 percent, four-of-five times with one verbal prompt.

The IEP team determined Student's occupational therapy goal required 30 minutes per week of occupational therapy through direct services from a non-public agency under contract with Garden Grove.

Goal Eight addressed Student's pragmatics and social language. Student did not independently initiate conversations or maintain topics. The goal, implemented by the speech and language pathologist, sought to improve Student's ability to communicate effectively, by independently initiating a conversation and maintaining a topic through at least two turns in three-of-four opportunities, as measured by observation, teacher report and data collection.

Goal Nine addressed Student's additional language deficits. Student answered "when and why" questions with 30 percent accuracy. The goal, implemented by the

speech and language pathologist, sought to improve Student's ability to comprehend language by answering "when and why" questions with 70 percent accuracy using visual supports as measured by clinical observation and data collection.

The IEP team determined the two speech and language goals required 30 minutes per week of group speech services provided by a speech and language pathologist, or supervised assistant.

Sanders' testimony was persuasive. Sanders, a qualified teacher with specialized skills, possessed first-hand knowledge of Student's academic and classroom performance. She presented opinions which appropriately referenced the 2022 reassessment findings and present levels of performance, which were undisputed at hearing.

Garden Grove establish the goals and services offered in the May 18, 2023 IEP were appropriate and addressed Student's unique needs. Each of the goals were based upon current data and assessments and contained measurable objectives to be accomplished over a 12-month period. The IEP team offered corresponding services for each goal, and sufficiently identified the frequency, location, and duration of each related service.

ACCOMMODATIONS

The IEP team determined Student required additional accommodations in all classroom settings as follows:

- Obtain Student's attention before speaking;
- Check for understanding by having Student restate or paraphrase information;

- Reduce distractions for Student;
- Extend time for Student;
- Provide directions in a variety of modalities;
- Provide visual cues;
- Provide visual organizers;
- Provide flexible seating to ensure auditory and visual access;
- Reduce background noise;
- Provide multiple or frequent breaks;
- Utilize noise cancelling headphones as needed; and
- Provide adaptive paper.

Each accommodation was appropriately designed to support Student in the educational setting. Sanders and Quirarte confirmed the accommodations appropriately supported Student's educational needs in the classroom.

Student's December 19, 2018 IEP addressed Student's mental health. The December 19, 2018 IEP contained a provision for educationally related mental health service in the form of family counseling. Although Parent consented to this service, Parent did not utilize the counseling. Therefore, the May 18, 2023 IEP team had no new information regarding Student's mental health and could not collect data at school due to Student's lack of attendance. The 2023 IEP team; however, continued to offer educationally related mental health services in the form of 60 minutes twice per month for family therapy, and case management services of 30 minutes per month to allow for collaboration with Student's family and members of the IEP team to monitor Student's progress towards behavioral goals. The counseling supported Student's behavioral goals and attendance issues.

BEHAVIOR INTERVENTION PLAN

Tanya Avina, the Principal at New Hope Elementary School, reviewed Student's December 19 2018 IEP, and corresponding behavior intervention plan. Avina attended the May 18, 2023 IEP team meeting and assisted in creating the May 18, 2023 behavior intervention plan.

The May 18, 2023 IEP included an updated behavior intervention plan. Given Student's lack of school attendance, the IEP team updated the behavior intervention plan through data collection such as observations, interviews, and records review. The team noted Student's extremely poor school attendance contributed to his behaviors, which included:

- aggression towards adults and peers consisting of
 - hitting,
 - punching,
 - kicking,
 - biting,
 - pinching,
 - slapping,
 - head-butting, and
 - spitting;
- property destruction by
 - hitting,
 - banging,
 - slamming,
 - kicking,

- throwing, and
- ripping objects and items of furniture;
- vocal disruptions of cursing, yelling, and screaming threats at adults and peers;
- non-compliance including escaping from groups or the classroom; and
- inappropriate boundaries of inappropriately touching himself and adults.

Student's maladaptive behaviors occurred daily when Student attended school and consisted of mild-to-moderate disruptions which lasted one-to-10 minutes each.

Due to Student's lack of school attendance, it was difficult to determine specific behavior antecedents; however, Student exhibited behaviors during transitions and during non-preferred tasks, lunch, and recess. The IEP team surmised Student's behaviors occurred to obtain preferred items and activities, for escape and avoidance, in response to sensitivity to sound, and due to attention deficits.

Student responded to a structured day that was predictable and consistent and where he was aware of the academic and behavioral expectations. Student did best when offered breaks and provided a daily visual schedule listing contingent rewards for engaging in work tasks. Nevertheless, Student required adult supervision throughout the school day to keep him and his peers safe.

The behavior intervention plan sought to replace Student's problem behaviors with appropriate classroom behaviors and expectations when provided adult support. The behavior intervention plan included a list of teaching strategies and enforcement

procedures for staff to establish, maintain, and generalize replacement behaviors. Staff response to Student's behavior depended on the level of intensity and ranged from low intensity redirecting with verbal prompts to physical restraints for harmful behavior.

The behavior intervention plan created on May 18, 2023 was an appropriate update of Student's prior behavior intervention plan from December 19, 2018. Student's behaviors remained similar; however, the May 18, 2023 behavior intervention plan considered Student's lack of school attendance as a contributing factor and created an IEP goal to address school attendance. The team also created a behavior goal to improve Student's communication and interaction with peers.

PLACEMENT AND LEAST RESTRICTIVE ENVIRONMENT

Garden Grove contended Student required placement in a special day class for students with moderate to severe disabilities as his modified educational program could not be implemented in a special day class for students with mild to moderate disabilities. Garden Grove further contended that moving Student from one special day class to another did not constitute a change of placement to a more restrictive setting.

A special education student should be educated with non-disabled peers to the maximum extent appropriate but may be removed from the regular education environment when the nature or the severity of the student's disability is such that education in the regular classroom with the use of supplementary aides and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.144(a)(2)(i) & (ii); Ed. Code, § 5634.)

School districts must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. (34 C.F.R. § 00.115(a).) In addition to the regular classroom, a school district must be able to offer education to students with disabilities in special classes, special schools, home and hospitals and institutions. (34 C.F.R. § 300.115(b),)

In 1994, the Ninth Circuit Court of Appeals adopted a four-factor balancing test to determine whether a school district's placement offered education in the least restrictive environment. (*Sacramento City Unified Sch. Dist., Bd. Of Educ. V. Rachel H. ex rel. Holland (Rachel H.)* (9th Cir. 1994) 14 F.3d 1398.) The four factors consisted of balancing

- 1) educational benefits of placement full-time in a regular classroom;
- 2) non-academic benefits of such placement;
- 3) effect the student has on the teacher and other students in the regular class; and
- 4) cost of mainstreaming the student.

Rachel H., however, did not override the Ninth Circuit's prior determination that mainstreaming must be balanced with the primary objective of providing children with disabilities an appropriate education. (*Wilson v. Marana Unified Sch. Dist.* (9th Cir. 1984) 735 F 2d. 1178, 1183).

The STRIVE program special day class constituted Student's placement pursuant to the December 19, 2018 IEP. As Principal at New Hope Elementary School, Avina credibility provided Student's 2018 IEP background and reported the circumstances which led to Student's placement in the STRIVE special day class at New Hope.

Avina confirmed that in 2018, Student qualified for special education and related services under the primary category of autism and secondary category of emotional disturbance. The entire IEP team, including Parent, expressed concerns about Student's assaultive behavior and mental health. Thus, in 2018, the IEP team crafted a robust behavior intervention plan and offered educationally related mental health services to the family.

Based upon Student's modified academics and mental health needs at the time, the IEP team offered placement in the STRIVE special day class at New Hope. Avina recounted that the STRIVE special day class was designed for students with mild to moderate disabilities, and behavior issues. The STRIVE program provided a smaller class size, supported by an individual behavior interventionist. STRIVE's mission was to teach students with average cognition pursuant to state standards, while teaching them social skills and behaviors needed to return to the general education classroom. Avina persuasively opined that Student could not meet the academic standards required in the STRIVE program.

Program supervisor Ashley Morris testified regarding Student's placement. Morris presented as a highly qualified witness. Morris held a bachelor's degree in psychology, a master's degree in educational psychology and school psychology, as well as a credential for applied behavior analysis. Morris had experience as a school psychologist, assessor, and board-certified behavior analyst, with experience in multi-tiered crisis and behavior intervention programs and strategies. Morris supervised special education at Garden Grove, managed Student's IEP, and attended Student's IEP team meetings since 2022. Morris confirmed Avina's description of the STRIVE special day class. Morris strongly opined that Student's modified academic program could no

longer be implemented in the STRIVE special day class. Instead, Student needed to develop functional and daily living skills which were provided in the special day class for students with moderate to severe disabilities.

Quirarte also testified that STRIVE students primarily performed at grade level but needed behavior support. Students in the STRIVE special day class needed to be cognitively aware in order to respond to the behavior interventions provided in the classroom. Quirarte, Avina, and Morris agreed that Student could no longer be appropriately supported in the STRIVE program. As of 2023, Student was far behind other students in the STRIVE special day class. Student's lower cognitive abilities and modified academic curriculum, coupled with his continued assaultive behaviors, and failure to attend school, required placement in a special day class for students with moderate to severe disabilities where he could focus on living skills and adaptive behavior.

In its closing brief, Garden Grove contended that a transfer to the special day class for students with moderate to severe disabilities did not represent a change in placement triggering the *Rachel H.* criteria. The argument bears consideration. Parent consented to a change in placement from general education to a special day class in 2018, which remained Student's last agreed upon and implemented placement in the least restrictive environment. The May 18, 2023 IEP offered placement in the special day class for students with moderate to severe disabilities as a lateral move from one special day class to another special day class, with similar mainstreaming time. Thus, Garden Grove contends it is not placing Student in a materially more restrictive setting than his current placement. In essence, it is the special day class program, which is changing, not

the special day class placement. The four *Rachel H.* factors are not “intended to apply to a comparison between two special education classrooms.” (*K.M. by and through Markham. v. Tehachapi Unified Sch. Dist.*, 2017 WL 1348807, 23 (E.D. Cal April 5 2017).)

When applying the *Rachel H.* factors, Student’s need for a highly modified academic program with a shift from core content to more functional and adaptive skills, the need for a special day class placement became apparent. The prerequisite that mainstreaming must be balanced with the primary objective of providing children with disabilities an appropriate education controls determination of the least restrictive environment. Once determined that Student’s needs could not be met in a general education setting with appropriate supports, Student’s least restrictive environment reverted to consideration of a special day class.

However, if it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires a further determination of whether the child has been mainstreamed to the maximum extent appropriate in light of the continuum of program options. (*Daniel R.R. v. State Bd. of Educ.* (5th Cir. 1989) 874 F.2d 1036, 1050.) Mainstreaming is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the district’s proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F. 2d 1307, 1314.) For the school district’s offer of special education services to constitute a FAPE under the IDEA, the offer must be designed to meet the student’s unique needs, comport with the students IEP, and be reasonably calculated to provide the student educational benefit through an IEP

reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Andrew F. supra.* at p. 1000). The content of Student's IEP drives his placement. When comparing the two special day class programs, the STRIVE special day class was intended for students with average cognitive functioning, who were near grade level. Based on the 2022 reassessment and the May 2023 IEP, Student's cognitive function was below average, and his academic performance was significantly below grade level. The difference in the special day classes was in IEP program offered, such as the modified curriculum, not in the placement. Garden Grove established the special day class for students with moderate to severe disabilities comported with Student's IEP and that Student's goals, services, and accommodations could be appropriately implemented within that setting. (5 C.C.R. § 3035(b)(1).) The offered special day class further complied with the statutory requirement that individuals with exceptional needs be grouped with students according to their instructional needs. (Ed. Code, § 56031, subd. (d).)

The IEP team determined the STRIVE special day class could no longer support Student's unique needs, both academic and behaviorally. The IEP team soundly concluded that to provide Student with a FAPE, he required placement in a special day class for students with moderate to severe disabilities, where he would benefit from a modified academic program and more focus on adaptive behavior skills.

PRIOR WRITTEN NOTICE

A school district must provide the parents of a child with a disability prior written notice whenever it proposes or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child. (34 C.F.R § 300.503 (a).)

On May 24, 2023, Garden Grove provided Parent with a letter of prior written notice. The notice stated, that as indicated in its May 4, 2023 letter of prior written notice, the IEP team met on May 18, 2023, for Student's annual IEP and offer of FAPE. The notice included a copy of the May 18, 2023 IEP for Parent's consideration and consent. The notice included a copy of the Parental Safeguards as well as an invitation to contact Garden Grove to convene an additional IEP team meeting to discuss the offer of FAPE. Parent did not respond to this notice.

Garden Grove sustained its burden of proof to establish that each component of the May 18, 2023 IEP was designed to enable Student to receive educational benefit in light of his circumstances and unique educational and functional needs. The May 18, 2023 IEP offered Student appropriate and measurable goals to address Student's needs, appropriate services and accommodations, an appropriate placement in the least restrictive environment, and a behavior intervention plan to support Student's behavioral needs.

The May 18, 2023 IEP was appropriate and offered Student a FAPE in the least restrictive environment. Garden Grove may implement the May 18, 2023 IEP without parental consent.

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.

Student's May 18, 2023, IEP was appropriate and offered Student a FAPE such that Garden Grove may implement the IEP without parental consent.

Garden Grove prevailed on the sole issue.

REMEDIES

Garden Grove may implement the May 18, 2023 IEP, including the behavior intervention plan, without parental consent.

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.

Judith L. Pasewark

Administrative Law Judge

Office of Administrative Hearings