

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN LEANDRO UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2019010124

DECISION

Student filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on January 3, 2019, naming San Leandro Unified School District. Student's first amended complaint, naming San Leandro, was deemed filed on February 22, 2019.

Administrative Law Judge Christine Arden heard this matter in San Leandro, California, on April 9, 10, 11 and 12, 2019.

Susan Foley, Attorney at Law, represented Student. Parents attended the hearing on all days on behalf of Student. Student did not attend the hearing.

Leah Smith and Gorev Ahuja, Attorneys at Law, represented San Leandro. Colleen Palia, Special Education Director, attended the hearing on all days on behalf of San Leandro.

A continuance was granted at the parties' request to file written closing arguments and the record remained open until May 8, 2019. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for

decision.

ISSUES¹

1. Did San Leandro deny Student a free appropriate public education in its August 9, 2018 offer to September 19, 2018 by failing to:
 - a) Make a clear offer with regard to the amount of time Student would spend in a special day class, as opposed to a general education classroom;
 - b) Offer a classroom with a sufficiently low student-to-teacher ratio and sufficient individualized instruction to allow him to benefit from his education; and
 - c) Offer placement on a campus small enough and with a small enough student population to allow him to benefit from his education?
2. Did San Leandro deny Student a FAPE from its September 19, 2018 offer by failing to:
 - a) Offer a classroom with a sufficiently low student-to-teacher ratio and sufficient individualized instruction to allow him to benefit from his education; and
 - b) Offer placement on a campus small enough and with a small enough student population to allow him to benefit from his education?

SUMMARY OF DECISION

On August 9, 2018, before the beginning of the 2018-2019 school year, San

¹ "The ALJ has reworded and clarified some issues as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) No change in substance has been made.

Leandro offered Student, a seven-year-old boy in second grade, placement at Roosevelt Elementary School in a combination of special day class (for approximately 55 percent of the school day) and general education (for approximately 45 percent of the school day), with a dedicated one-to-one aide. The special day class had 10 children in it, and at least three adults, including the aide assigned to Student. Student's behaviors impeded his ability to access his education during the first eight days of the school year. Parents then withdrew Student from school.

On September 19, 2018, San Leandro offered Student placement at Monroe Elementary School in a combination of special day class (for approximately 70 percent of the school day and all academic classes) and general education (for approximately 30 percent of the school day). The Monroe special day class would have had five children in it, including Student, with at least three adults, including the aide assigned to Student.

In November, 2018, Parents unilaterally placed Student in a nonpublic school and thereafter filed for due process against San Leandro, seeking reimbursement for all costs incurred in connection with that placement. Student claimed that August 9, 2018 amendment to IEP was ambiguous regarding the amount of time Student would be in the special day class and in general education. Student claimed this ambiguity denied him a FAPE because it significantly impeded Parents' opportunity to participate in the decision-making process regarding a FAPE to Student.

Student further claimed that both the August 9, 2018, and September 19, 2018, offers of FAPE failed to offer Student a placement in a classroom with a sufficiently low student-to-teacher ratio and sufficient individualized instruction to allow him to benefit from his education. Student also alleged that both the August 9, 2018, and September 19, 2018, offers of FAPE failed to offer Student placement on a campus small enough and with a small enough student population to allow him to benefit from his education.

Student failed to meet his burden of proof on all issues presented. The August 9,

2018 offer of a FAPE was clear and unambiguous regarding the amounts of time Student would spend in special and general education and did not impede Parents' opportunity to participate in the decision-making process regarding a FAPE. Additionally, both IEPs at issue in this case offered Student appropriate placements in the least restrictive environment.

FACTUAL FINDINGS

1. Student was a seven-year-old boy at the time of hearing, who resided with his Parents within the boundaries of San Leandro at all relevant times. Student was first identified as eligible for special education under the primary eligibility category of speech and language impairment one week before his third birthday.

2. Not long after Student was initially found eligible for special education, he was diagnosed with autism. As of the time of hearing his primary eligibility for special education was autism.

PRESCHOOL

3. In the 2015-2016 school year Student attended the Broadmoor Preschool on the campus of Roosevelt Elementary School, Student's school of residence within the San Leandro Unified School District. Student attended a special day class for a portion of his day and a general education preschool program for a portion of his day. During the general education portion of his school day Student was supported by an aide trained in applied behavior analysis therapy. Student made some progress in preschool.

4. In May, 2016, San Leandro offered Student placement in a mild-to-moderate special day class for Student's upcoming kindergarten year, starting in August, 2016. Parents disagreed with that placement and did not consent to it. In June, 2016, the IEP team revised its offer of FAPE for the upcoming kindergarten school year to placement in a general education classroom. Parents consented to the June, 2016 IEP.

KINDERGARTEN – 2016-2017 SCHOOL YEAR

5. In the 2016-2017 school year Student attended a general education kindergarten class at Roosevelt. Student left this class at noon each school day, even though the class ended at 1:50 p.m., due to his behavior issues. Student received applied behavior analysis therapy at home in the afternoons. Student did not have an assigned adult aide pursuant to his IEP, but he was informally provided with adult support throughout his entire time in the kindergarten class. Student's behaviors interfered with his learning. These behaviors included: inattention, elopement from class; pica, which meant eating or mouthing inedible objects, such as carpet fibers and crayons; hitting, kicking, and hair pulling.

FIRST GRADE – 2017-2018 SCHOOL YEAR

6. San Leandro offered Student placement for first grade in a special day class. Parents did not consent to that placement. Parents wanted Student to be in a general education program because they were afraid he would fall behind academically in a special day class.

7. Student was in Debbie Dodd's first grade general education class at Roosevelt, along with 25 other children. The proposed first grade special day class usually had only about 10 to 12 students, and a maximum of 15 students, with a teacher and a class aide.

8. When Student started first grade school personnel frequently called Parent 1² and asked her to either come pick Student up and bring him home from school, or to come to school to help with Student in class. Student was overwhelmed and not able to

² Student's Parents are each referred to individually in this Decision as Parent 1 and Parent 2.

handle the placement, which Parent 1 characterized as a “disaster.” He eloped from class and acted aggressively toward adults and peers. He did not have adequate support to enable him to access his education in that setting. Parents believed Student was not benefitting from school, so they withdrew him from school for a period of time. Therefore, Student missed a significant amount of school in the beginning of the 2017-2018 school year.

9. San Leandro and Parents both filed for due process against each other in the last quarter of 2017. These complaints were consolidated into one case. In January, 2018, the parties settled the consolidated lawsuit by agreeing to a number of terms for the balance of the 2017-2018 school year. Student remained in his general education first grade class at Roosevelt, and received speech and language group therapy for 45 minutes per week, individual occupational therapy for 15 minutes per week, plus an additional 15 minutes of occupational therapy consultative services each week. At Parents’ request, specialized academic instruction and resource specialist support were suspended. As of February 7, 2018, and throughout the second semester of the 2017-2018 school year, San Leandro contracted with STE Consultants, a nonpublic agency specializing in behavioral services, to provide a one-to-one aide for Student throughout the entire school day. This aide was trained in applied behavior analysis therapy and was supervised by a STE behaviorist. A San Leandro behaviorist consulted and collaborated with STE about the behavioral services being provided to Student. The settlement term providing for a nonpublic agency aide for Student was not “stayput.” STE drafted a behavior intervention plan for Student. STE also provided Student with applied behavior analysis therapy services at home.

10. After the resources services were suspended Student would often choose to come into the resource specialist program room to relax, with his aide following. Kassoria Scales, the resource specialist program teacher, would then help Student return

to class.

11. As of April, 2018, Student had attended school in first grade only about 40 percent of the time school was in session. He was also suspended from school multiple times due to his aggressive behaviors toward others. Parents kept Student home from school sometimes because they were concerned about his safety.

12. Parent 1 observed the mild-to-moderate special day classes at four different San Leandro elementary schools and concluded that those special day classes were too low academically for Student.

13. By the end of first grade Parent 1 believed Student would not benefit from attending Roosevelt, but she did not share this opinion with the rest of the IEP team at that time.

MAY 2018 ANNUAL IEP MEETINGS

14. On May 14, 2018, the IEP team met for Student's annual IEP meeting. Parents; David Kumamoto, Roosevelt principal; Ms. Dodd; Maricela Garcia Plascencia, STE board certified behavior analyst; Natalie Aihara, STE trainer; Jenelle Wade, STE board certified behavior analyst; Michelle Turbin, San Leandro board certified behavior analyst; Talyna Sandine, speech language pathologist; Kerry Rinks, occupational therapist; Colleen Palia, San Leandro director of special education; Ms. Scales; and Jennifer Fischer, special day class teacher, attended the meeting. At that meeting Parents said they wanted Student to remain in general education with a one-to-one aide. The IEP was not completed at the May 14, 2018 team meeting.

15. Ms. Scales provided resource specialist program services to Student in first grade and had been his case manager. She testified at hearing that Student made some progress on his goals during first grade, but he required support when he was in the general education classroom. In Ms. Scales' opinion, based on her knowledge of Student and an assessment result, his cognitive level was appropriate for a special day class.

According to Ms. Scales, who was a very credible witness, Student's cognitive levels were below average, and lower than the other children in general education for whom she provided resource specialist program services.

16. Part two of Student's annual IEP team meeting occurred on May 21, 2018. Ms. Dodd reported that Student made academic progress in first grade, and he participated in the morning movement song. Ms. Plascencia reported Student was completing more work, sitting longer, and was on task for more than five minutes without problem behavior. The IEP was not completed at the May 21, 2018 meeting.

17. On May 29, 2018, the IEP team met for part three of the Student's annual IEP meeting. Parents; Mr. Kumamoto; Ms. Dodd; Ms. Plascencia; Ms. Aihara; Ms. Turbin; Ms. Sandine; Ms. Rinks; Ms. Palia; and Ms. Fischer attended. The team reviewed the behavior intervention plan. San Leandro offered Student the following placement at Roosevelt: 56 percent of his school day of specialized academic instruction in a special day class; and 44 percent of his school day in general education, consisting of 80 minutes daily of general education academics, 50 minutes daily of nonacademic electives (art, music, physical education or library), and recess and lunch. San Leandro offered the following services: 120 minutes monthly of occupational therapy; 240 minutes monthly of behavior intervention for data collection, staff training and materials preparation; 180 minutes monthly of group speech language therapy; 60 minutes weekly of individual occupational therapy; 1200 minutes yearly for behavior intervention services for observation, consultation, data tracking, and data sheet preparation; and 1800 minutes yearly of individual and group language and speech therapy. Additionally, the IEP offer included a one-to-one adult aide when Student was in the general education setting and three-to-one adult support when he was in the special day class. San Leandro also offered Student extended school year.

18. The San Leandro IEP team members intended that the offer of general

education for 44 percent of his day would provide Student with opportunities to develop social, behavioral, and academic skills to prepare him to access the general education curriculum in a large group setting.

19. At the May 29, 2018 IEP team meeting Parents expressed their concern that the offer of FAPE had Student spending too much time in the special day class, which they believed was not an appropriate setting for him. They did not consent to the May 14, 2018 offer of FAPE.

AUGUST 9, 2018 IEP MEETING

20. On August 9, 2018, Parents; Mr. Yamamoto; Ms. Palia; and Patricia Evans, San Leandro's assistant director of special education, met to discuss Student's placement and schedule for the upcoming 2018-2019 school year. At that meeting the team agreed to an interim placement for Student from the first day of the school year until September 20, 2018. To memorialize the team's agreement, the meeting participants signed an IEP amendment dated August 9, 2018, which amended the annual IEP dated May 14, 2018. The amendment provided that Student would be in a mild-to-moderate special day class during approximately 55 percent of his day and would be in a general education setting approximately 45 percent of his day. The amendment provided "[t]he exact schedule and percentage of time in each setting is flexible for the first 30 days." Student would have a one-to-one San Leandro aide throughout the day, subject to a "fade plan" addressed in the behavior intervention plan drafted during the previous school year by STE. Student would have one person as an aide all day. The aide's break time would be covered by the resource specialist program provider's paraprofessional or would occur during Student's recess. Resource specialist program services were not offered in the August 9, 2018 IEP amendment. The amendment further provided that the IEP team would meet before September 20, 2018, to finalize Student's schedule.

21. At the August 9, 2018 meeting a color coded document titled "Tentative Schedule," illustrating Student's proposed daily school schedule, reflecting implementation of the August 9, 2018 IEP amendment, was presented to Parents. Student's proposed daily schedule and the division of his time between the general education classes and the special education classes was thoroughly explained to Parents. The Tentative Schedule illustrated the times Student would be in general education, which were coded in blue. Times Student would be in the special day class were coded in yellow. The Tentative Schedule clearly showed Student would be in general education for two hours and forty minutes (160 minutes) of the six hour (360 minute) school day. It also clearly showed Student would be in a special day class for the balance of the school day. That meant Student would be in general education for 44.44 percent of his school day; and in a special day class 55.56 percent of his day.

22. The Tentative Schedule illustrated Student would be in Ms. Fischer's special day class every day from 10:05 to 11:45 a.m., and again from 12:30 p.m. to 2:10, the end of the day. The Tentative Schedule also showed Student receiving "RSP" 30 minutes daily while his aide took his lunch or rest break, which occurred between 1:05 and 1:25 p.m., depending on the day of the week. RSP was an abbreviation for resource specialist program.

23. The signed August 9, 2018 IEP amendment did not mention resource specialist program service. The Tentative Schedule included 30 minutes daily of resource specialist program service, which was going to be pushed into the special day class. Ms. Scales was confused in the beginning of the 2018-2019 school year as to whether resource specialist program services were supposed to be provided to Student.

24. Resource specialist program services were not provided to any children during the first two weeks of school at Roosevelt in the 2018-2019 school year. Missed resource specialist program services were going to be made up later in the school year.

This allowed for expected adjustments in class enrollments and personnel assignments, which occurred at the beginning of each school year.

25. Parents wanted Student to begin his day in Ms. Julie Pence's general education language arts class, because he was stronger in language arts than other subjects. The rest of the IEP team wanted to minimize Student's transitions between settings because transitions were very difficult for him.

26. Parent 1's testimony that she did not understand the interim offer of placement memorialized by the August 9, 2018 IEP amendment because it was ambiguous as to how much time Student would be spending in special education, versus general education, was not credible. At the August 9, 2018 meeting San Leandro team members thoroughly discussed Student's proposed schedule and explained to Parents the proposed split of Student's time between general education and special education that San Leandro offered. Parents pushed San Leandro to maximize Student's time in general education and to have him start his day in general education. The interim offer, approximating that 45 percent of Student's day would be spent in general education, reflects San Leandro's attempt to satisfy Parents. San Leandro reasonably assumed that, with an aide, Student might be able to successfully handle this portion of his school day in general education, since he had achieved some success with an aide in general education during first grade.

BEGINNING OF SECOND GRADE

27. On August 15, 2018, the first day of the 2018-2019 school year, Student attended Roosevelt. His schedule called for him to spend approximately 55 percent of his day in Ms. Fischer's mild-to-moderate special day class, and approximately 45 percent of his day in either Ms. Julie Pence's second grade general education class, or in other general education activities (i.e., lunch, recess, electives).

28. At school Student exhibited behaviors, including distraction, elopement,

and physical aggression, which interfered with his ability to access his educational program. Within the first eight days of school Student hit, pulled hair, pushed, and kicked toward adults in general education. He was also aggressive when he returned home after school.

29. On August 20, 2018, Student was restrained twice by Michelle Turbin, due to his unsafe behaviors. Parents and other members of Student's IEP team met the next day to discuss the incident and Student's behavior intervention plan.

30. Ludi Duenas worked as Student's aide for the first four days of school. Ms. Duenas's permanent position was as Ms. Fischer's class aide. Michelle Go, a certified registered behavior technician hired specifically to be Student's aide, was his aide for the next four school days that he attended Roosevelt that school year. There were ten children in Ms. Fischer's special day class. Student was the only child in the class with his own aide.

31. The team hoped Student would eventually progress behaviorally so that he would not be reliant on an aide while he was in the special day class. This would be achieved pursuant to a "fade plan" in the behavior intervention plan. During the first eight days of school, Student was not present in Ms. Fischer's class very often due to his disruptive behaviors.

32. Ms. Fischer's practice was to provide variations in the special day class curriculum in order to meet the different individual needs of the children. Ms. Fischer very credibly opined that students in a special day class usually take from six weeks to three months to establish a routine for an entire school day.

33. Ms. Scales provided about one hour of support for Student in each of the first eight days of the 2018-2019 school year. Ms. Scales observed Student acting aggressively during that time period, including hitting, kicking, hair pulling and eloping. Once she saw him get close to the front of the school building. Ms. Scales opined

Student would have benefited from more time in the special day class.

34. Parents believed Student was not benefitting from his placement at Roosevelt and that he was unsafe there. Consequently, they pulled him out of Roosevelt after attending eight days in second grade. Parents provided San Leandro with two medical notes from Student's doctor, excusing Student from attending school from September 4, 2018 through October 14, 2018. The reason given was because Student was undergoing an evaluation by a psychiatrist. Parents requested home-hospital instruction, which San Leandro denied.

35. Other than Parent 1 stating she feared Student might elope from Roosevelt and she was concerned about Student putting inedible objects in his mouth, no other potential threats to Student's safety at school were mentioned at hearing. Student walked out of the building once, but he was followed by his aide and an administrator. They convinced him to come back into the building. There was no evidence that Student had ever eloped off of the Roosevelt campus. Since Student was with a one-to-one aide while he was at Roosevelt it was unlikely he could elope unnoticed off of the Roosevelt campus.

36. On August 23, 2018, during a phone conversation, Ms. Evans offered Parent 2 an opportunity to observe Mr. Ryan Mah's mild-to-moderate special day class at Monroe Elementary School. Parents did not observe Mr. Mah's special day class.

SEPTEMBER 19, 2018 IEP MEETING

37. Student's IEP team met on September 19, 2018, for the 30-day review of Student's placement. Parent 2; Ms. Palia; Ms. Evans; Mr. Kumamoto; Ms. Fischer; Ms. Scales; Ms. Turbin; Ms. Sandine; Ms. Pence; and Trisha Davis, San Leandro occupational therapist, attended the meeting. Student was not attending school at this time. The team reviewed goals, and discussed services and whether Student's present placement at Roosevelt was appropriate.

38. At the September 19, 2018 IEP meeting the team acknowledged Student had not succeeded in his present program. Student's behaviors, including eloping, wandering, pica, flopping to, or lying on the ground, and aggression, had increased since February 2018. Ms. Fischer told the team that, due to Student's behaviors and because he stopped attending school, he was not able to participate successfully in her special day class. When Student had been at school, he spent most of the time with his aide.

39. The San Leandro team members suggested to Parent 2 that Mr. Mah's mild-to-moderate special day class at Monroe would be more appropriate for Student than Ms. Fischer's class. Mr. Mah's class had fewer and older students. The San Leandro team members suggested that Student be in the special day class for 70 percent of the day and in general education 30 percent of the day.

40. The offer of FAPE made in the September 19, 2018 IEP was for the following program at Monroe Elementary School:

- a) 70 percent of Student's school day and all academic classes in a mild-to-moderate special day class, which consisted of five children (including Student) in the second and third grade;
- b) 30 percent of Student's school day in general education, which included lunch, recess and electives (nonacademic) classes;
- c) a one-to-one San Leandro aide throughout the day, subject to a "fade plan" in the special day class, as addressed in the behavior intervention plan, which would be reviewed at the beginning of each month;
- d) a one-to-one San Leandro aide in the general education setting;
- e) 120 minutes monthly of individual occupational therapy; and
- f) 180 minutes monthly of group speech therapy.

41. The San Leandro members of the IEP team recommended Student be

placed in Mr. Mah's mild-to-moderate special day class because Mr. Mah had significant experience with challenging behaviors. The San Leandro members of the IEP team thought the blend of second and third graders in the class would address Parents' concern that the children in the special day class were academically behind Student. There were always at least two adults in a special day class, the teacher and a class assistant.

42. Mr. Mah's mild-to-moderate special day class was a very structured classroom with 50 minute blocks for each lesson. This tracked the general education curriculum schedule. Students in Mr. Mah's class shifted out of the class at various times during the day for general education electives and services. In September, 2018, all five of the children in the class were eligible for special education under the primary eligibility of autism.

43. The 30 percent of Student's program offered in general education would give him opportunities to use and practice social skills he learned in the special day class in the general education setting. It would also provide him some access to the general education curriculum. Student's elective teachers and aide would be able to modify the general education curriculum for him, thereby providing him with needed individualized instruction.

44. Student was not offered resource specialist program services in the September 19, 2018 IEP because all his academic instruction would occur in the mild-to-moderate special day class, where he would receive sufficient individualized instruction. Ms. Scales, who was quite familiar with Student, credibly opined that a special day class was the least restrictive environment that was appropriate for Student.

45. At the September 19, 2018 IEP meeting, Parent 2 requested a placement for Student at a nonpublic school. Parent 2 informed the rest of the IEP team that Parents had determined Student needed to be placed in a nonpublic school, and

Student was in the process of applying to Wellspring Educational Services. Parents did not consent to the September 19, 2018 IEP.

46. Monroe had a student population of about 400. Roosevelt had a student population of about 550. Both schools served students ranging from transitional kindergarten through fifth grade. Both schools were completely surrounded by fencing with gates, which were closed and locked when school started. Only one gate remained unlocked at Roosevelt during the school day. Due to fire regulations Roosevelt had three gates equipped with push bars, so that people could exit in an emergency. Monroe was similarly secured, equipped with locked gates and also had requisite gates and doors with push bars to allow for emergency exits.

WELLSPRING

47. On October 22, 2018, Parents gave San Leandro written notice of their plans to unilaterally place Student at Wellspring Educational Services in ten business days, and that they would be seeking reimbursement from San Leandro for all costs they incurred from the placement. San Leandro gave Parents written notice on November 2, 2018, that it denied Parents' request to fund Student's placement at Wellspring.

48. Student started attending Wellspring in the first half of November, 2018. Wellspring was a nonpublic school, certified by the California Department of Education. Wellspring provided relationship based programs for children with autism and other developmental disabilities. At the time of hearing, 35 children, ages 4 to 14 in grades kindergarten through eighth grade, attended Wellspring. All children attending Wellspring had special needs; most were on the autism diagnostic spectrum. The students at Wellspring had a wide range of cognitive abilities. Most of them had below average to average cognition. Student fit in well with the Wellspring student population. Most students attending Wellspring were placed there pursuant to IEPs. The teachers, occupational therapist and speech language therapist at Wellspring were all certified

though the California Department of Education.

49. Student's behaviors at Wellspring included aggression, elopement, non-compliance, work refusal, hitting, kicking, hair-pulling, property destruction, and furniture climbing when he started attending there. His physical aggression was usually aimed at adults, but occasionally at peers.

50. Student eloped from his classroom at Wellspring. The Wellspring campus was completely fenced. Student's classroom was located on the second floor. It would be difficult for Student to elope from Wellspring's campus, particularly because he had an aide with him at all times. Wellspring staff blocked, but did not restrain Student.

51. Student attended Ms. Vienna Thouchalanh's class at Wellspring. There were seven children, ranging from second to fifth grades, in the class. Ms. Thouchalanh, who was the lead teacher, testified very credibly at hearing. She had five aides assisting her with the class. The aides were informally trained at Wellspring. One aide also took an online course for registered behavior technicians. One of three aides accompanied Student throughout the school day. The rotation encouraged Student to generalize skills with different people.

52. When Student first started attending Wellspring he acted out aggressively five to seven times a day. At the time of hearing his aggressive acts had diminished to one or two aggressive acts a day. Initially, Student was aggressive with his classmates. At the time of hearing Student knew the children in his class and wanted to play with some of them. Student's social skills started to improve near the end of January, 2019, after he had been attending Wellspring for a few months. By April, 2019, Student's elopements from class had decreased.

53. Student made academic and socialization progress since he started at Wellspring. Student's class at Wellspring rotated activities every 30 minutes. Because Student had difficulty with transitions he sometimes missed an activity, even after

attending Wellspring for five months.

54. Ms. Thouchalanh, who had worked at Wellspring in the position of interim teacher for one and one-half years, was completing her master's degree at the time of hearing. She completed the requirements for her teaching credential in a "mild-to-moderate" special day class in March, 2019. She did not observe the Monroe special day class offered to Student by San Leandro.

55. Neither Ms. Thouchalanh, nor Mariam Fendler, assistant director of Wellspring, or any expert witnesses, offered an opinion as to whether San Leandro's offer of a special day class for a portion of Student's school day, with a general education setting for a portion of his school day, on a comprehensive public school campus, would address Student's needs.

56. Mr. David Kamamoto, principal of Roosevelt for the previous two years, testified at hearing very credibly. He answered questions readily and candidly. He maintained good eye contact while being questioned and testified without hesitation, knowledgeably, honestly, and with candor. One of his duties as principal was to supervise the special education program at Roosevelt. Mr. Kamamoto first met Student before Student started first grade. Mr. Kamamoto reviewed all IEP's for children at Roosevelt. He had attended 50 to 60, or more, IEP meetings. Ms. Kamamoto noted that typically, children who were placed in special day classes, were also placed in the general education setting for 30 percent of the school day during lunch, recess, physical education, and art, or other elective classes. Mr. Yamamoto credibly opined that Student had benefitted from being in general education in first grade when he had a one-to-one aide.

57. Ms. Palia credibly opined that Student could access some of the general education academics. STE personnel also believed Student had some academic success in first grade when he was accompanied by an aide. Parent 1 believed Student made

some progress when he was in general education with an aide in first grade.

58. No evidence was introduced at hearing which supported Student's contention that Student could not benefit from inclusion in a general education setting for a portion of his school day with the support of an aide.

59. No evidence was introduced regarding how or why the size of either the Roosevelt or Monroe campuses and student populations influenced Student's educational program. There was also no evidence that Student's potential elopement from either the Roosevelt or the Monroe campus posed a safety hazard for Student, since he had been offered a one-to-one aide throughout the school day at both schools.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA³

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁴ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. §

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

⁴ All subsequent references to the Code of Federal Regulations are to the 2006 version.

1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE

requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at p. 200, 203–204.)

4. In 2017, the United States Supreme Court unanimously declined to interpret the definition of FAPE in a manner at odds with the *Rowley* court’s analysis, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’...” (*Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 137 S.Ct. 988, 1000). The Supreme Court in *Endrew* stated that school districts must “... offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable a student to make progress appropriate in light of his circumstances.” (*Id.* at p. 1002.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

ISSUE 1(A): WAS THE OFFER OF FAPE IN THE AUGUST 9, 2018 IEP AMENDMENT

SUFFICIENTLY CLEAR?

6. In his issue 1(a) Student contends San Leandro denied him a FAPE between August 9, 2018, and September 19, 2018 (when San Leandro made a subsequent offer of FAPE), because the August 9, 2018 Amendment to IEP was unclear regarding the amount of time Student would spend in a special day class, as opposed to a general education classroom. Student contends this ambiguity denied him a FAPE because it significantly impeded Parents' opportunity to participate in the decision-making process regarding provision of a FAPE to Student. San Leandro denies that contention and asserts the offer of FAPE in the August 9, 2018 amendment to IEP was sufficiently clear as to the amount of time Student would spend in a special day class and in general education. This program was offered in a clear writing and fully explained to Parents, so their opportunity to participate in the decision-making process regarding provision of a FAPE was not significantly impeded.

7. A student's IEP must contain a clear written offer of placement. The offer must include a statement of the special education and related services and supplementary aids and services, including program modification or supports. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) The offer must also include a statement of the anticipated frequency, location, and duration of services and modifications. (34 C.F.R. § 300.320(a)(7); Ed. Code, § 56345, subd. (a)(7).)

8. A FAPE offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it. In *Union School Dist., supra*, 15 F.3d 1519, the Ninth Circuit observed that the formal requirements of an IEP are not merely technical and therefore, should be enforced rigorously. The requirement of a coherent, formal, written offer creates a clear record that helps eliminate factual disputes about when placements were offered, what placements were offered, and what additional assistance was offered to supplement a placement. It also assists parents in presenting complaints

with respect to any matter relating to the educational placement of the child. (*Ibid.*) The requirement of a formal, written offer alerts the parents to the need to consider seriously whether the offered placement was an appropriate placement under the IDEA, so that the parents can decide whether to oppose the offered placement or to accept it with the supplement of additional education services. (*Ibid.*; *Glendale Unified School Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1107.)

9. The August 9, 2018 IEP amendment, which documented the agreed upon interim 30-day placement at the beginning of Student's second grade, was very clear as to how Student's time would be divided between the special day class and general education settings. Student's argument seems to rely on the fact that the August 9, 2018 IEP amendment included the word "approximately" when referring to the percentages of Student's day when he would be in the special day class and the general education settings. However, the visual Tentative Schedule, which illustrated how Student's day would be divided, showed that the 45 percent and 55 percent approximations were correct within less than one percentage point. The use of the word "approximately" to describe the percentage of the day set forth in the schedule was sufficiently clear, such that Parents could understand the placement offer and make intelligent decisions based upon it.

10. Student did not prove that San Leandro denied him a FAPE between August 9, 2018 and September 19, 2018, by significantly impeding Parents' opportunity to participate in the decision-making process due to a lack of clarity in the offered program regarding the amount of time Student would spend in a special day class, as opposed to general education. The August 9, 2018 IEP amendment was sufficiently clear on the issue of how much time Student would be in both a special day class and in general education. Therefore, the offer of FAPE made in the August 9, 2018 IEP amendment met the requirements for a coherent, formal, written offer of a FAPE.

Student failed to meet his burden of proof on issue 1(a).

ISSUE 1(B): AUGUST 9, 2018 IEP OFFER - STUDENT-TO-TEACHER RATIO

11. In his issue 1(b) Student contends San Leandro denied him a FAPE from August 9, 2019, to September 19, 2018, by failing to offer him a classroom with a sufficiently low student-to-teacher ratio and sufficient individualized instruction to allow him to benefit from his education. San Leandro denies this contention, and asserts it offered Student a placement with a sufficiently low student-to-teacher ratio and individualized instruction to enable him to receive educational benefit.

12. Federal and state laws require school districts to provide a program in the least restrictive environment to each special education student. (Ed. Code, §§56031; 56033.5; 34 C.F.R. § 300.114.) A special education student must be educated with non-disabled peers to the maximum extent appropriate. They may be removed from the regular education environment only when the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2).) School districts are required to provide each special education student with a program in the least restrictive environment. (20 U.S.C. § 1412(a)(5)(A).)

13. If an IEP team determines 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 Bd. of Educ.* (5th Cir. 1989) 874 F.2d 1036, 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication, instruction in the home or instruction in hospitals or institutions. (Ed. Code, § 56361.)

14. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404) [adopting factors identified in *Daniel R.R.*, *supra*, 874 F.2d at p. 1048–1050].

15. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*See Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. *Id.* An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.* citing *Fuhrmann v. East Hanover Board of Education*, *supra*, 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

16. Student had experienced some progress and academic success from his time in general education with the STE aide in first grade. There was no reason to place Student in a nonpublic school, which was a more restrictive environment than a special day class, when he had previously benefited from inclusion in general education. A full-time general education program was not appropriate due to Student's behaviors and cognitive ability. However, Student had some success in a comprehensive campus and in the general education setting in first grade. He is entitled to the opportunity to be educated in the least restrictive environment that will service his needs. Student failed to

establish that Student cannot receive educational benefit in a less restrictive environment than a nonpublic school, such as Wellspring, which offered him no inclusion in general education, and no exposure to typical peers.

17. There were ten children in Ms. Fischer's special day class. In addition to the teacher, there was a full time classroom assistant. Student also had his own one-to-one aide. This teacher-to-student ratio was low enough to provide sufficient opportunity for Student to receive the individualized instruction he needed to enable him to access the curriculum.

18. Student had difficulty with transitions. The transition to second grade was clearly challenging for Student. Student's aide would eventually "fade back" after Student became accustomed to the routine of second grade. However, Student was only in school for eight days in second grade before Parents removed him from Roosevelt. He did not have adequate time to become accustomed to the new special day class, and the routine of his second grade schedule. Ms. Fischer credibly testified that most children in special day classes take anywhere from six weeks to three months to get used to the routine of a new school year.

19. The evidence did not establish that the slightly smaller class Student attended at Wellspring, rather than the special day class at Roosevelt in combination with inclusion in general education with the support of an aide, was the least restrictive environment in which Student could access his education. The special day class at Roosevelt provided Student with a sufficiently low teacher-to-student ratio and individualized instruction to enable him to access his education once he adjusted to the routine of the school year. Student failed to meet his burden of proof on issue 1(b).

ISSUE 2(A): SEPTEMBER 19, 2018 IEP - LOW STUDENT-TO-TEACHER RATIO

20. In his issue 2(a) Student contends San Leandro denied him a FAPE in the September 19, 2018 IEP by failing to offer him a classroom with a sufficiently low

student-to-teacher ratio and sufficient individualized instruction to allow him to benefit from his education. San Leandro denies this contention, and asserts it offered Student a placement with a sufficiently low student-to-teacher ratio and individualized instruction to enable him to receive educational benefit.

21. The applicable law and analysis of the evidence addressed above regarding Student's right and ability to be educated in a less restrictive environment than a nonpublic school are hereby incorporated by this reference.

22. There were only five children, including Student, anticipated to be in the special day class at Monroe offered to Student in the September 19, 2018 IEP. There were at least three adults expected to be in that class, consisting of the teacher, class assistant, and Student's one-to-one aide. This was a lower Student-teacher ratio than existed in Student's previous placement at Roosevelt. Moreover, the September 19, 2018 IEP provided that all academics would be provided to Student in the special day class. Additionally, Student was offered a one-to-one aide to accompany him in the general education portion of his day, and a one-to-one aide in the special day class, until such time that he progressed to a point where his aide could successfully fade out in that setting. The evidence established that Student could access his education in a small special day class, particularly with the assistance of an aide. Student did not require placement in a more restrictive environment, such as a nonpublic school, in order to access his education.

23. The evidence did not establish that the September 19, 2018 IEP denied Student a FAPE by failing to offer him a classroom with a sufficiently low student-to-teacher ratio and sufficient individualized instruction to allow him to benefit from his education. The September 19, 2018 IEP offered Student a FAPE in the least restrictive environment. Student failed to meet his burden of proof on issue 2(a).

ISSUE 1(C): AUGUST 9, 2018 OFFER - SMALL CAMPUS AND STUDENT POPULATION

24. In his issue 1(c) Student contends San Leandro denied him a FAPE between August 9, 2018, and September 19, 2018, because it failed to offer him a placement on a small campus with a small enough student population to allow him to benefit from his education.

25. No evidence was introduced which supported Student's claim that he needed a small campus with a small student population in order to benefit from his educational program. No experts, or witnesses from Wellspring, opined that Student could not benefit from his education on a comprehensive public school campus, or on any campus other than a very small one with an extremely small homogenous student population, such as Wellspring.

26. There was evidence that Student had a history of eloping from class, and of putting crayons and carpet fibers in his mouth. However, San Leandro offered Student a one-to-one aide throughout the school day from August 9, 2018, through September 19, 2018. That offer was reasonably calculated to address elopement and other challenging behaviors. Moreover, Student had benefitted in first grade from his inclusion in the general education setting, which proved that a comprehensive campus was the least restrictive environment necessary for Student to access his education. The September 19, 2018 IEP was reasonably calculated to address Student's behaviors. Student failed to meet his burden of proof on issue 1(c).

ISSUE 2(B): SEPTEMBER 19, 2018 OFFER - SMALL CAMPUS AND STUDENT POPULATION

27. In his issue 2(b) Student contends San Leandro denied him a FAPE from September 19, 2018 because the IEP of that date failed to offer him a placement on a small campus with a small enough student population to allow him to benefit from his education.

28. The applicable law and analysis of the evidence addressed above regarding Student's ability to be educated on a comprehensive public school campus are hereby incorporated by this reference.

29. The offer of a FAPE San Leandro made to Student in the September 19, 2018 IEP, was for placement at Monroe, a school with a student population of approximately 150 fewer children than attended Roosevelt. Since the Roosevelt campus and student population were not too large to enable Student to benefit from his education, as discussed above, the Monroe campus, with its smaller student population, was also not too large to allow Student to benefit from his education.

30. There was no evidence that the size of the Monroe campus, or the size of the Monroe student population, would impede Student's ability to access his education.

31. Student had previously benefitted from his inclusion in general education in a public school, which established that a comprehensive campus was the least restrictive environment in which Student could access his education. There was no evidence to the contrary. Student failed to meet his burden of proof on issue 2(b).

ORDER

1. Since Student did not meet his burden of proof on any issues presented in this case, all relief sought by Student is denied.

PREVAILING PARTY

Pursuant to Ed. Code, § 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, San Leandro was the prevailing party on all issues presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all

parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: May 31, 2019

/s/

CHRISTINE ARDEN

Administrative Law Judge

Office of Administrative Hearings