

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:
SAN LEANDRO UNIFIED SCHOOL
DISTRICT,

OAH Case No. 2013100539

v.

PARENT ON BEHALF OF STUDENT.

DECISION

San Leandro Unified School District (District) filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on October 11, 2013, naming Student. The matter was continued for good cause on October 31, 2013.

Administrative Law Judge (ALJ) Rebecca Freie heard this matter in San Leandro, California, on January 21 through 23, and January 30, 2014.

Matthew Tamel, Attorney at Law, represented District. Colleen Palia, Program Manager, attended the hearing as District's representative.

Mother represented Student. Father attended the hearing on all dates.¹ Student attended the hearing for two to three hours on each date.

A continuance was granted to allow the parties to file written closing arguments and the record remained open until February 18, 2014. District and Student filed written closing arguments on February 18, 2014. The record was closed on February 18, 2014, and the matter was submitted for decision.

¹ Mother and Father are referred to collectively as Parents.

PRELIMINARY MATTERS

District's Motion to Compel

On January 30, 2014, the last day of hearing, Mother testified. Initially she read from a document she had written, and was cross-examined by District's attorney. Pursuant to Evidence Code section 771, Mother was ordered to provide a redacted copy to District's attorney no later than close of business on February 3, 2014.

On February 7, 2014, District's counsel filed a motion to compel Mother to produce the document with OAH as he had not received it. No reply was received from Mother. There was no ruling on the motion, and District's counsel did not subsequently pursue a ruling, thereby waiving a right to one.

District's Motion to Strike Portions of Mother's Written Closing Argument

On February 21, 2014, District's attorney filed a letter titled "District's Objection to Portions of Student's Closing Statement." In it he asked that statements in Student's written closing argument not be considered by the ALJ in rendering this decision, because they discuss information outside the record in the case. In the alternative, he asked that if the ALJ was going to consider this new information, he be allowed to file a reply brief. Student did not respond. The ALJ interprets District's request to be a motion to strike.

A written closing argument, in and of itself, is not evidence in a due process hearing. The ALJ can only consider documents that were admitted into evidence during the due process hearing, the testimony of witnesses under oath, and observations during the due process hearing.

The ALJ has reviewed Mother's written closing argument and determined that portions of it were not supported by testimony or other evidence. Student did not file a motion to reopen the record to have this information admitted. District's motion is granted. The ALJ strikes the statements in Student's written closing argument as described in District's motion.

ISSUE²

May District implement the individualized education program (IEP) offer of September 27, 2013, with proposed goals and services, calling for placement of Student in a

² The issue has been rephrased for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

counseling enriched special day class and program at Roosevelt Elementary School (Roosevelt), without parental consent?

SUMMARY OF DECISION

Student will be provided a free appropriate public education (FAPE) by placement in the counseling enriched classroom at Roosevelt. Student's maladaptive behaviors in the school setting are such that he requires placement in the counseling enriched environment in the special day class at Roosevelt. The goals and services in the IEP offer of September 27, 2013, can be implemented at Roosevelt, and Student will receive educational benefit. The IEP offer is an offer of a FAPE in the least restrictive environment, and can be implemented without Mother's consent.

FACTUAL FINDINGS

Background

1. Student resides within the geographic boundaries of District with Mother. He was enrolled as a District student on February 4, 2013, after Mother moved into District from the boundaries of the Oakland Unified School District (Oakland). He is eight years old and is in the third grade.

2. An Oakland IEP team made Student eligible for special education in December 2012, as a child with emotional disturbance after Oakland personnel conducted a psycho-educational assessment of Student (Oakland assessment). Student is currently attending the counseling enriched program at Roosevelt. He was placed here as an interim alternative educational setting pursuant to an OAH order of December 16, 2013, in OAH Case No. 2013100168. Notice is taken of that Decision, but its factual findings are not adopted since the order is not final.

IEP Team Meeting of September 27, 2013

3. Parents attended an IEP team meeting on September 27, 2013 at Monroe Elementary School (Monroe), where Student had attended since February 4, 2013. Other attendees included Victoria Forrester, principal at Roosevelt;³ Jeannette McNeil, principal at Monroe;⁴ and Eva Caraher,⁵ a District behavioral specialist. Other District personnel also attended the meeting.

³ Ms. Forrester began her career in education in 1989 as a teacher. She became principal of Roosevelt in 2007. She has "an extensive background working with at-risk students and their families." She has a bachelor's degree and a master's degree, and has had an administrative credential since 2007.

PARENT PARTICIPATION

4. District came to the meeting with a draft IEP, as was standard practice, and a District team member amended that draft IEP on the computer during the meeting, based on the input of all parties. Mother made handwritten notations on the notes taken during the meeting by a member of District's team. Mother was an active participant at all IEP team meetings District convened, including the IEP team meeting of September 27, 2013. Further, District did not hold pre-meetings, or in any way predetermine its offer of September 27, 2013. All procedural requirements were met.

STUDENT'S UNIQUE NEEDS

5. On September 27, 2013, the team discussed Student's present levels of academic achievement and functional performance. When Student was evaluated in Oakland, in the fall of 2012, he was found to have average cognitive abilities and his academic abilities were at grade level with the exception of one area, reading fluency. Although Student's academic achievement during the 2012-2013 school year was less than one might have expected, with his scores on the California standardized testing administered in April 2013 in the basic and below basic range, and his low report card grades, this was due in large part to him having difficulty staying on task, and his behavioral issues.

6. Student's most problematic area in the domain of functional performance was his behavior. Although Mother claims that Student's maladaptive behaviors at school were due to the "physical assaults" he suffered at the hands of Oakland personnel and parents of other students at his school there, this was not substantiated by any other source. He entered District with a behavior support plan developed by Oakland, and in March 2013, Ms. Caraher had developed a behavior intervention plan for Student as part of a functional analysis assessment of Student that she conducted. The assessment and behavioral intervention plan met all legal requirements, and the behavior intervention plan was made part of an IEP in March 2013.

7. Some of Student's problematic behaviors are discussed below. There were many more incidents than these. Parents and District members of the IEP team were all aware of these and other incidents, which led to District making the offer of placement in the counseling enriched program at Roosevelt. Ms. McNeil witnessed many of these incidents and conducted investigations concerning them.

⁴ Ms. McNeil holds both a bachelor's and a master's degree. She was a classroom teacher for 12 years, and an administrator for eight years.

⁵ Ms. Caraher has been a Board Certified Behavior Analyst since 2008. She has worked as a behaviorist since 1994, and has been employed by District since 2006 as a behavior consultant. She has a bachelor's degree and a master's degree.

8. On February 28, 2013, there was a serious disciplinary incident involving Student in the classroom. He was called to the board to do work in front of the class and became frustrated because he thought the other students were teasing him. He began to throw chairs at the other children and the teacher. The teacher was able to get him to leave the classroom, at which point he punched and kicked the teacher, and had to be restrained by trained personnel for a few minutes until he calmed down. The behavior support plan from Oakland was being consistently implemented at this time, but clearly was ineffective.

9. Student was moved to a special day class on March 11, 2013. The special day class had 12-15 students, with a special education teacher and a class aide, in contrast to a general education classes with many more students, and lesser aide support. In addition, the special day class was more structured than a general education class.

10. Student did much better behaviorally in the special day class and general education classes for the first several weeks he was there. He was generally on task for a greater amount of time in the special day class than in general education classes with the exception of the computer class, a high interest activity for him. The data collected by Ms. Caraher in her functional analysis assessment in March 2013 supported this finding.

11. On May 14 and May 22, 2013, Student had two serious behavioral incidents, both in general education classrooms. On May 14, 2013, Student attacked another child in the general education art classroom, using a plastic clay-sculpting tool, injuring the child on the face below the eye. When he attempted again to attack the child, he was restrained by the teacher, at which point he stomped on her foot and tried to kick her. Student was suspended from school for a day. The injury to the other student's face was still visible the next day.

12. On May 22, 2013, Student became angry in the general education computer class. He was now accompanied to general education classes by an aide. Student picked up computers to throw them, but was prevented from doing so by the aide. Student then began grabbing chairs and attempted to throw them, and then he attempted to hit another student. When the aide put up her hand to block the blow, Student grabbed one or more of her fingers and bent them back and kicked her. Student ran out of the room with the aide following. He then grabbed a pencil and began digging it into the wall. When the aide grabbed the pencil it broke. The aide was able to get the remaining pencil piece from Student's hand, at which time he hit her in the chest. Then he grabbed a packet of sunflower seeds and threw it, hitting another staff member in the head. As a result of these incidents, Student ended the 2012-2013 school year at Monroe in a classroom with no other children, taught by a credentialed teacher who was assisted by an aide.

13. Student returned to the Monroe special day class on August 21, 2013, the first day of school. However, there were several behavioral incidents. One of the most serious began in the special day class when he left campus and bit a staff member who was trying to get him back to campus, and also bit the principal, drawing blood. As a result of this and other incidents, Student was again placed in a separate classroom with a teacher and instructional aide, and no other students. In relation to all of the behavioral incidents,

following Ms. Caraher's functional analysis assessment in March 2013, District personnel were consistently implementing the behavior intervention plan she had developed. Ms. Caraher occasionally modified the behavior intervention plan in response to new developments with Student. However, the behavior intervention plan was not very effective in controlling Student's maladaptive behaviors.

14. Student's violent, maladaptive behaviors in school affected his relationships with peers and staff at Monroe. Other children were wary of him because his behaviors were sudden and unpredictable. On multiple occasions staff was required to restrain him so he would not hurt himself or others.

15. During the discussion of Student's present levels of academic achievement and functional performance, at the IEP team meeting of September 27, 2013, the team considered both the Oakland assessment, and an educationally related mental health services assessment report performed by the Alameda County Mental Health Services Children's Specialized Services (Alameda County assessment). In the Oakland assessment Student was found to have poor relationships with teachers and peers, and demonstrated physically aggressive behaviors when anxious or stressed due to poor social skills and poor coping skills. As previously discussed, these types of behaviors also occurred at Monroe, and they interfered with his ability to access the general education curriculum. The Alameda County assessment, was completed in May 2013, and discussed at an IEP team meeting later that month. It recommended that Student be placed in "a small, structured classroom setting, [with] dedicated mental health support in the class, as well as the opportunity to receive individual, family and group therapy . . ." Both assessments were thorough and met all legal requirements, and this was credibly confirmed by Lyla Belli, school psychologist at Monroe.⁶

16. In addition to these reports, the team also reviewed a three-page document Mother had brought to the IEP team meeting on February 4, 2013, when she enrolled Student at Monroe. This document described Student at home and at school, and also provided information about various incidents when he attended school in Oakland and was purportedly assaulted. Some of the words Mother used to describe Student in a school setting were "unhappy, tense, anxiety and stress. . ." There was no dispute that these words accurately portrayed Student at times in the school setting.

GOALS AND ACCOMMODATIONS

17. The IEP team also discussed two behavior goals for Student. The September 27, 2013 IEP offer contains two goals: one calling for Student to be compliant

⁶ Ms. Belli obtained her license as a licensed educational psychologist in 2013. She has been a school psychologist for District since 2007, and was previously employed by District as a middle school teacher from 1998 until 2007, when she became a school psychologist. She has a bachelor's degree and a master's degree, as well as an education specialist post-graduate degree.

with directives, and the other requiring him, when becoming upset in unstructured time, with one adult prompt, to use pre-taught strategies for self-regulation. These goals address Student's unique needs in the area of behavior.

18. Various accommodations were discussed and incorporated into the IEP at the September 27, 2013 IEP team meeting. The accommodations are intended to reduce Student's stress levels and anxiety, as well as to allow close adult monitoring of his stress and anxiety. There is no dispute that Student requires these accommodations in the classroom.

COUNSELING ENRICHED PROGRAM

19. Prior to the September 27, 2013 IEP team meeting, another IEP team meeting was held on September 9, 2013. This meeting was attended by Parents, and others, including Ms. McNeil and Ms. Forrester. Following this meeting, Parents drove to Roosevelt to observe the counseling enriched program. During their observation they were accompanied by Ms. Forrester.

20. Ms. Forrester established the counseling enriched program at Roosevelt in 2007. The program, in September 2013, had seven students, one teacher, one aide, and the services of a therapist who was either in the classroom or conducting counseling sessions in his office. In addition, Ms. Forrester often spent portions of the day in the classroom. Students in the class were in grades three through five, and all had emotional disturbance as an eligibility category in their IEP's. Many had social-emotional and behavioral issues similar to Student. All of the students were essentially working at or close to grade level academically. An Alameda County assessment that recommended a small classroom setting with embedded counseling services for students and families was required for participation in the program. Students in the program participated in two, 50-minute group therapy sessions each week, and one 50-minute individual therapy session each week. Families of students in the classroom could also participate in therapy if they chose, but this was more common when the student had behavioral issues in the home as well. It was undisputed that Student did not have behavioral issues like those he displayed at school in his Parents' homes.

21. The teacher in the counseling enriched program at the time of the September 27, 2014 IEP team meeting, and currently, is Jeffrey Lehton. He is the students' case manager as well as teacher. This is his first year as a teacher in the counseling enriched program at Roosevelt, and previously he was a high school teacher. He has taught in a nonpublic school for children with disabilities, and began his work in education as a paraprofessional. He has a multi-subject and mild to moderate special education credential, and just finished work on his autism authorization. Mr. Lehton is qualified to be the teacher in the counseling enriched program.

22. The therapist in the counseling enriched program at the time of the September 27, 2014 IEP team meeting was, and currently is Jesse Kovalcik. Mr. Kovalcik is employed by East Bay Agency for Children (East Bay), a nonpublic agency that provides

mental health services for families and children. The agency has a contract with District to provide counseling services in the counseling enriched program at Roosevelt, and he is the assigned therapist. Mr. Kovalcik has a bachelor's degree, and received his master's degree in marriage and family therapy in 2010. While working on his master's degree, Mr. Kovalcik worked with children at a nonprofit community center. He worked as an intern therapist with abused children and their families for the eight months before he received his master's degree. He continued earning the therapy hours California requires for licensure as a marriage and family therapist with East Bay, beginning in 2011. He has provided over 4,000 hours of therapy services to children and adults. He had completed the requisite hours of therapy services as an intern several months before the hearing, and was waiting for the California Board of Behavioral Sciences to issue his formal license which was delayed due to a backlog. The evidence established him to be a highly qualified therapist.

23. Ms. Forrester had worked very hard in previous years to ensure that students in the program were accepted by the general education students at Roosevelt, as well as staff. Students in the counseling enriched program are expected to participate in at least two general education class periods each day. The goal of the program is to teach the students to identify and regulate their emotions when frustrated, anxious, or otherwise emotionally stressed, and the expectation is that after a year or more in the program they can be integrated back into full-time participation in the general education environment. Behavior support and regulation is embedded in the program, as is working with the students to develop appropriate social skills.

24. The entire school uses a program called "zones of regulation" to assist the students to identify their emotions at any given time, pairing certain emotions with colors, such a green for being "good to go," and yellow for "excited." School staff, both in and out of the counseling enriched program, are trained to respond to these students in a manner that is not likely to escalate a student who is noncompliant.

25. The Roosevelt counseling enriched program was discussed at the September 27, 2013 IEP team meeting. The IEP offer from that date proposes that Student spend 1,760 minutes each week in the counseling enriched program, and be mainstreamed into the general education program as behavior improves. Student is also to receive one, 50-minute session of individual therapy each week, and two, 50-minute group therapy sessions each week. Two, 50-minute parent counseling sessions each month are also part of the District's proposal of placement from September, although family counseling is optional. A major difference between the special day class at Monroe, and the counseling enriched special day class program at Roosevelt is that Monroe does not have the level of counseling Student needs to modify his chronic maladaptive behavior. The counseling enriched program has the full-time presence of a therapist as part of the program.

26. With the exception of Mother, all members of the team, including Father, agreed with the proposed IEP. Father consented to the IEP, but Mother refused to do so.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the Individuals with Disabilities Education Act (IDEA)*⁷

1. This hearing was held under the IDEA, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.;⁸ Ed. Code, § 56000 et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; 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, such as mental health 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); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 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

⁷ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁸ All subsequent references to the Code of Federal Regulations are to the 2006 version.

developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950. Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided or offered a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; 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, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this Decision, District has the burden of persuasion since it filed the case.

Issue: Can District Implement the Offer of September 27, 2013, Without Mother’s Consent?

5. District contends that it procedurally complied with the IDEA in making its offer of September 27, 2013. District claims the IEP addresses Student’s current levels of academic achievement and functional performance, and contains goals that address Student’s unique needs. District argues that the IEP contains accommodations that meet his needs. District contends that Student requires educationally related mental health services at an intensive level, as well as behavioral supports, and the only place in District where Student can receive those services and supports is in a counseling enriched special day class. The only such class in District that serves third grade students is at Roosevelt. Further, Student cannot receive a FAPE in a lesser restrictive environment. District claims that this placement will meet Student’s unique needs and confer educational benefit.

6. Mother claims that District did not comply with procedural requirements of the IDEA when it developed the IEP of September 27, 2013 because it predetermined the placement prior to the IEP team meeting. She questions both the Oakland assessment, and the educationally related mental health services assessment, which were relied upon when developing the offer, believing that they do not present an accurate picture of Student. Mother believes that placement at Monroe, where Student attended school from February 4, 2013, to the end of the 2012-2013 school year, and for the beginning of the 2013-2014 school year, in either a special day or general education classroom will meet his unique needs and provide him with a FAPE in the least restrictive environment. Mother

contends that the reason Student did not succeed at Monroe in either environment is because either he had no behavior plans, or if he did, they were not implemented by District personnel. Finally, one of her concerns about the counseling enriched program is that Mr. Kovalcik is not a “highly-trained” therapist, as recommended in Alameda County assessment since he did not have his California marriage and family therapist license at the time he testified.

IMPLEMENTATION OF AN IEP WITHOUT PARENTAL CONSENT

7. If a school district determines that the proposed special education program component to which a parent does not consent is necessary to provide a FAPE to the child, the school district shall initiate a due process hearing.(Ed. Code § 56346, subs. (d) & (f).)

PARENT PARTICIPATION

8. Parents are required and vital members of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed. Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parents for enhancing their child’s education throughout the child’s education. (20 U.S.C. § 1414(c)(1)(B) [during assessments], (d)(3)(A)(i) [during development of the IEP], (d)(4)(A)(ii)(III) [during revision of an IEP]; Ed. Code, § 56341.1, subs. (a)(1) [during development of an IEP], (d)(3) [during revision of an IEP], & (e) [right to participate in an IEP].) The requirement that parents participate in the IEP process ensures that the best interest of the child will be protected, and acknowledges that parents have a unique perspective on their child’s needs, since they generally observe their child in a variety of situations. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891.)

EVALUATION OF AN IEP

9. An IEP is to be evaluated in light of information available at the time it was developed and offered, and is not to be evaluated in hindsight. (*Adams v. State of Oregon*, (9th Cir. 1999) 195 F.3d 1141, at 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that “[a]n IEP is a snapshot, not a retrospective.” (*Ibid.*) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*; *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.) To determine whether a school district offered a pupil a FAPE, the focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

10. For a school district’s IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student’s unique needs, must be reasonably calculated to provide the student with educational benefit, and must comport with

the student's IEP. (20 U.S.C. § 1401(9).) Educational benefit is not limited to academic needs, but includes social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467.)

LEAST RESTRICTIVE ENVIRONMENT

11. A local education agency must ensure that “[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled.” (20 U.S.C. § 1412(a)(5)(A); see also 34 C.F.R. § 300.114; Ed. Code, § 56342, subd. (b).) This “least restrictive environment” provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403 (*Rachel H.*) A local education agency must have a continuum of alternative placements available that proceed from “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” (34 C.F.R. § 300.115(b); see also Ed. Code, § 56342, subd. (b).)

12. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit has balanced the following factors: (1) “the educational benefits of placement full-time in a regular class”; (2) “the non-academic benefits of such placement”; (3) “the effect [the student] had on the teacher and children in the regular class”; and (4) “the costs of mainstreaming [the student].” (*Rachel H.* at p. 1404 [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (*Daniel R.R.*).)

13. If a school district determines that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R., supra*, 874 F.2d at p. 1050.)

ANALYSIS

14. There was no evidence as to whether only Mother holds the educational rights of Student. Although District has Father's consent to the September 27, 2013 IEP offer of placement in the counseling enriched program, District felt compelled to file this case.

15. Failure to permit a parent meaningful participation in the IEP process is a procedural violation. Mother's claim that she was not able to participate in the IEP process was unsubstantiated. She attended all IEP team meetings District convened in the 2012-2013 school year, as well as the IEP team meetings on September 9, and September 27, 2013, when the counseling enriched program was discussed. Notes from those meetings, and the testimony of witnesses, establish that she made comments at those meetings, changes were made in IEP documents at her request, and she was a full participant in those meetings, including the meeting of September 27, 2013. There was no evidence of predetermination by

District members of the IEP team at any of the IEP team meetings. Just because Mother does not agree with District's proposal for placement in the counseling enriched program at Roosevelt on September 27, 2013, does not mean that her participation in the process was significantly impeded by District.

16. In determining whether the IEP offer of September 27, 2013, is an offer of a FAPE for Student, one must first determine if the IEP accurately describes Student's current levels of academic achievement and functional performance. In determining Student's levels of academic achievement the IEP team relied on Parent report, using the document Mother submitted at the February 4, 2013 IEP team meeting when Student entered District. It also relied on the results of Student's standardized statewide testing towards the end of second grade, as well as the Oakland assessment.

17. The Oakland assessment showed Student's cognitive abilities at the average level and his academic achievement at the time of that testing was at grade level for the most part. In assessing Student's functional performance, especially in the social-emotional domain, the team looked at the Oakland assessment, the Alameda County assessment, the functional analysis assessment, and the mental health assessment from Alameda County. Although Mother complained at the IEP team meeting and at hearing that the Oakland assessment and mental health assessments were faulty because they relied on the same information, this was not substantiated. Information in these reports was substantiated by District witnesses, based on their own personal experiences with Student, such as the testimony of Ms. Belli and Ms. McNeil. Further, although Mother claimed in her closing argument and testimony at hearing that the functional analysis assessment was incomplete, this too was unsubstantiated based on both the assessment itself, and the testimony of Ms. Caraher. All assessments met legal requirements, and contained reliable information that helped establish Student's unique needs.

18. Mother believes that Student's issues in the area of behavior are due to alleged physical assaults by school staff and parents of other students when he attended school in Oakland, and resulting trauma from these incidents, and District's failure to address this. The cause of Student's school behaviors is irrelevant for the purposes of this hearing. What is relevant is Student's violent behaviors in school, without regard to the cause. What is of importance for the purposes of this Decision is that Student has, on repeated occasions, with no observed District provocation, engaged in highly destructive behaviors that have injured other students, and District staff. Further, although Mother argued that District did not have any behavior support plans for Student, the evidence established otherwise, and also established that they were consistently implemented, with inconsistent results.⁹

19. The IEP team on September 27, 2013, discussed goals for Student. The goals were developed based on input from team members, and were directed towards his behaviors

⁹ It must be stressed that witnesses testified that there were many more behavioral incidents in both the 2012-2013, and 2013-2014 school years at Monroe than are detailed in this Decision, and that was not disputed by Student.

of non-compliance, and his behavioral outbursts. These were directly related to his unique needs. Accommodations were also discussed for Student. For the most part they were designed to reduce his stress and anxiety in the academic environment, as well as to enable close staff monitoring of his behavior.

20. The IEP team discussed the counseling enriched program at Roosevelt as one which would provide him with the services he needs to access the curriculum, i.e., mental health counseling as well as a highly structured program with behavioral and mental health supports embedded in the classroom. In the counseling enriched program at Roosevelt, Student is in a classroom with seven or eight other children, a full-time classroom aide, a qualified teacher, and a qualified therapist. In spite of Mother's claims to the contrary, Mr. Kovalcik is a highly trained therapist who has experience working with children who have been victims of trauma and abuse. Further, all of the students, teachers, and staff at Roosevelt are welcoming and accepting of the students in the counseling enriched special day class, and staff is specifically trained to work with students who have behavioral challenges. This program will meet Student's unique needs and provide him with educational benefit, since it will reduce incidences of non-compliance and teach him strategies for coping with his emotions so he can stay on task and learn in the classroom.

21. Mother asks that Student continue to be placed at Monroe in the general education classroom, or in the special day class there, which she believes is a lesser restrictive environment than the counseling enriched program at Roosevelt. The evidence is abundant that the placement Mother desires in either a general education class or special day class at Monroe will not provide Student with a FAPE. Neither a behavior support plan, nor a behavior intervention plan has helped to ameliorate Student's behavioral issues at Monroe. One thing that is remarkable about Student's behavioral incidents is that there often is no escalation period; he simply explodes.

22. In making a determination as to whether the counseling enriched program is the least restrictive environment for Student, one must consider the *Rachel H.* factors. In relation to the first factor, whether Student achieved academic benefit in the less restrictive environment, the functional analysis assessment conducted by Ms. Caraher, showed that for the most part he did not. He was often off task in general education settings. Further, he had a greater level of serious outbursts in the general education environment which resulted him from being removed from those classes, thus limiting his exposure to the academics offered in them. This establishes that he received greater educational benefit from placement in a special day classroom than in a general education, or "regular," class.

23. In regards to the second *Rachel H.* factor, the non-academic benefit to Student in the lesser restrictive environment, the three serious incidents of February 28, May 14, and May 22, 2013, caused injury to staff and at least one other student in the case of the May 14, 2013 incident. These incidents made other students very wary of him, and they tended to avoid contact with him. They damaged his social relations with his peers. And the final result of him being placed in a classroom with no other students is evidence that

ultimately he did not derive social or non-academic benefits from the general education environment.

24. In relation to the third *Rachel H.* factor, the effect of Student on other students and teachers, the violent events had a disruptive effect on Student's teachers and other students in the class. This was established by the nature of these events in and of themselves, as well as the final result, that Student was placed in a classroom with no other children at the end of the 2012-2013 school year, and shortly after the beginning of the 2013-2014 school year.

25. Based on all three factors, a general education classroom is not the least restrictive environment for Student.¹⁰ And serious events occurred after Student was placed in the special day class at Monroe, in spite of the additional structure, smaller class size, and behavioral supports in that classroom. Because the special day class at Monroe does not have a counseling component, it too will not meet Student's unique needs.

26. The counseling enriched program at Roosevelt is the least restrictive environment for Student. The classroom is highly structured, and the evidence established that Student performs better in a structured environment. The focus on mental health services, that are not only embedded in the classroom, but also provided to students in small group and individual therapy sessions during the week, will meet Student's need for intensive counseling. And the record was clear that as Student's behavior improves, he will receive additional mainstreaming into general education classes at Roosevelt

27. As discussed above, the counseling enriched program offers Student a FAPE in the least restrictive environment. Accordingly, District may maintain Student in this classroom for the remainder of the 2013-2014 school year without Mother's consent.

ORDER

1. District's offer of September 27, 2013, placing Student in the counseling enriched program at Roosevelt is an offer of a FAPE in the least restrictive environment.

2. District may place Student in the counseling enriched program at Roosevelt, and implement the IEP of September 27, 2013, without Mother's consent.

¹⁰ There was no evidence concerning the fourth factor, cost, and discussion of that factor is not necessary for the purposes of this Decision.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District was the prevailing party on the two 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: March 11, 2014

_____/s/_____
REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings