

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

TUSTIN UNIFIED SCHOOL DISTRICT

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2015090381

**DECISION**

Tustin Unified School District filed its Request for Due Process on September 9, 2015, naming Student. The Office of Administrative Hearings continued the hearing at the parties' request on September 23, 2015.

Administrative Law Judge Kara Hatfield heard this matter in Tustin, California, on December 8, 9, 10, 16, 17, and 18, 2015, and in Santa Ana, California, on January 4, 5, 7, and 8, 2016. Telephonic argument regarding Student's request to admit additional exhibits was heard on January 11, 2016.<sup>1</sup>

Attorney Lauri Arrowsmith represented District. Lori Stillings, District's Assistant Superintendent for Special Education, attended all days of the hearing.

Attorneys Maureen Graves and John Nolte represented Student. Mother attended the hearing on all days and Father attended the hearing on December 9, 2015. Student did not attend the hearing.

On the last day of hearing, the matter was continued at the parties' request so the parties could file and serve written closing arguments on February 4, 2016, and response briefs on February 16, 2016. Closing arguments and response briefs were filed, the record was closed, and the matter was submitted on February 16, 2016.

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<sup>1</sup> The telephonic hearing was conducted only with counsel, without any party representatives on the call.

## ISSUES<sup>2</sup>

Did District's March 13, 2015, April 13, 2015, and May 29, 2015 offer in Student's 2015 annual and kindergarten transition individualized education program for the 2015-2016 school year constitute a free appropriate public education in the least restrictive environment?

### SUMMARY OF DECISION

District contends it offered Student a FAPE for the 2015-2016 school year by developing appropriate goals, offering an appropriate placement, and offering appropriate services. Largely, District advanced its case by presenting evidence centered on responding to the disagreements with the IEP Parents expressed in a prior written notice letter withdrawing Student from school. District argues it procedurally and substantively complied with the Individuals with Disabilities Education Act, or that any procedural deficiencies did not rise to the level of denying Student a FAPE. Central to this decision, District contends that the placement it offered Student in a blend of special day class and general education kindergarten classrooms at Loma Vista Elementary School was appropriate to serve his slower pace of learning while affording him interactions with typical peers.

Student contends District did not offer him a FAPE for the 2015-2016 school year by a litany of procedural and substantive deficiencies, ranging from an incorrect eligibility category to checking a box in a kindergarten transition IEP that Student's graduation plan was "to participate in high school curriculum leading to certificate of completion or other than diploma." Central to this decision, Student argues District's offer did not afford Student a FAPE in the least restrictive environment because it unnecessarily removed him from half of the general education kindergarten class time, and, because District proposed that Student spend part of his school day in a special day class, it unnecessarily removed him from his neighborhood school.

Regardless of all the other procedural and substantive aspects of FAPE the parties attempted to litigate in this case, District did not meet its burden of demonstrating that it offered Student a FAPE for the 2015-2016 school year due to District's failure to prove that its placement offer constituted the least restrictive environment for Student. Due to District's failure to prove it offered Student placement in the least restrictive environment, it is not necessary to address the other procedural or substantive aspects of the offer. District may not implement the IEP over Parents' objection.

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<sup>2</sup> The issue is that presented in District's complaint and framed in the Order Following Prehearing Conference. The ALJ has clarified the dates of the annual IEP in question without changing the substance of the issue, for purpose of 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.)

## FACTUAL FINDINGS

### *Background*

1. Student was five years and eight months old at the time of hearing. At all relevant times, he lived with Parents within District's geographic boundaries.

2. Student had developmental delays and received Early Start services from the Regional Center of Orange County from the time he was 18 months old until his third birthday. When he was two years and six months old, he was seen by the neurology department at Children's Hospital of Orange County for speech delays and behavior issues; Children's Hospital diagnosed him with Autism.

3. When Student approached his third birthday, Regional Center directed Parents to have Student assessed by District for eligibility for special education and related services. District's initial assessment resulted in District finding Student eligible for special education and related services and developing an IEP for him in April 2013. District's assessment ruled out eligibility under the category of autistic-like behavior<sup>3</sup> and found him eligible for special education solely under the eligibility category of Speech-Language Impairment. The parties have been in constant disagreement ever since.

4. At first, Mother was relieved that District's initial assessment concluded Student did not have Autism or Autism Spectrum Disorder and found him eligible for special education solely under the eligibility category of Speech-Language Impairment. But because of District's determination, Regional Center declined to provide Student further services. Parents noticed a deterioration of Student's behavior and tried to re-establish Student's eligibility as a consumer at Regional Center while also advocating for additional services from District. Parents pursued evaluations and opinions from various other providers, as well as a re-evaluation by District in April 2014, attempting to determine whether Student did or did not have Autism or Autism Spectrum Disorder.

5. District's Amended Psychological Report dated May 30, 2014, concluded Student might have met the eligibility criteria for Autistic-Like Behaviors, and appeared to meet the eligibility criteria for Intellectual Disability. Although Student's score on the Autism Diagnostic Observation Schedule, Second Edition, met the threshold for Autism Spectrum but not Autism, District's school psychologist concluded that Student's presentation in the school setting was best described by Intellectual Disability. The IEP team that met to review the May 2014 assessment changed Student's eligibility for special education to be primarily for Intellectual Disability and secondarily for Speech-Language

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<sup>3</sup> The special education eligibility category of autistic-like behaviors before July 1, 2014, was found in California Code of Regulations, title 5, section 3030, subdivision (g). The present eligibility category is now autism, in California Code of Regulations, title 5, section 3030, subdivision (b)(1). The special education eligibility criteria are different than the criteria of Autism Spectrum Disorder found in the DSM-5.

Impairment. Parents continued to disagree with District's determination that Student was not eligible for special education services under Autistic-Like Behaviors.

*2014-2015 School Year*

6. During the 2014-2015 school year, Student attended Ladera Elementary School in a special day class for preschool students. The preschool program was three hours a day, four days a week. He began the school year in one classroom, but was moved to another classroom in mid-October to separate him from another student whose disruptive behaviors Student had begun to imitate. From October 2014 to June 2015, Student's classroom had a total of 16 students, 12 of whom had IEP's and four of whom were neuro-typical children.<sup>4</sup> There was one teacher and three instructional assistants in the classroom. Student received pull-out speech and occupational therapies as related services.

7. Student's special education teacher acknowledged Student had delays and a slower rate of acquisition of skills than his typical peers, but thought his rate of progress was good and she was happy he was making progress. She believed his skills were evenly delayed across all areas and readily accepted the description of Student as being eligible for special education because of Intellectual Disability. She was aware that Parents disagreed with the eligibility category of Intellectual Disability and thought he had Autism, but she did not see Student as classically autistic, which she understood to be marked by great deficits in social function and social reciprocity, lack of interest in peers, and lack of acknowledgment of other students in the classroom. She described Student as very interested in his peers. For example, he asked peers to play with him, responded to peers' greetings as well as adults' greetings, and was developing a lot of social reciprocity. He engaged in pretend play, played with blocks with a peer, enjoyed playing in the kitchen area with another peer, and played house with another peer. He enjoyed being around children, and learned from peers who were older. Most of the typical students had higher language skills than those on IEP's, and Student had no difficulty interacting with them.

8. Student had difficulty paying attention in class and was very distractible. During circle time, if he sat in the second of the two rows, he would not focus on the teacher, book, or song, but instead would look around the classroom. When he was seated in the front row, his attention improved. During small group instruction, with approximately four students, his attention was better if he sat right next to the adult than if he sat farther, two students, away. If he became distracted, his classroom teacher was able to redirect him by calling his name, putting a hand on his knee, leaning closer, or putting him in a seat closer to her. During occupational therapy, Student also had difficulty with attention, particularly for non-preferred tasks like pencil and paper activities and table tasks. Student's occupational

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<sup>4</sup> District generally does not provide preschool to children who do not qualify for special education; District does not offer Head Start, State Preschool, or fee-for-service preschool programs. However, District does offer preschool to a few non-disabled children to create classrooms for children with disabilities that afford those children exposure to and socialization with their non-disabled peers.

therapist easily redirected Student with a verbal prompt or a little tap on the shoulder to get him back to an activity on the desk or wherever it was presented. She used a “first/then”<sup>5</sup> approach to keep him working on table tasks. By the time of Student’s annual IEP in March 2015, Student’s classroom teacher noticed that he was no longer wiggly in his seat, no longer running around the room, and was staying longer at activities. Comparatively, Student was less distracted when working in a small group of four students and could get overwhelmed in the full group of 16. Student was also sometimes able to participate in the special day class in large group activities like calendar time, or large group play inside or outside, and he participated successfully even with the large group around. There was a student-to-adult ratio of 4:1 in the classroom, however, Student did not have a 1:1 aide in the special day class, and his teacher did not think he needed one.

9. Student’s classroom teacher described her classroom as having no disruptive, challenging behaviors, “zero.” This related to the classroom overall. Student did not exhibit any negative behaviors in her class so she did not need to use any specific behavior intervention techniques because they were unnecessary.

10. Student’s classroom teacher did not think Student had any adaptive skills deficits that manifested in class, that there were any daily living skills he could not do that were relevant to the classroom setting.

11. Student started the 2014-2015 school year giving only one word answers. But after the classroom teacher and aides modeled longer responses for a while, he began spontaneously saying longer sentences of two to three words, then three to four words, and during the last month of school, four to five words. He did not reach the point of consistently using four to five word utterances. At the time of Student’s 2015 IEP, his speech therapist characterized his language as 90 to 95 percent set phrases and fixed speech, with 5 to 10 percent of his speech being novel phrases, which had recently increased before the IEP. Student’s classroom teacher did not think 90 to 95 percent of his language was scripted or rigid, and she did not recall discussing that with the speech therapist, either.

12. Parents spoke Spanish to Student at home, with a few English words used occasionally. At school, Student’s classroom instruction was provided in English. There were Spanish-speaking aides in the preschool classroom, but Student used English in the classroom and when he did not respond to instructions in English, he did not respond to the same instruction even if it was provided in Spanish immediately after. Student’s speech therapist was aware that there were no English Language Development services for preschool students whose primary/home language was not English; District tested children in kindergarten for English proficiency and provided English Language Development services beginning in first grade as a result of the kindergarten assessment results. However, the

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<sup>5</sup> First/then is a system by which a teacher or therapist encourages a student to complete a task by telling the student that if he first completes the task presented to him, then he can have time for an activity he prefers.

speech therapist did not think Student needed a structured curriculum to learn English language skills because he was making adequate progress without such a curriculum.

13. There were a few examples in related service provider notes of Student having difficulty transitioning from the classroom to related service sessions in the early part of the 2014-2015 school year, but Student's classroom teacher was not at all concerned about his transitions. He functioned well in most transitions made throughout his school day.

*Spring 2015 Annual and Kindergarten Transition IEP*

14. Student's classroom teacher, speech therapist, and occupational therapist evaluated Student's present levels of performance in March 2015 and drafted new goals for the next 12 months. Student's annual IEP team meeting was convened on March 13, 2015. As of that time, Student still had another three months remaining in preschool for the regular school year, as well as the 2015 extended school year. Kindergarten would begin in September 2015. Parents again disagreed with District's eligibility category identification. District providers reported on Student's present levels of performance and his progress on the April 2014 IEP's goals. They presented their newly drafted goals, all of which were identified as enabling Student "to be involved/progress in general education curriculum/state standards" tied to the State Department of Education's California Preschool Learning Foundations or the Desired Results Developmental Profile. The meeting was adjourned with a plan to reconvene.

15. The annual IEP team meeting reconvened on April 13, 2015. The IEP team again discussed proposed goals. District offered to continue Student's placement and services for the remainder of the school year and the extended school year, with the new goals proposed, and to reconvene to discuss Student's transition to kindergarten. Mother signed the April 13, 2015 IEP consenting to implementation of the proposed goals as discussed that day, but not agreeing that they were appropriate. Mother also consented to implementation of speech and occupational therapy services, while disagreeing that the levels of service offered were adequate.

16. On May 29, 2015, the IEP team again met for a third session of Student's annual IEP and his kindergarten transition meeting. Student's in-home behavior service provider had submitted a written report with proposed goals, which District staff had reviewed after the April 13, 2015 IEP team meeting. District members of the team believed that the goals the in-home provider proposed were either already addressed in the goals District had proposed, part of the kindergarten curriculum that would be taught to Student by virtue of his participation in kindergarten, or beyond Student's ability to achieve within 12 months given his present levels of performance. Although two and a half months had passed since the goals District proposed had been developed on March 13, 2015, Student's present levels of performance were not updated and the goals were not adjusted to be tied to the general curriculum or state standards for kindergarten instead of preschool.

17. In April 2014, District members of the IEP team had not believed Student had the receptive language skills to benefit from a general education preschool. But in May 2015, District members of the IEP team believed Student would benefit from spending some time daily in the general education kindergarten. District's general education kindergarten program was a class of about 30 students, divided into two roughly equal sized groups called the "early birds" and "late birds." Children in each group were at school for three hours and 23 minutes, five days a week. Although the bell schedules varied slightly per school campus and per school year, the amount of time was consistent. For example, at Loma Vista Elementary School, for the 2015-2016 school year, the early birds arrived at 8:15 a.m.; the late birds arrived at 9:57 a.m. and both groups participated in whole group instruction of calendar time and interactive whiteboard lessons, guided reading, shared reading, shared writing, independent reading, and recess together; the early birds left at 11:38 a.m.; and the late birds left at 1:20 p.m. The total overlap time of the early birds and late birds was about one hour and 40 minutes.

18. District's special day class program for kindergarteners at Loma Vista was a combined classroom of kindergarten, first, and second grade students. The kindergarten students arrived at 8:15 a.m. and left at 11:38 a.m. The first and second grade students arrived at 8:15 a.m. and left at 2:30 p.m. In the 2015-2016 school year, there were 11 students in the special day class at Loma Vista, including three kindergarteners.

19. District proposed that starting on September 1, 2015, Student would be in the special day class in the morning, join the general education kindergarten when the early birds left, then return to the special day class when the late birds left, then leave school with the first and second graders at the end of their longer school day. District could not tell Parents exactly what time Student would arrive or leave or exactly how much time he would spend either in the special day class or in the general education kindergarten, because at the time of the IEP team meeting, the bell schedule for the upcoming school year had not been established.

20. Based on Student's home address, his neighborhood school was Beswick Elementary School. Beswick did not have a special day class program for kindergarten students. The school Student attended for preschool, Ladera, also did not have a special day class for kindergarten students. Because District was proposing that Student spend part of his day in a special day class, District suggested that Student attend Loma Vista, which had both special day class and general education kindergarten classrooms.

21. Parents wanted Student to be placed in a full day general education kindergarten program and receive Applied Behavior Analysis services at home. District offered placement of five hours daily of specialized academic instruction in a separate class, "includes mainstreaming in later kindergarten session with 1:1 aide support." It was clear from the discussion at the May 29, 2015 IEP team meeting that what District offered was for Student to be in the general education classroom only during the time that the late bird group was present without the early bird group. The IEP document continued to reflect that Student would spend 90 percent of his time outside of the regular class, extracurricular, and

non-academic activities and 10 percent of his time in the regular class, extracurricular, and non-academic activities, which was the arrangement during his preschool program. This information was not updated to reflect the balance under District's offer for kindergarten in the 2015-2016 school year.

22. Student's IEP contained a form area for "graduation plan" for students "Grade 7 and Higher." A box was checked next to the text "To participate in high school curriculum leading to certificate of completion or other than diploma." At hearing, all District employees who were asked about the box denied having caused that box to be checked or having any knowledge of either how, or why, that box would be checked for a student who was transitioning from preschool to kindergarten. Although District employees did not believe that placing Student in a special day class for kindergarten was any indication of Student's potential or prospects of ultimately earning a high school diploma, Parents understood the fact that this box was checked to indicate that District did not have expectations for Student's success and was already writing him off and relegating him to an entire academic career of largely segregated special education placements.

#### *Events After District's IEP Offer*

23. On August 18, 2015, Parents wrote to District disagreeing with District's offer on several grounds, including that District's offer was not placement in the least restrictive environment. Parents asserted that District's proposal of a blend of special day class and partial inclusion in the late bird general education kindergarten with a 1:1 aide with unspecified training would not allow Student to be fully integrated with his neuro-typical peers. Parents again disputed District's characterization of Student as having Intellectual Disability rather than Autism and language issues, and suggested that District underestimated Student's capabilities and used low expectations to deny Student services. Parents notified District they intended to withdraw Student from District, place him in a private school general education kindergarten with 1:1 ABA aide support, and would seek reimbursement from District.

24. On August 28, 2015, District wrote to Parents in response to their Prior Written Notice. District included information regarding the specific times of day Student would enter and leave the placements District offered, and corrected the percentage of time in special education and general education noted on the IEP to be 70 percent of the time in special education and 30 percent of the time in general education for the 2015-2016 school year. District asserted the program it offered for the 2015-2016 school year constituted a FAPE for Student in the least restrictive environment, in that it provided Student "significant daily participation in the general education setting with support from an appropriately[ ]trained aide who would facilitate his access to the general education curriculum, while providing the level and intensity of special education instruction he requires through a credentialed special education teacher to adequately address his goals, prepare him for his participation in the general education setting, and benefit from his education." District requested that Parents sign their consent to the IEP so it could be implemented immediately and advised Parents that District was prepared to file a request for

due process to obtain an order declaring that District's IEP offered Student a FAPE in the least restrictive environment.

*Insights Into District's Placement Analysis From Hearing*

25. The collective IEP document and meeting notes from the March 13, April 13, and May 29, 2015 IEP team meetings were relatively sterile regarding the basis for District's proposal to place Student in a self-contained special day class for 70 percent of Student's day. The document and notes do not memorialize any discussion of what could possibly have been done to facilitate Student participating full-time in the general education kindergarten or what reasons District had for concluding that District would not offer placement full-time in general education kindergarten. Testimony from District employees provided insight into their opinions about Student, his capabilities and needs, and how District came to propose the blended program it offered Student.

26. While Student's preschool teacher in the 2014-2015 school year described Student as very easy going and compliant, yet also easily distractible, she thought full-time general education kindergarten would have been very difficult for him. She thought having Student attend general education kindergarten for a portion of the day would push him and offer exposure to typical peers, but she thought rather than have him attend general education kindergarten for the full three hours and 23 minutes, it would be "better" for him if he started the day in a smaller setting. She thought the two general education kindergarten groups had 12 to 15 students each, and that if he attended during the overlap when there would be about 30 students, he would be too distracted. She believed the special day class kindergarten was appropriate for him due to his rate of learning in a group setting and his need for more support than was available in a general education classroom. She explained that the reason District offered a 1:1 aide for Student during the time he would be in the general education kindergarten was because of his distractibility as well as his slow rate of acquisition and the pace of general education kindergarten. They thought that an aide could help him not be overwhelmed with the demands in that setting. She was concerned that even with an aide, if he was in the classroom during the early bird and late bird overlap time, it would be too many bodies because he was used to the smaller setting of his special day class preschool, with 16 students.

27. Student's preschool teacher recalled that the only discussion at the May 29, 2015 IEP team meeting about Student attending his neighborhood school was that he would not attend Beswick because he was going to be in a special day class, and Beswick did not have one for kindergarten. She did not recall any discussion of Student possibly attending his neighborhood school with supports, or of supports that could have been put in place for him to attend general education kindergarten at his neighborhood school.

28. A general education kindergarten teacher at Ladera, where Student attended preschool, attended Student's kindergarten transition IEP team meeting on May 29, 2015. She had not met Student. She attended the meeting for 20 minutes. She did not recall any discussion of why Student would not go to his neighborhood school. She had a class of

kindergarteners with the early/late bird system in the 2014-2015 school year, and she did not think it was loud or unruly when the two groups overlapped. She has had 1:1 aides in her classroom to help students engage. Also, kindergarten teachers have always had general classroom aides. For the 2014-2015 school year, they had an aide for two hours, and in the 2015-2016 school year they had an aide for three hours. When asked about what supports were available for students with Attention Deficit Hyperactivity Disorder, she commented that all her students were five years old; they were up, down, under the tables and chairs, and she was always finding ways to get their attention, have them stop something or start something.

29. Student's occupational therapist understood Student to be compliant although distractible with everyone. She did not attend Student's kindergarten transition IEP team meeting. No one asked her about the early and late bird overlap period in general education kindergarten and strategies that could be used to support Student in attending general education kindergarten during that time.

30. Student's speech therapist thought that general education kindergarten classroom language was too complex for him to receive benefit, too difficult for him to understand. She believed he did not have the receptive language skills to benefit from general education kindergarten without some additional supports, such as the teacher rephrasing directions for Student, or maybe a 1:1 aide who could use visual prompts, gestures, hand over hand support, etc. She explained that special day class teachers have special training on facilitating language for children with special needs. Depending on the needs of the child, they can use visual supports, verbal supports, or simpler language. She asserted that general education does not use visual aids, check for understanding, or simplify directions. She described a resource support program as a language-enriched environment, but said resource support program occurs maybe only a few times a week. When directly asked, she acknowledged that visuals could be provided in a general education classroom, that simplifying directions could be an accommodation in a general education classroom, and that checking for understanding is an accommodation Student would need in a general education classroom.

31. The Coordinator of Special Education for Loma Vista did not know Student, but had chaperoned classroom observations by Student's educational consultant, Caroline Bailey, Ph.D. They observed the morning and afternoon sessions of the special day class District offered Student, and the late bird general education kindergarten class. In the special day class, various positive behavior strategies were used, including clip up charts, token boards for students who needed them, positive praise, individualized behavior plans for students who needed them, and breaks when work was accomplished. They did not observe behavior strategies in the general education classroom. The general education classroom teacher told the Coordinator of Special Education that students need to be independent workers for up to 20 minutes, be focused, engaged, keep their hands to themselves, and sit on the carpet without touching others.

32. During her testimony, the Coordinator of Special Education for Loma Vista explained District's offer, limited by the acknowledgement that she did not know Student or his needs other than what she read in a report by Dr. Bailey, which mentioned "distractions and such." Based on the information she read, she expressed that if Student was in a general education kindergarten, she was not sure if he would benefit "as much" as he would in a special day class where there would be a smaller number of students, more direct -- as opposed to global -- instruction, and more opportunity for him to participate in interactive lessons or in calendar time, because there would be fewer students. She stated that in a general education classroom he "could get some educational benefit, but would get more educational benefit" in the special day class during circle time.

33. Most importantly, District's Special Education Facilitator described how District developed its offer of placement. She had been involved with Student since his April 2013 initial preschool assessment and attended all three of Student's IEP team meetings in spring 2015. She described Student as having made steady progress from the first day. She said he had a great capacity to learn and had demonstrated that in his time at District, reiterating that he had always made steady gains. District's placement offers were very individual and based on a child's needs and District developed recommendations for a child based on what would serve them "best." District proposed the blended special day class and part-day general education kindergarten classroom with a 1:1 aide for Student because they felt it would be the "most beneficial." District offered only the smaller portion of the late bird class because Student was distractible and they thought he would do "better" with the smaller group. District thought Student would "benefit most" with the smaller group than with the larger group during the overlap time because he had difficulty attending and they thought it would be supportive of him to be there when he had fewer classmates. Over the two years Student had been at Ladera, they could see that he "perform[ed] optimally" in a smaller grouping of students; there was less movement, less bodies, and therefore fewer things to distract him.

34. When the Special Education Facilitator was asked why Student was not offered a 1:1 aide for the full day of general education kindergarten, and why District felt it was necessary to remove Student from part of the general education classroom, she explained that from her perspective, "remove" was a strong word, and she did not think of it as removing him from something. She thought of it as starting him with something they knew would support him in an "optimal way." She denied thinking that he would not make educational progress if he was in the general education kindergarten the whole day, stating they never thought he would not be able to progress. But as a beginning for him, they thought it would be easier for him to participate and "gain the most" from instruction in that setting with a smaller group. The Special Education Facilitator was asked if she thought that Student could make some educational progress even if he stayed in the kindergarten full time with aide support, and she replied that knowing Student, she would say he would progress.

35. The Special Education Facilitator did not recall any discussion about Student going to his neighborhood school. Regarding any presumption of a student with an IEP attending his or her home school, she stated that there are some students who attend their

home school, but it depends on the child's needs and "best recommendations" for providing for their needs. Her testimony regarding students with disabilities attending their neighborhood schools suggested that she did not see home schools as a priority. Special education resources at Student's neighborhood school included specialized academic instruction, speech and occupational therapies, and "whatever services are needed for students." She stated that pre-teaching and review could not be arranged at Student's home school because they felt the impactful instruction would be "best" in the special day class setting. Over and over, she justified the recommendation of a special day class as based on it being a "better" setting that would support Student making the "most" progress.

36. Upon questioning by Student's attorney, the Special Education Facilitator stated that cost was not a factor in deciding not to provide services to Student at his home school, rather than in a special day class, or with respect to any decision about Student.

*Information From District's Assessment Affecting Placement Offer*

37. District did not introduce evidence regarding the assessments it had conducted which led to Student's primary eligibility category being changed from Speech-Language Impairment in 2013 to Intellectual Disability in 2014. District did not introduce evidence regarding the assessments it had conducted in 2013 and 2014<sup>6</sup> which were the basis of District refusing to categorize Student as eligible for special education due to Autistic-Like Behaviors or Autism.

38. Student called District's school psychologist to testify after District had rested its case, and examined her about the instruments she used and conclusions she drew from the results in 2013 and 2014. Most important to the central basis of this decision, the school psychologist reviewed the instruments and subtests used with the intention of evaluating Student's cognitive abilities and adaptive functioning. In 2014 when Student was approximately 47 months old, the results of the cognitive component of the Developmental Profile, Third Edition, Teacher Rating, indicated Student's age equivalence was 24 months, with a standard score of 66. At the same time, the results of the Battelle Developmental Inventory, Second Edition, across all three tested domains<sup>7</sup> indicated Student's age equivalence was 30 months, with a standard score of 62. Evaluations of Student's adaptive functioning were completed by Mother using the Developmental Profile, Third Edition, Parent Spanish Form and the Behavior Assessment System for Children, Second Edition, Adaptive Scales Spanish Form. On the Developmental Profile regarding adaptive functioning, Mother's reports indicated that in this realm, Student's age equivalence was 20 months, with a standard score of 57. On the Behavior Assessment System for Children,

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<sup>6</sup> District did move its 2014 amended psycho-educational assessment into evidence during its cross examination of one of Student's experts Student called to testify after District had rested its case in chief.

<sup>7</sup> The three subtests are Attention and Memory, Reasoning and Academic Skills, and Perception and Concepts.

his adaptive skills composite score<sup>8</sup> placed him in the clinically significant range overall. The F-scale, which measures a rater's tendency to be excessively negative in describing the child, was high for Mother's responses and the results should therefore be "interpreted with caution."

39. The school psychologist was, in one respect, cautious about the results of Mother's ratings of Student's adaptive functioning. The school psychologist noted that when Mother completed the same rating scales about one year earlier, Student's age equivalence was 37 months (his actual age), with a standard score of 116 on the Developmental Profile, and his adaptive skills composite score<sup>9</sup> on the Behavior Assessment System for Children was in the average range. The school psychologist had never seen such a dramatic decline in that time period before, and a change from even something like a score of 100 to 66 would be unlikely to occur unless there had been a significant event such as a traumatic brain injury. The school psychologist's interpretation of the Mother reporting in spring 2014 that Student was unable to do things he had been able to do in spring 2013 was that Mother was, potentially, purposefully underreporting Student's abilities in an attempt to make Student eligible again for services through Regional Center.

40. But when the school psychologist interpreted the data to make a recommendation about whether Student was eligible for special education and related services through District and under what eligibility category, she took the adaptive functioning scores as Mother provided them, did not discount them despite her concerns about their accuracy, and reported that Student appeared to meet the eligibility criteria for Intellectual Disability. At hearing, the school psychologist claimed District determined eligibility for special education under the category of Intellectual Disability when there was a deficit in cognitive abilities reflected by a standard score of 69 or lower, combined with adaptive behavior/skills at a standard score of 69 or lower. In her report summary, the school psychologist, without referencing the standard scores relied upon to reach the conclusion, stated that Student had significantly below average intellectual functioning and deficits in adaptive behaviors, which were manifested during the developmental period and adversely affected educational performance.

41. While there was debate between the school psychologist and Student's attorney about whether the standard scores of the Developmental Profile and the Battelle were appropriate instruments and measures to use to determine whether Student had Intellectual Disability, either under the California Code of Regulations or the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5), the IEP team adopted the school psychologist's analysis of the data that Student qualified for

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<sup>8</sup> This score combined the subtests of Adaptability, Activities of Daily Living, and Functional Communication.

<sup>9</sup> On the 2013 administration of the BASC-II, the composite score combined the subtests of Adaptability, Social Skills, Activities of Daily Living, and Functional Communication.

special education and related services as a student with Intellectual Disability. District employees who interacted with Student recalled that the test results indicated Student had low cognitive functioning, with his classroom teacher not being aware of his “IQ” but knowing that cognitive functioning had been assessed. Also, the district employee who conducted a Behavior Assessment of Student in November 2014 specifically recalled at hearing that Student’s “IQ” was 62.<sup>10</sup>

42. This decision does not make a determination of whether Student does or does not have Autism, Autism Spectrum Disorder, or Intellectual Disability, either under the definitions contained in the California Code of Regulations or the DSM-5. It is not necessary to do so to resolve the issue in this case. The information regarding District’s 2014 assessment has been provided only insofar as is helpful to review the information District had available to it and considered at the time of the May 29, 2015 IEP team meeting and that influenced District’s placement offer for the 2015-2016 school year. The biggest import of the 2014 assessment was that due to their awareness of its content, District personnel regarded Student as having low intellectual functioning and thought he would therefore be best served for kindergarten in a self-contained classroom for students with disabilities, with some exposure to and interaction with non-disabled students.

## LEGAL CONCLUSIONS

### *Introduction: Legal Framework under the IDEA<sup>11</sup>*

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)<sup>12</sup> et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are (1) to ensure that all children with disabilities have available to them a 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).)

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<sup>10</sup> This notation is not meant as a factual finding that Student in fact had an Intelligence Quotient score of 62, only that the report of the Battelle Developmental Inventory Total Standard Score was precisely recalled by a District employee and in that person’s mind, equated to the determination that Student had an IQ of 62. The school psychologist’s 2014 report created the impression in District personnel that Student had a low IQ.

<sup>11</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>12</sup> All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

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 IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) “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); 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] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals (Ninth Circuit) 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 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505.) 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).) 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, 56-62 [126 S.Ct. 528]; 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 case, District, as the complaining party, bears the burden of proof on the sole, all-encompassing, issue.

*District Failed to Demonstrate that the IEP Offered Student Placement in the Least Restrictive Environment*

5. The sole issue in this case is whether District's March 13, April 13, and May 29, 2015 offer in Student's 2015 annual and kindergarten transition IEP for the 2015-2016 school year constituted a FAPE in the least restrictive environment. There were no stipulations that resolved any aspect of the issue, procedural or substantive.

6. District contends it satisfied its burden of proof to demonstrate that it offered Student a FAPE in the least restrictive environment for the 2015-2016 school year, and that to do so, it was only required to prove that the procedural and substantive aspects of the IEP that Parents challenged via their Prior Written Notice withdrawing Student from District and privately placing him due to their disagreement with the IEP offer were in fact appropriate. Although requested to provide it, District offered no legal authority for its assertion that it was not required to prove that its IEP offer met all procedural and substantive elements of a FAPE. District contends it met its burden of proof with regard to the issues contested by Parents in disagreeing with District's offer of placement and services. Specifically with respect to the requirement that a student be educated in the least restrictive environment for him or her, District contends Student required a special day class for priming/pre-teaching and for review, and that District's offer was appropriate because it included him in the general education environment to the maximum extent appropriate.

7. Student contends District has not met its burden of proof, which included every possible element of a FAPE. Student argues that District failed to satisfy many procedural and substantive components of a FAPE, including the composition of the IEP team at the March 13 and April 13, 2015 IEP team meetings; whether certain members of the IEP team fulfilled the purposes of their attendance at the meetings; whether District developed goals for all of Student's areas of unique need, such as attention; whether District predetermined the goals, placement, and services offered; whether District provided a clear, written offer; whether District offered appropriate accommodations; and, critically, whether District appropriately determined the least restrictive environment in which Student could receive educational benefit. Student contends District's offer unnecessarily removed him from the full day general education kindergarten to place him in a special day class, and as a consequence unnecessarily removed him from his neighborhood school.

8. This decision does not resolve every disagreement between the parties and does not determine or analyze every element of FAPE on which District had the burden of proof. For the reasons set forth below, this decision concludes that District did not satisfy its burden of proof regarding a major substantive element of FAPE, the least restrictive environment. Therefore, it is unnecessary to evaluate every procedural and substantive

component of District's offer. Even if District had met its burden of proof as to all the other elements of a FAPE, without an offer that afforded Student education in the least restrictive environment, District's March 13, April 13, and May 29, 2015 offer for the 2015-2016 school year did not offer Student a FAPE.

9. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).)

10. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged exclusively in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

11. To determine whether a school district substantively offered a student a FAPE, the focus must be on the adequacy of the district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1313-1314.) If the school district's program was designed to address the student's unique educational needs, was reasonably calculated to provide the student with some educational benefit, comported with the student's IEP, and was in the least restrictive environment, then the school district provided a FAPE, even if the student's parents preferred another program, and even if the parents' preferred program would have resulted in greater educational benefit. (*Ibid.*)

12. School districts are required to provide each special education student with a program in the least restrictive environment. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with 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); Ed. Code, § 56031.)

13. In determining the educational placement of a child with a disability, a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the least restrictive environment; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

14. 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. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1048-1050] (*Daniel R.R.*.)

15. However, the Ninth Circuit has also found that a general education placement is not the least restrictive environment for every special needs child. In *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830 (*Poolaw*), the Ninth Circuit considered the *Rachel H.* factors and determined that a general education classroom was not the least restrictive environment for the child in question. The Court acknowledged that there was a tension within the IDEA between the requirement that a district provide children with a FAPE to meet their unique needs and the preference for mainstreaming. The Court stated:

In some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In these situations continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment. This allows educators to comply with the Act's main requirement—that the child receive a free appropriate public education. Thus, “the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom.”

(*Poolaw, supra*, 67 F.3d at p. 834, citing *Daniel R.R., supra*, 874 F.2d at p. 1044.)

16. 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.) 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 or instruction in the home, in hospitals, or other institutions. (Ed. Code, § 56361.)

17. District did not meet its burden of showing that it offered Student placement for the 2015-2016 school year in the least restrictive environment. District's written closing argument acknowledged that the determination of whether a special education student can be satisfactorily educated in a regular education environment involves a four factor analysis under *Rachel H.* However, District personnel did not follow the 20-year-old law's approach to analyzing the placement decision at the time District developed its recommendation for

Student's kindergarten placement, and District's attorney did not attempt after the fact, in closing argument, to rationalize District's offer under each of the four factors.

18. Applying the four factor test from *Rachel H.* shows that full-time general education kindergarten was appropriate and that it was not necessary to place Student in a special day class for him to receive some educational benefit. First, the educational benefit of placement full-time in a general education class would have been satisfactory. Student's preschool teacher described his rate of learning as slow compared to his typical peers, but she was satisfied with his progress. When regarding Student as having Intellectual Disability and explaining his slow rate of learning was the justification for concluding his "cognitive delay" "required the supports available in a special day class setting," District should recall that the student in *Rachel H.* had an IQ of 44 and was still determined to be able to receive educational benefit in full-time general education kindergarten.<sup>13</sup> Student's preschool teacher had concerns about Student's distractibility, and District offered Student a dedicated 1:1 aide in general education kindergarten to assist him with attention. Student's speech therapist had concerns about Student's ability to access the level of language used in a general education kindergarten classroom, but she identified accommodations that were, in fact, possible for a general education credentialed teacher to use in a general education classroom to support Student in accessing the language and academic instruction of the classroom. District did not think Student required any specific English language curriculum to develop his English as a second language because he was progressing without one. District regarded Student as non-disruptive, and was not concerned about behaviors that would impede his learning. District did not identify adaptive skill deficits relevant to the classroom. Most importantly, the Special Education Facilitator acknowledged, knowing Student as she had for two years, that if Student participated in full-time general education kindergarten with a 1:1 aide, he would receive educational benefit. District's focus on its prediction that Student would receive "more" benefit, perform "optimally," and "gain the most" in a special day class supplanted the correct analysis regarding whether Student would get some educational benefit from full-time general education. A review of the information District had at the time it offered Student a placement for kindergarten does not support District's conclusion that Student could not be satisfactorily educated in a regular education environment. The evidence indicated Student would educationally benefit from placement full-time in a regular class with supports and accommodations.

19. Second, District was required to consider whether Student would receive non-educational benefit in general education. Student needed exposure to typical peers who

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<sup>13</sup> See also *Fresno Unified School District v. Student* (2009) Cal.Offc.Admin.Hrngs. 2008120492, Student, who was then 17 years of age, had an IQ of between 50 – 60 and Fresno's offer of a mild to moderate special day class was not the least restrictive environment. In that case, Student was fully integrated in general education with a 1:1 aide. Cf. *San Francisco Unified School District* (2009) Cal.Offc.Admin.Hrngs. 2008040696, special day class appropriate due to the severity of Student's academic and non-academic deficits. Prior administrative decisions have persuasive value in later cases, although they are not binding precedent. (Cal. Code Regs., tit. 5, § 3085.)

would model appropriate language, behavior and social interactions. Importantly, Student was interested in his peers and was developing skills in appropriately initiating and sustaining social interactions with them. District acknowledged that Student would receive non-educational benefit in that its offer included him spending 30 percent of his day in the general education environment. District failed to provide any evidence that Student would not gain non-educational benefit from placement full-time in general education, and did not argue this point in its closing brief.

20. Under the third factor of *Rachel H.*, there was no evidence that Student would have had any negative effect on other students and teachers. District described Student as compliant and cooperative, with no disruptive behaviors. District said Student transitioned well, and was easily redirectable. He showed interest in his peers and was able to have positive interactions with them. District's kindergarten classrooms had general aides, and District offered a 1:1 aide for Student, all of which would lessen any impact Student would have on a general education teacher. There was no reason to believe Student should not be placed full-time in general education kindergarten due to impact he would have on the students or teacher in that classroom.

21. Fourth, District did not assert that the cost of educating Student full-time in the general education environment was a factor in or justification for its decision to offer Student placement that was not 100 percent in the general education environment. District did not present any evidence of the costs for supports and services to fully include Student, and Student elicited testimony by which District acknowledged cost was not a factor in its placement offer.

22. While it is admirable that District educators wished to provide an optimal education for Student, such is neither required under the law nor contemplated in determining the least restrictive environment for a child. The only focus of an inquiry as to what constitutes the least restrictive environment is whether the child will be able to make some progress in a general education classroom, even if supports are required to achieve that progress, and not on whether another placement would maximize the child's progress. District failed to introduce evidence that would justify not including Student in the additional one hour and 40 minutes of general education kindergarten and only relied on its unsupported conclusion that a special day class was "better" for him. District did not demonstrate that the nature or severity of Student's disability or disabilities were such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily, supporting placement in a special class.

23. In applying the four factor analysis of *Rachel H.*, District has not met its burden of proof that Student's least restrictive environment as of the time of his kindergarten transition IEP team meeting on May 29, 2015, was a special day class. Because the placement offer did not comport with Student's least restrictive environment, the IEP District developed on March 13, April 13, and May 29, 2015, did not offer Student a FAPE for the 2015-2016 school year, and therefore cannot be implemented over the objection of Student's parents.

