BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: EVERGREEN SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016040351

AMENDED DECISION[1]

Evergreen School District filed a request for due process hearing with the Office of Administrative Hearings on April 6, 2016, naming Parent on behalf of Student.

Administrative Law Judge Cheryl Carlson heard this matter in San Jose, California on May 4, 2016.

Laurie E. Reynolds, Attorney at Law, represented Evergreen. Gary Kishimoto, Director of Special Education, was present throughout the hearing on behalf of Evergreen.

Mother represented Student. Noreen Pham provided Vietnamese language interpretation for Mother.

On May 4, 2016, the matter was continued to May 31, 2016 for the filing of written closing arguments. The parties filed closing arguments on that day, the record was closed, and the matter was submitted for decision.

[1] This decision is amended to identify Ms. Stahlnecker's title as special day class teacher throughout and correct the inadvertent reference that she testified at the hearing when she did not do so.

ISSUE[2]

Did Evergreen's June 9, 2015 individualized education program, as amended on October 12, 2015 and March 7, 2016, offer Student a free appropriate public education in the least restrictive environment?

SUMMARY OF DECISION

This Decision holds that Evergreen's June 9, 2015 proposed individualized education program, as amended on October 12, 2015 and March 7, 2016 did not offer Student a free appropriate public education in the least restrictive environment. Evergreen contended that the dispute in this case centers on a disagreement regarding the appropriate placement: specifically school-based or home hospital. The issue, however, was broader in that Evergreen sought a determination not just regarding placement but that it offered Student a FAPE. This Decision holds that the procedural and substantive violations were so significant and resulted in a denial of FAPE, that a determination regarding the appropriateness of the placement is not reached.

FACTUAL FINDINGS

Jurisdiction

1. Student is a seven and a half-year-old boy who resides with his Parents and his brother within Evergreen's jurisdictional boundaries. He is eligible for special education and related services under the category of other health impairment.

2. Evergreen initially found Student eligible for special education in June 2009. He received home instruction, occupational and physical therapy and nursing services during preschool and kindergarten because of his complicated medical condition. Student transitioned from Early Start services when he turned three years old.

Background

3. Student has never attended school in a formal educational setting, such as a classroom. Vietnamese is Student's primary language and is spoken in the home. The IEP indicates that as of June 9, 2015, Student was in the first grade. It is unclear what grade level Student was entering during the 2015-2016 school year.

---

[2] The issue has been reframed 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 Sch. Dist. (9th Cir.2010) 626 F.3d 431, 442-443.)

MEDICAL BACKGROUND

4. Evergreen's multidisciplinary psychoeducational report, following an assessment on May 16, 2011, summarized Student's complicated medical history. At the time of his birth, Student was diagnosed with chromosomal anomalies which caused premature fusion of certain skull bones which prevented Student's skull from growing normally and affected the shape of his head and face. He underwent two surgical repairs in 2008 to treat the abnormal fusion of the sutures of his skull. Physicians also surgically placed a G-tube into Student's stomach in 2008. They inserted a left-sided shunt to drain excess cerebrospinal fluid from Student's brain in 2009. At the time of the assessment in May 2011, Student was able to cough effectively to clear secretions through his tracheotomy but required suctioning throughout the assessment. Student was only two years old at the time the 2011 report was prepared; therefore the findings in this report are not otherwise relied upon in this Decision.

MULTIDISCIPLINARY PSYCHOEDUCATIONAL REPORT - APRIL 28, 2014[3]

5. Student was assessed again on April 28, 2014, and a multidisciplinary psychoeducational report was produced. At hearing, Evergreen's witnesses established that the school IEP team members relied on many of the findings in the 2014 multidisciplinary psychoeducational report to identify Student's needs, describe his then present levels of performance, and develop the goals contained in the June 9, 2015 IEP. Except as detailed below, there was no evidence that Student's performance in April 2014 was materially different than in June 2015 when the IEP in question was developed.

6. The evidence established that as Student transitioned to school he would require assistance in the school setting in the areas of feeding, suctioning, and toileting because of his ongoing medical issues. Student's adaptive skills were not able to be accurately assessed because of his medical needs. He had deficits in fine motor, gross motor, and visual motor skills.

7. Regarding Student's communication needs, the 2014 examiners found that Student was average for his age group in the area of communication even though Student primarily used signs to communicate and used gestures and facial expressions to show his emotions. The assessor's conclusion that Student had an "average" overall ability to communicate is unreliable and not supported by the evidence. The examiners also did not address the fact that Student's primary language is Vietnamese and that the tests were given in English. They did not discuss whether the communication scores would have been different if the examiners had conducted the tests in Vietnamese.

[3] No legal findings regarding the legal sufficiency of the 2014 assessment is made. The findings made in this decision regarding the 2014 assessment are to determine Student's needs and present levels of performance as they existed in June 2015.

8. In describing Student's receptive language skills, the examiner reported a variety of skills that Student was able to complete when he was observed in 2014 such as telling whether words rhyme and identifying at least three complete sentences. Expressively, the examiner reported that Student tells simple jokes, is able to state and describe similarities, and knows more than 1,000 words in sign.

9. The examiner did not explain exactly how Student's ability to perform the above reported tasks was determined or what results gave rise to her opinions. More importantly, other evidence produced at hearing established that in June 2015, Student was unable to speak and had no reliable communication system in English, Vietnamese, or sign language. Moreover, while the 2014 report states Student knew one thousand signs, the report itself does not include which signs Student purportedly knew or the basis for that conclusion. While Evergreen produced some evidence that Student knew some signs, the evidence did not establish that he knew 1,000 signs, or anywhere close. The evidence does not support a finding that Student's speech and language and communication ability was in the average range. Both receptive and expressive languages were significant areas of need for Student.

June 9, 2015 IEP Meeting

10. The June 9, 2015 IEP team participants included Mother, the district coordinator Carole MacLean, the special day class teacher Diana Stahlnecker, the speech therapist Sheri Jefferson, the school psychologist Theresa Elliott, and a Vietnamese translator. The occupational therapist, Mansi Shah, was excused by Parent from attending the IEP team meeting, but her information was provided in writing and shared by the IEP team.

STUDENT'S AREAS OF NEED IN JUNE 2015

11. In determining Student's areas of need, several Evergreen employees conducted additional testing and observed Student on June 8, 2015, the day before the IEP team meeting. The testing was conducted in English, although page one of the IEP stated Student's native language is Vietnamese and he is an English language learner. Student's parents spoke primarily Vietnamese to him. His nurses and teacher spoke to him in English at home, but these people did not testify at the hearing. The degree to which Student actually understood English or how the nurses or assessors came to believe that Student understood English was not established.

12. In June 2015, Student still relied on a G-tube for feeding and did not take regular food by mouth. The evidence established that feeding was an area of need for Student. Student still used a trache which had to be suctioned multiple times throughout the testing with Evergreen staff on June 8, 2015. Student was unable to speak, so he could not orally tell staff when he needed suctioning. Student was unable to toilet himself and needed assistance both getting to and from the bathroom as well as in the bathroom stall. Suctioning and toileting were areas of need for Student.

13. Ms. Stahlnecker, the special day class teacher, claims in her report that she gave Student the Woodcock-Johnson test in order to assess his academic skills, but she did not identify the version of the test she administered or include a score report. The test protocols were not introduced at the hearing. Ms. Stahlnecker cautioned that the results were inaccurate because of the degree of accommodations she needed to provide for Student to complete the test. However, no results were listed on the IEP and no mention was made of the accommodations she provided.

14. With regard to reading, Ms. Stahlnecker did not assess Student's ability to identify letters, but believed he could identify both uppercase and lowercase letters. She provided no support for this belief. She also concluded he could understand simple sentences that were read to him because he could point to Y or N to indicate true or false when asked. She did not assess his knowledge of sight words because Student was too fatigued and unable to complete that subtest. Given Student's age, the evidence established that Student had needs in the area of reading. Student was reportedly only able to trace two letters of the alphabet, A and D. Ms. Stahlnecker did not provide any other evidence that Student was able to write. Clearly, Student had a need in the area of writing. Student understood number concepts for the numbers one to ten and could perform some addition and subtraction using manipulatives. This is far below what would be expected for Student given his age; therefore, the evidence established a need in the area of math as well.

15. In the area of Student's language and communication needs, the previous assessor's conclusion that Student's communication skills in 2014 were in the average range was unreliable, as noted above. Student's communication skills were assessed again by speech and language therapist, Ms. Johnson in preparation for the June 2015 IEP. Ms. Johnson could only administer the receptive subtest of the Preschool Language Scaled-5th Ed., although she did not indicate why. Student obtained a standard score of 77, placing his skills at the sixth percentile. This score is considered to be at around the five year age equivalent. Ms. Johnson noted that the score should be taken with caution because Student did not receive credit for certain test items that required verbal responses. The evidence established that Student had a need in the area of receptive language.

16. Ms. Johnson noted in 2015 regarding Student's expressive language abilities, that Student responded to his name and greeting from her and waved good bye. He shrugged his shoulders when she asked if he was ready to begin a task, which she interpreted as indicating his agreement. No information was introduced into evidence regarding why or how Ms. Johnson determined the meaning Student meant to convey by shrugging. He vocalized utterances but they were unintelligible. Ms. Johnson also observed Student use some signs when his nurse asked if he was tired. Expressive language was a significant area of need as it intersected with Student's medical condition. Student's trach required suctioning, even during the speech assessment. Student did not inform his nurse or the assessor of this need; rather the nurse acted based upon her observations.

17. Student's gross and fine motor abilities were impaired and the evidence showed that both were areas of need for Student. He had difficulty holding a pencil, cutting,

forming letters, walking, and balancing without support. Student's social skills were also an area of need. Student's lack of exposure to other children in a school environment and his inability to speak showed Student would have difficulty communicating socially with peers and adults.

18. Regarding mobility, the assessor reported in 2014 that Student was not ambulatory but walked with assistance requiring full support under his arms when he left the assessment room. He was initially supported by his father and then carried out the door. Mobility continued to be an area of need for Student in June 2015. The occupational therapist noted that Student had difficulty with balancing without support. Further, his speech therapist, Ms. Johnson, reported that Student "is not without adult assistance as he requires support for safety in navigating his environment." Student had an area of need in mobility.

19. The totality of the evidence, including the 2011 and 2014 assessments, the 2015 testing, the Evergreen witnesses' testimony at the hearing and Mother's testimony established that Student's needs in 2015 were in the areas of feeding, suctioning, toileting, reading, writing, math, communication including both receptive and expressive language, gross and fine motor skills, social skills and mobility. The 2015 IEP document only listed areas of need in expressive language, fine motor skills, math, reading and social skills. The IEP document does not state whether the school IEP team considered Student's needs in the areas of feeding, suctioning, toileting, mobility, receptive language, and writing while developing Student's IEP.

PRESENT LEVELS OF PERFORMANCE AND GOALS

20. The IEP team failed to recognize feeding, suctioning, toileting, mobility, receptive language and writing as areas of need for Student. Therefore, the team did not develop any goals in these areas. Further, some of the goals which were developed were based on present levels of performance that were not shown to be accurate or clear at hearing and some of the goals themselves were not specific or measureable. The IEP lists the results of partial assessments completed in anticipation of the June 2015 IEP team meeting. These results are listed in the IEP document as present levels of performance, but the evidence showed that the conclusions reached by the examiners were not consistent with the overall weight of the evidence in the hearing.

21. The speech therapist made a number of assumptions regarding Student's ability to understand or comprehend language heard or read. For example, the therapist noted that Student often "shrugged his shoulders when examiners asked him if he was ready to start which indicated that he meant to indicate 'okay.'" However the speech therapist did not explain the basis for her assumption that when Student shrugged his shoulders it meant "okay" as opposed to something entirely different. The speech therapist also noted that Student nodded his head in response to a question but she did not explain why she thought his nod meant he was answering a question in the affirmative.

22. It is unclear what any of Student's gestures meant because the speech therapist did not explain the basis for her assumptions. She stated Student "appeared to tire from the extended session but did not shake his head or express that he did not want to go on with testing." It is not clear from this statement whether Student had any tools such as gestures to show he understood the questions addressed to him or that he knew he could stop the testing if he was tired. It was not until Student started crying that the therapist asked Student's nurse if he might be tiring. At a second session, Student's nurse told the therapist that Student knew several signs but the therapist did not observe Student use signs to initiate requests or to indicate needs during either session. Based on the therapist's notes it is unclear whether Student can communicate at all with signs or gestures or whether he understood anything the assessors asked him.

23. The speech therapist reported that she gave Student credit for identifying pictures that do not belong, ordering pictures by size, understanding the concepts each/every and last/first. However the therapist did not explain how Student could do so if he could not verbally respond. She did not explain what Student did that made her believe he could do these tasks.

24. The special day class teacher stated the test she administered was inaccurate, but concluded Student could identify both uppercase and lowercase letters. No basis was given for this opinion. This teacher did not testify at the hearing and so did not explain her conclusions. On one test, she asked Student to point to the correct answers and concluded he was able to do this even though she also stated he did not get all the answers correct. The teacher did not explain why she thought Student actually understood the questions rather than guessing at his responses.

25. The special day class teacher also reported that Student understood simple sentences that she read to him and let her know if it was true or false by pointing to Y or N. Again she did not explain the basis for her belief that he understood the sentences or that he was not randomly pointing to Y or N. It may also have been confusing for Student to hear the question in English which asked for true or false, yet his choices were "yes" or "no."

26. The special day class teacher did not explain these inconsistencies which were written on the IEP in the present levels of performance section. The teacher's testing results were not introduced into evidence at the hearing. The teacher did not test Student's writing ability because she asked him to write two different numbers and "this task appeared to be difficult for him." She did not explain why it appeared to be difficult for him or whether she determined that Student's issue was writing the number or recognizing the number.

27. Evergreen also failed to show that the present level of performance for Student in the area of expressive language was accurate. The IEP team reported that Student's present level of performance in expressive language was that he used 1,000 signs and gestures to communicate; and that he also nodded his head and shrugged his shoulders to say yes or okay. Evergreen failed to establish the basis for this present level of performance. Ms. Johnson did not assess the number of signs Student actually knew and she did not

observe him initiate communication using signs. No testing protocols were entered into evidence at the hearing. Although the speech therapist reported Student was responding to her during her assessment, the special day class teacher reported that Student "does not have an established functional communication system to provide responses to assessment items." The speech therapist did not testify at the hearing. The weight of the evidence did not establish that this present level of performance in expressive language was accurate.

28. Student's IEP team developed an expressive language goal to address Student's communication needs. The goal was to increase his expressive language skills by using signs, gestures, or picture icons to request his wants/needs to adults including nurse/aides/teacher in the classroom, when provided with minimal prompting in four out of five trials over three sessions as measured by the therapist. There was no measureable indicator of how many different signs, gestures or pictures Student would have to use to meet this goal, whether any of these would be newly learned during the duration of the IEP or how the therapist would actually measure and know whether Student wanted or needed something during an observation. The expressive language goal was not measureable.

29. Student's present levels of performance in reading are another example of inaccurate present levels of performance on the IEP. Student's present level of performance stated that Student was able to let an adult know if something was true or false by pointing to a "Y" for true, and an "N" for false. It is unclear how this relates to Student's ability to read as the evidence showed that Student was responding to oral questions, not written. The present level also stated that Student was also able to identify a "couple" of sight words; however, the specific words were not identified nor was "couple of sight words" quantified. Evergreen failed to establish that the present level of performance in reading was accurate.

30. Student's goal in the area of reading was not measureable. Student's goal was to identify 50 sight words by pointing to the correct word when asked to identify the word with 70 percent accuracy in three out of four tries as measured by teacher observation/documentation. It is unclear how Student would point to a correct word with 70 percent accuracy. If the goal meant that Student would correctly identify 70 percent of 50 sight words presented to him by pointing to the correct word, the goal would be measureable. This is not what the goal stated. It is unclear how the goal could be measured as written. Also, since the IEP team did not know how many sight words Student knew at the time, it is unclear whether a goal for 50 sight words was appropriate, too low or too high.

31. Finally, no evidence was introduced to establish that Student's math goal was appropriate for him. Ms. Stahlnecker assessed Student's math skills in preparation for the IEP. She concluded Student was able to do simple addition and subtraction and appeared "to have a good handle" on numbers from one to ten. Student's goal to meet his math needs was to "orally count/read/write and identify place value of each digit for whole numbers to one thousand when given teacher direction with 70 percent accuracy in three consecutive trials as measured by teacher-charted work samples." At the time the goal was written, Student could make only unintelligible sounds, and could not read anything but a couple of sight words. Evergreen did not establish that it was appropriate to expect Student to orally count to 1,000

or read numbers up to 1,000 within one years' time. Further, there was no evidence that he could write anything other than tracing two letters at the time the goal was written. Evergreen did not show that it was appropriate to expect Student to be able to write all of the numbers up to 1,000 in one year. This goal is also not measureable as the requirement that a Student count up to 1,000 with 70 percent accuracy would be impossible to ascertain. Evergreen did not establish that this goal was appropriate for Student.

SERVICES AND PLACEMENT OFFER

32. Evergreen's placement offer in the June 9, 2015 offer is unclear in several parts. Multiple placements were identified in the IEP document including both a full time special day class and home hospital placement. At hearing, Evergreen asserted that it offered Student placement in a special day class operated by the County Office of Education. This program was set up to support students who are medically fragile with nursing support, speech therapy, and occupational therapy while at school. Student would be placed in a special day class in a public integrated facility five times weekly for 300 minutes. The IEP does not indicate the grade level of the students in the special day class. The IEP offered 30 minutes of integrated speech and language services twice a week to be provided by the County Office of Education. Individual health and nursing specialized physical care was offered throughout Student's entire 300 minute school day provided by a nonpublic agency with the SELPA or district. Occupational therapy would be provided individually out of the classroom by the county office of education one time weekly for 30 minutes.

33. The IEP team also proposed an extended school year program beginning July 1, 2015 and ending July 29, 2015 in a special day class in a public integrated facility five times weekly for "240 minutes in a regular classroom/public day school". Health and nursing specialized physical care would be provided five times weekly for "300 minutes in the regular classroom/public day school" by a nonpublic agency with SELPA or the district. Occupational therapy would be provided one time weekly for thirty minutes. No explanation was given about why Student would receive nursing care for 300 minutes but would only receive 240 minutes in a special day class. It is likely that the extended school year program was either 240 or 300 minutes, but it is unclear which is correct. This makes the extended school year placement offer unclear, as it is impossible to determine from the document how many minutes of extended school year were being offered to Student.

34. The IEP document states that transportation would not be provided. No evidence was presented at the hearing or on the IEP regarding any discussion regarding Evergreen's determination that transportation was not a necessary service for Student. The only supplementary aid and service listed was an occupational therapy consult to provide accommodations for access to classroom for 60 minutes once per month.

35. As noted above, the specific placement offer in the IEP was unclear. Despite Evergreen's assertion at hearing that only the special day class was offered, page 15 of the IEP document proposed an educational setting with a school type identified as home/hospital instruction. To compound the confusion, the placement states that Student will be placed for

"241%" of the student's time outside the regular education class and "-141%" in the regular class and extracurricular and non-academic activities. No explanation was given regarding the meaning of these percentages, or why the proposed school type would be home/hospital instruction as opposed to the special day class proposed on page 13 of the IEP document.

36. Addendum IEP team meetings took place on October 12, 2015 and March 7, 2016 to consider Mother's opposition to the school based IEP placement instead of a home-hospital instruction placement. No changes were made to the IEP during or after either meeting.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA[4]

1. This due process 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 et seq. (2006);[5] Ed. Code, § 56000, et seq.; and 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 to 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); Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's 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).)

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

---

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

[5] All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 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, 951 [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. 951, 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. §§ 1414(b)(6)(A), 1415(f) & (h); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505, 56505.1; Cal. Code Regs., tit. 5, § 3082.)

Burden of Proof

5. As the petitioning party, Evergreen has the burden of proof by a preponderance of the evidence on all issues in this case. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [163 L.Ed.2d 387].)

ANALYSIS

Procedural Compliance with the IDEA

6. Under the IDEA, in matters alleging a procedural violation, an ALJ may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE; significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to Parents' child; or caused a deprivation of educational benefits. (20 U.S.C. 1415(f)(3)(E)(ii).)

CLARITY OF THE JUNE 9, 2015 PLACEMENT OFFER

7. In *Union School Dist. v. Smith* ((1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*)), the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. The Court emphasized the need for rigorous compliance with this requirement:

> We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously.

> The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school District will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." 20 U.S.C. § 1415(b)(1)(E). (*Union* , *supra*, 15 F.3d at p. 1526; see also *J.W. v. Fresno Unified School Dist.* (E.D. Cal. 2009) 626 F.3d 431, 459-461; *Redding Elementary School Dist. v. Goyne* (E.D.Cal., March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.)

8. One District Court described the requirement of a clear offer succinctly: *Union* requires "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal." (*Glendale Unified School Dist. v. Almasi, supra,* 122 F.Supp.2d at p. 1108.)

9. *Union* involved a district's failure to produce any formal written offer. However, numerous judicial decisions invalidate IEP's that, though offered, were insufficiently clear and specific to permit parents to make an intelligent decision whether to agree, disagree, or seek relief through a due process hearing. (See, e.g., *A.K. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine School Dist. v. K.H.* (D.Ore., June 2, 2005, No. 04-1468) 2005 WL 1587241, p. 10; *Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108**;** *Mill Valley Elem. School Dist. v. Eastin* (N.D.Cal., Oct. 1, 1999, No. 98-03812) 32 IDELR 140, 32 LRP 6047; see also *Marcus I. v. Department of Educ*. (D. Hawai'i, May 9, 2011, No. 10–00381) 2011 WL 1833207, pp. 1, 7-8.)

10. In this case, Evergreen's June 9, 2015 IEP does not contain a clear offer such that Parents could make an intelligent decision whether to agree, disagree, or seek further relief through a due process hearing.

11. The educational setting described on page 15 of the IEP document conflicts with the one described on page 13. Specifically, page 13 purports to offer full time placement in a special day class while page 15 indicates that all special education and related services would be provided in a home and hospital setting. This is particularly confusing in this matter considering that a home versus school based placement was at the heart of the dispute between the parties. Moreover, the description of the amount of time Student would spend in a special education placement did nothing to resolve this confusion but only compounded it more. Specifically, page 15 states that "241% of time student is <u>outside</u> regular class & extracurricular & non-academic activities." The document also states, "-141% of time student is <u>in</u> the regular class & extracurricular & non-academic activities." [Emphasis in original.] This percentage breakdown is unintelligible. No evidence regarding any of these inconsistencies was provided at the hearing or in the IEP documents.

12. The June 9, 2015 IEP is also unclear regarding the offer of extended school year services. The services are identified as beginning on July 1, 2015, and continuing to July 29, 2015, in a special day class for 240 minutes per day five days per week. The health and nursing specialized physical care is offered for 300 minutes per day but Student's program is reduced to240 minutes. No explanation was given about why Student would receive nursing care for 300 minutes but would only receive 240 minutes in a special day class. This discrepancy makes the extended school year program offer unclear.

13. The ambiguity of these critical components of Student's program renders the IEP unclear and a violation of *Union*. This violation rises to the level of a denial of FAPE because the failure to make a clear offer denied Parent the right to meaningfully participate in the IEP development process. Without a clear offer, Parent would not be able to intelligently accept the offer nor would Evergreen be able to implement the offer. The IEP is not clear regarding how many minutes of extended school year Student would be entitled to, or where the education would take place for Student. Therefore the IEP itself does not offer FAPE. Even if the offer were clear, the IEP offer was still defective and failed to offer FAPE because it contained other procedural and substantive denials of FAPE.

FAILURE TO DISCUSS MAINSTREAMING

14. In addition to providing a FAPE, a school district must ensure that "To the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled." (20 U.S.C. § 1412(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.) Under the LRE mandate, a school district must consider a continuum of alternative placements which 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).)

15. Testimony did not establish and the IEP document does not specify whether the school IEP team considered whether Student could receive some education with his typically developing peers. No witnesses testified that over the course of three IEP team meetings the IEP team ever discussed opportunities for Student to interact with typically developing peers. Student had needs in the area of social skills development and communication. Given his needs, it was a procedural violation for Student's IEP team not to consider whether Student should spend any portion of his school program interacting with typically developing peers.

16. The school IEP team's failure to discuss or consider whether Student could receive some education with his typically developing peers rises to the level of a denial of FAPE because the failure to do so denied Parent the right to meaningfully participate in the

IEP development process. Parent may not have been aware their son could attend classes in a regular education classroom and without this knowledge Parents would not have been able to meaningfully participate as an IEP member.

TRANSPORTATION AND MOBILITY SERVICES NOT OFFERED

17. The term "special education" means specially designed instruction that meets the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) "Specially designed instruction" means the adaptation, as appropriate to the needs of the disabled child, the content, methodology or delivery of instruction to address the unique needs of the child that result from the child's disability. (34 C.F.R. § 300.39(b)(3)(2006).) In the context of the IDEA, "special education" refers to the highly individualized educational needs of the particular student. (*San Rafael Elementary v. California Educ. Hearing Office* (N.D. Cal. 2007) 482 F.Supp.2d 1152, 1160.) The term "related services" means transportation and developmental, corrective or other supportive services required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a) (2006).) In California, "related services" are called "designated instruction and services" or "DIS." (Ed. Code, § 56363, subd. (a).)

18. In terms of special education law, a "related service" is one that is required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a) (2006); Ed. Code, § 56363, subd. (a).) An educational agency, in formulating a special education program for a disabled pupil, is not required to furnish every special service necessary to maximize the child's potential. (*Rowley, supra*, 458 U.S. at p. 199.) Instead, an educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033 (*Park*).

19. The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) travel in and around school buildings; and (iii) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16).) The IDEA does not explicitly define transportation as door-to-door services. Decisions regarding such services are left to the discretion of the IEP team. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed.Reg. 46576 (August 14, 2006).)

20. A school district must provide transportation to disabled students if it provides transportation to non-disabled students. If a school district does not provide transportation to non-disabled students, "the issue of transportation to students with disabilities must be decided on a case-by-case basis. If a [school district] determines that a disabled student needs transportation to benefit from special education, it must be provided as a related service at no cost to the student and his or her parents." (*Letter to Smith*, (23 IDELR 344 [23 LRP 3398]).)

21. Orientation and mobility instruction may include specialized instruction for individuals in orientation and mobility techniques, and consultative services to other educators and parents regarding instructional planning and implementation of the IEP relative to the development of orientation and mobility skills and independent living skills. Orientation and mobility instruction shall be provided only by personnel who possess a credential that authorizes services in orientation and mobility instruction. (5 C.C.R. § 3051.3; Ed. Code, § 56320, subd. (f); 34 C.F.R. § 300.34(a))

22. The IEP does not include an offer of transportation or mobility services and does not reflect that the IEP team discussed transportation or mobility options. Evergreen did not show at hearing that its determination to not offer transportation or mobility services to Student was appropriate. Evergreen was required to show that all components of the IEP were appropriate for Student and failed to do this for transportation and mobility. Given that Student has severe mobility problems and is unable to speak or write, transportation and mobility assistance are services that the IEP team should have at least discussed and considered. The failure to establish that Student's IEP team considered whether transportation or mobility services were necessary related services in this case, is a procedural violation of the IDEA.

23. Further since Student's transportation and mobility needs are significant, both traveling to and from school and between schools, and traveling in and around school buildings, this violation impeded Student's right to a FAPE. It also impeded Parent's opportunity to participate in the decision making process regarding the provision of FAPE because it was unclear what if any, transportation and mobility assistance might be available to Student, and the IEP team did not discuss what would be appropriate for Student. Without this information, Parent was unable to evaluate the offer from Evergreen. This failure also results in a finding that the June 9, 2015 IEP does not offer Student a FAPE.

Substantive Appropriateness of June 9, 2015, IEP

24. The accumulation of procedural violations described above makes the IEP unclear and fatally flawed. However, even if the procedural violations did not doom the IEP, the substantive violations described below clearly show Student was not offered a FAPE in this case.

25. An IEP is a written document which details the student's present levels of academic and functional performance, provides a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, an explanation of the extent to which the child will not participate with non-disabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

26. When developing an IEP, the team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A); 34 C.F.R. § 300.324(a), (b); Ed. Code, § 56341.1, subds. (a), (d).) An IEP must include a statement of measureable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability.

27. Student's needs in 2015 were in the areas of feeding, suctioning, toileting, reading, writing, math, communication, receptive language, gross and fine motor skills, social skills and mobility. In its IEP, Evergreen only listed areas of need in expressive language, fine motor skills, math, reading and social skills. Neither the IEP document nor the witnesses' testimony at the hearing discussed whether the school IEP team considered Student's needs in the areas of feeding, suctioning, toileting, mobility, receptive language, and writing while developing Student's IEP. This resulted in an IEP that did not address these areas of need and therefore substantively failed to offer Student a FAPE.

28. Evergreen also did not establish that the June 9, 2015 IEP accurately and completely listed Student's present levels of performance, as they existed in June 2015. No assessment reports were entered into evidence from the testing in June 2015. Testing was given and not completed in some areas, and other tests were not attempted. The speech therapist drew conclusions regarding Student's communication abilities and yet no evidence was offered explaining how she came to these conclusions.

29. These unsupported conclusions formed the basis for the present levels of performance included in Student's IEP. Evergreen stated Student's baseline in the expressive language goal was that Student used 1,000 signs in gestures to communicate. Yet the speech therapist reported that she did not observe Student use signs to initiate requests or indicate needs during her sessions. It appears that Evergreen used the 2014 report to determine Student's levels of performance in 2015 which stated that Student knew all of his letters and used more than 1,000 words in sign. Yet, one and a half years later, Evergreen did not show that Student knew his letters and he was not observed using any signs at all. Further, the 2014 report listed student's communication abilities as average despite the fact that a year later, in 2015, Student clearly could not communicate. These contradictory results were not explained by Evergreen.

30. Evergreen failed to show that the present level of performance as listed on Student's reading goal was related to reading or what was meant by the word "couple". The failure to accurately list Student's present levels of performance resulted in a denial of FAPE to Student. Evergreen did not meet its burden to establish that Student's present levels of performance were accurate, specifically in the areas of expressive language and reading. These inaccurate present levels formed the basis for the goals and an IEP which was did not offer FAPE.

31. Federal and state law generally require that the IEP contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § 1414 (d)(1)(A)(ii); Ed. Code, § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (34 C.F.R. § 300.320(a)(2)(i)(ii) (2006); 34 C.F.R. part 300, Appendix A, Q.1 (2006); Ed. Code, § 56345.) For each area of which a special education student has an identified need, the IEP team must develop measurable goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

32. Evergreen did not propose any goals for Student in the areas of feeding, suctioning, toileting, mobility, receptive language, and writing, and the goals proposed in the IEP for the needs Evergreen did find were incomplete. Evergreen's seven goals did not address some of Student's most significant needs. This failure constituted a denial of FAPE. Additionally in the areas of need identified by Evergreen, some of the goals are not measurable.

33. With regard to the reading goal, the school IEP team described Student's baseline as being able to let an adult know if something was true or false by pointing to a Y (true) or N (false) and that he was also able to identify a couple of sight words. However no persuasive evidence was provided by Evergreen that this statement was related to Student's reading ability. Student's goal to identify 50 sight words by pointing to the correct word when asked to identify the word with 70 percent accuracy in three out of four tries as measured by teacher observation/documentation was not measureable. How would a teacher determine that Student could identify 50 sight words with 70 percent accuracy in three out of four tries as measured by teacher observation and documentation? Without knowing which sight words Student already knew, it would be impossible to know whether or not Student met this goal by increasing his knowledge or by simply identifying words he already knew. Additionally, it was not clear how knowledge would be measured. How would Student point to a word with 70 percent accuracy? Was Student to choose among two words or a field of multiple words? If it was intended to be between two words, how was the assessor to rule out guessing the correct word? The incomplete or inaccurate baseline coupled with the lack of specificity regarding how the goal would be achieved renders this goal immeasurable.

34. The school IEP team wrote that Student's current math baseline was the ability to do simple addition and subtraction and that he appeared to "have a good handle on numbers from one to ten." Yet the school IEP team's descriptions of Student's math abilities do not support this baseline. The school IEP team proposed that in order for Student to meet his math needs, he would orally count/read/write and place value of each digit for whole numbers to one thousand when given teacher direction. The assessor would measure this goal by observing Student accomplish this activity with 70 percent accuracy in three consecutive trials as measured by teacher-charted work samples. Again the methodology for measuring Student's ability to reach this goal within one year is not identified. The IEP team did not provide an explanation as to how such a goal could be measured. In light of the fact

that Student had no reliable communication system and limited ability to write numbers, it is unclear why or how Student could orally count or write place values for whole numbers up to 1,000. Moreover, it is not possible to decipher how Student could achieve 70 percent accuracy when counting as a part of this goal. In light of Student's needs, it is determined this goal is neither appropriate nor measurable. The failure to have accurate present levels of performance and measureable goals did not result in an IEP that offered Student a FAPE.

35. In conclusion, Evergreen did not comply with the procedural or substantive requirements of the IDEA and California law and the June 9, 2015 IEP did not offer Student a FAPE. It did not include a clear offer of FAPE in violation of *Union* and, included other procedural violations such as failing to consider mainstreaming, transportation and mobility services. The offer was not substantively appropriate since it failed to address all areas of need, included inaccurate present levels of performance, and included goals that were not measurable or appropriate for Student given his unique needs. As such, the IEP was not reasonably calculated to enable Student to receive educational benefit. The offer was fatally flawed to the degree that it was not necessary to analyze whether there were additional procedural or substantive denials of FAPE and a determination regarding the appropriateness of the placement offer could not be reached.

ORDER

1. Evergreen's June 9, 2015 IEP offer, as amended on October 12, 2015, and March 7, 2016, did not offer Student a free appropriate public education in the least restrictive environment.

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, Parents prevailed on the sole issue.

RIGHT TO APPEAL THIS DECISION

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: June 22, 2016

/s/

CHERYL CARLSON
Administrative Law Judge
Office of Administrative Hearings