

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MORELAND SCHOOL DISTRICT.

OAH Case No. 2013071261

DECISION

Student filed her Due Process Complaint on July 29, 2013. The hearing was continued at the parties' request on September 4, 2013.

Kara K. Hatfield, Administrative Law Judge (ALJ), Office of Administrative Hearings, State of California, heard this matter in San Jose, California, on October 30 and 31, 2013, and November 1, 5, 6, and 7, 2013.

Attorneys Mandy Leigh and Sarah Fairchild represented Student. Student's legal guardian (Parent) attended all days of hearing. Student did not attend the hearing.

Attorney Melanie Seymour represented Moreland School District (District). Destiny Ortega, District's Director of Special Education, attended all days of the hearing.

On November 7, 2013, the matter was continued at the parties' request until December 2, 2013, so the parties could file and serve written closing arguments. Closing arguments were filed, the record was closed and the matter was submitted on December 2, 2013.

ISSUES¹

1. Whether District denied Student a free appropriate public education (FAPE) for the 2012-2013 school year by failing to offer appropriate placement and related supports and services to address Student's unique needs in the area of behavior; and
2. Whether District denied Student a FAPE for the 2013-2014 school year by failing to offer Student appropriate placement and related supports and services to address her unique needs.

SUMMARY OF DECISION

Student contends she was denied a FAPE in the 2012-2013 school year because in her prior school's program, she was less dependent on prompting by adults and engaged in less frequent self-injurious behaviors, whereas in District's program, she depended upon a 1:1 aide and engaged in increased head banging. District contends that it continually assessed Student and developed, modified and delivered programs and services using methodologies that were reasonably calculated to address Student's behavioral challenges, and that its programs and services were effective at reducing Student's long-standing behavior difficulties. For the reasons set forth below, the placement, supports, and services related to behavior that District provided Student for the 2012-2013 school year were sufficient to provide Student a FAPE.

Student contends that because the placement and services District offered for 2013-2014 were the same ineffective and inappropriate placement and services District provided the year before, Student was not obligated to accept them and is entitled to reimbursement for the home school program and speech and occupational therapy services that Student procured. District contends that based on the progress Student demonstrated in academics, social skills, and behavior in 2012-2013 with the placement, supports, and services that were provided, the same placement and services were reasonably calculated to provide Student with a FAPE in 2013-2014. For the reasons set forth below, the placement, supports, and services that District offered Student for the 2013-2014 school year also were sufficient to provide Student a FAPE.

Student's request for relief is denied.

¹ The issues are those presented in Student's complaint and framed in the Order Following Prehearing Conference. The ALJ has revised the issues without changing their substance, for purposes of organizing this decision. 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

1. Student was nine years and seven months old at the time of hearing. At all relevant times, she lived with Parent within District boundaries. Student was eligible for special education as a student with autistic-like behaviors. Student also had needs due to having some intellectual disability.

2. Since pre-school, Student had longstanding and persistent self-injurious behaviors. Student banged her head on walls and floors. The frequency and intensity of Student's head banging fluctuated throughout her childhood, but the behavior was never extinguished. Student also hit her head, walls, and tables with her hands, and engaged in tantrum behavior including crying, screaming, agitated vocalizing, and throwing herself to the ground.

3. District provided Student an individualized education program (IEP) from 2007 until late summer 2010 when Student moved into a neighboring school district and attended Forest Hill Elementary School (Forest Hill). By November 2010, she moved back within District boundaries. Through an inter-district agreement, Student continued to attend Forest Hill and received related services there during the 2010-2011 and 2011-2012 school years. Student's classroom at Forest Hill was a special day class (SDC) for students with autism that included students in kindergarten through second grade.

4. Lisa Simpson, Ed.D., was Student's teacher at Forest Hill for the 2010-2011 and 2011-2012 school years. Dr. Simpson received her doctorate in Learning and Instruction with Concentration in Special Education in 2013. When Student first began attending Dr. Simpson's classroom, Student had head banging behaviors, five or six times per day. Student's head banging reduced over the time Student was in Dr. Simpson's class, but sometimes there were spikes in frequency. During the assessments Dr. Simpson conducted for Student's April 2012 IEP, Dr. Simpson observed Student hitting her head with her hand and hitting her head on the table. Student's occupational therapist observed Student exhibiting self-stimulatory behaviors such as head banging, hitting herself in the head with her hand or slapping her hand on the table, and Student had difficulty maintaining a regulated state of arousal. When Student was having a difficult time with self-regulation, behavioral overreactions and increased self-stimulatory/injurious behaviors occurred. Although Dr. Simpson and the classroom staff were very good at trying different strategies to help Student get back to a more regulated state, Student did not respond consistently and "what work[ed] on one day may not work the next day." Student's speech therapist observed that Student had difficulty using a functional protest to eliminate items she did not want and Student would climb on a person to block their access, yell, bang her head, or leave the room.

At hearing, although Dr. Simpson testified that there was written data on Student's head banging, those records were not produced. Instead, Student relied on Dr. Simpson's memory of the frequency of Student's head banging during the two years Student was in her classroom. Dr. Simpson recalled that during Student's second year in her class, Student banged her head about once per week. Dr. Simpson's and other service providers' written reports of Student's head banging behaviors from April 2012 make it likely that Dr. Simpson's recollection was more optimistic than accurate.

5. Easter Seals Bay Area Autism Project (Easter Seals) conducted a functional behavior assessment (FBA) in January and February 2012 and developed a behavior support plan (BSP) in March 2012 to address Student's self-injurious, aggressive, wandering, self-stimulatory, and mouthing-non-edible-objects behaviors. Easter Seals collected data on Student's self-injurious behaviors while at home, in the community and at school. In a 60 to 90 minute observation period, Student engaged in five incidents of self-injurious behavior while at school on February 9, 2012.

6. The March 2012 BSP recommended that at the end of Student's first quarter of services through Easter Seals, the BSP should be re-evaluated and, in the event that Student's "self-injurious behavior ha[d] not adequately decreased in frequency and intensity, procedures related to using protective headgear should be considered as part of the BSP." There was no evidence that Parent ever implemented, or even considered implementing, the Easter Seals recommendation regarding protective head gear.

7. Although Student was in an autism classroom for first and second grade, Forest Hill did not have an autism classroom for students in third through fifth grade. Both District and Parent anticipated that Student would continue to attend Forest Hill during the 2012-2013 school year. Student's April 18, 2012 IEP was therefore built around placement at Forest Hill in a non-categorical classroom, for pupils with a variety of disabilities. The IEP provided that Student would receive the supplementary aids and services of visual aids to support communication development and access to classroom schedules and routines, and occupational therapy consultation 30 minutes per month. The IEP provided that Student would receive the related service of speech therapy, and extended school year services.

8. At the end of Student's second grade year, the inter-district agreement was not extended and Student needed a placement within District. Student continued to attend Forest Hill during the extended school year of 2012 while working with District to amend Student's IEP to provide a placement and related services within District.

9. Elementary schools within District had non-categorical SDC's for students with Mild/Moderate disabilities, and with Moderate/Severe disabilities. Students in the Mild/Moderate SDC's often had specific learning disabilities and/or speech/language impairments. Those students worked on reading comprehension and math skills; the classes were more academically rigorous and aligned to the common core standards. Students in the Mild/Moderate SDC's needed fewer modifications to the curriculum. Students in the Moderate/Severe SDC's required more modifications in the classroom and focused on a curriculum that was functional and modified to meet their needs. Those students worked on functional communication skills, went out into the community and worked on daily living skills. The Moderate/Severe SDC's had occupational therapy, speech and language, and behavioral supports integrated into the classroom program throughout the day, whereas students in the Mild/Moderate SDC's received those services only on a pull-out basis.

10. On August 8, 2012, Student's IEP was amended to reflect placement at Easterbrook Discovery School (Easterbrook), in a non-categorical Moderate/Severe SDC for third through fifth graders. This placement was based upon Student's significant needs in the areas of intellectual functioning, social functioning, communication, and behavior. Student would receive language and speech services and occupational therapy services for the amount of time agreed upon in the April 18, 2012 IEP, while new assessments were done for language and speech and occupational therapy. In addition, a FBA was to be done in order to develop a BSP and/or behavior intervention plan (BIP). The FBA was to determine the function of Student's noncompliance, mouthing non-edible objects, aggressive behaviors, and self-injurious behaviors, which were defined as "hitting her head on hard surfaces; hitting her hand/wrist on hard surfaces; may be accompanied with screaming and crying."

11. Student began attending Easterbrook on August 20, 2012. Easterbrook was the District school closest to Student's home. Her teacher was Bill Pierce. Mr. Pierce held an Educational Specialist credential for moderate/severe disabilities since 1997. Mr. Pierce's classroom had nine students and four aides (two classroom aides and two 1:1 aides). Mr. Pierce used individual and whole class visual schedules, and visual timers. The classroom had picture icon books (a generic version of what is known as PECS, the Picture Exchange Communication System) for low-verbal or non-verbal students to use to communicate their needs and wants to the teacher and staff. Occupational therapy, language and speech and behavioral supports were integrated throughout the day while students worked on a modified academic curriculum, functional communication skills, and daily living skills.

12. The IEP team met to review Student's placement and services on September 18, 2012. The occupational therapist created a sensory diet and it was being used at least every 30 minutes. A sensory diet is a time/event-associated routine of actions or

activities that involve large or small motions that provide a student with sensory input and stimulation. Actions and activities are scheduled throughout the day to be proactive in regulating a student's sensory input needs and to avoid a student engaging in maladaptive self-stimulatory behaviors. A weighted blanket and a compression vest were added to the classroom to support and address Student's sensory input needs. Student was assigned a 1:1 aide. Student's mainstreaming activity and related goal was changed from eating lunch with general education peers to participating in the general education art and music classes. Student's interactions with typically developing peers also included a reverse mainstreaming activity during which general education students came to Mr. Pierce's classroom for 30 minutes two times per week and worked with the special education students on reading and on social, leisure and turn-taking activities and goals. A further IEP meeting was scheduled in three weeks to review language and speech, occupational therapy, and behavior assessments.

13. On September 18, 2012, Student banged her head on the glass front of a fire extinguisher case at school, and broke the glass. She sustained a mark on her head, but no cuts. Student did not behave as if the incident hurt her, and the incident did not appear to change a raised bump that was perpetually on her forehead due to her frequent head banging.

14. By October 10, 2012, the new language and speech and occupational therapy assessments were completed and a Verbal Behavioral Milestones Assessment and Placement Program (VB-MAPP) had been conducted, but the new FBA was not done. The IEP team met to discuss the results of the completed assessments and based on them, two language and speech goals and an occupational therapy goal (connected to decreasing behavioral overreactions) were proposed to be added to Student's IEP. Occupational therapy consultation services were increased from 30 minutes per month to 90 minutes per month. Parent agreed to a one month extension of time for the FBA to be completed.

15. Photographs of Student taken during a class trip to the pumpkin patch during the third week of October 2012 show a raised lump near the center of her forehead, at the hairline. According to Mr. Pierce, the photos reflected what her forehead looked like most days of the school year. According to Parent, the lump grew and reduced, but it never completely went away.

16. On November 16, 2012, the IEP team met to review the FBA and the BIP. Documents and evidence at hearing usually referred to Student's BIP as a BSP.² The IEP was amended to adopt the language and speech and occupational therapy goals from the October

² The distinction between a BIP and a BSP is immaterial in this case. The decision will refer to the plan as a BSP.

10, 2012 IEP, to modify some methodologies being used in Student's BSP to include additional data collection regarding Student's food and beverage intake to possibly correlate hunger/thirst as antecedents to Student's behaviors, and to add behavior intervention services consultation for one hour per week.

17. The data collected as part of the FBA during the 15 calendar days from October 23 to November 6, 2012 documented a total of 118 occurrences of self-injurious behaviors. The frequency varied from 2 to 23 occurrences per day. The primary function of Student's head banging was to escape from demands, gain access to preferred items/activities, and to gain access to sensory stimulation/input. One of the recommended antecedent management strategies to reduce the likelihood of Student's self-injurious behaviors was to vary high-demand/low-demand and high-preference/low-preference activities throughout the day. To implement this recommendation, Student was offered periods of high impact and large/gross motor activities such as climbing and jumping in the occupational therapy equipment room before she was expected to sit for prolonged periods. One of the recommended reinforcement strategies was to model requesting behaviors so that Student could learn how to ask for items/activities appropriately, and to encourage appropriate requesting. Two of the recommended replacement behaviors were to teach Student how to ask for a break before she engaged in self-injurious or tantrum behaviors. Student worked on making requests in speech therapy, on securing an adult's attention before she requested things, such as by saying a person's name first, and on the volume of her voice to be sure her requests would be heard. Other recommended antecedent management strategies included providing Student with a predictable, visually depicted schedule of her daily activities and providing warnings of upcoming transitions and/or termination of preferred activities, including by using a visual timer if needed to help Student see how much longer she needed to wait. Student's classroom used visual schedules and visual timers.

18. District personnel implemented Student's IEP and made occasional adjustments to timing or methodologies. In November 2012, the occupational therapist observed that the sensory diet and sensory items were being used. Student tolerated some items, but not others such as the weighted blanket and a wiggle seat. In December 2012, slight modifications were made to Student's sensory diet regarding gross motor activities.

19. On January 29, 2013, the IEP team met to develop the assessment plan for Student's triennial evaluation. The team also discussed the sensory diet to be sure it was being implemented in the classroom.

20. The IEP team met on April 3, 2013, to review the triennial assessments and develop Student's IEP for the remainder of the 2012-2013 school year, ESY 2013, and for the

2013-2014 school year. The triennial psychoeducational assessment showed Student's overall nonverbal IQ score fell within the lower extreme range for her age. The school psychologist did not recommend that Student be eligible for special education under the category of Intellectual Disability, which requires significantly below average cognitive abilities in all areas of cognitive processing, because Student demonstrated a splinter area of cognitive strength in the area of memory. The social, emotional, and behavioral assessments continued to reflect Student's self-injurious behavior, primarily in the form of head banging, although there was some reduction in the behavior. Student's BSP addressed strategies to use when the behavior was present, and staff implemented those strategies. Other areas of difficulty were social communication, unusual behaviors, self-regulation, peer socialization, adult socialization, social/emotional reciprocity, atypical language, stereotypy, behavioral rigidity, attention and sensory sensitivity.

21. The occupational therapy assessment showed Student was making smoother transitions, having less behavior overreactions, and was attending to non-preferred tasks with longer duration compared to a few months prior to the assessments. Her self-stimulatory behaviors had decreased and there was less frequency with head banging and masturbatory behaviors. Student benefited from continual use of a sensory diet and frequent self-regulation strategies in the classroom to improve her sensory processing skills and increase participation. The occupational therapist recommended that the sensory diet continue to be implemented both at home and school, and that Student continue to receive occupational therapist consultation to monitor the sensory diet and provide ongoing assistance and training to staff as needed.

22. The language and speech assessment showed Student appropriately protested things she did not want or places she did not want to go. When focused on the task, her volume was appropriately audible. In close proximity, Student had improved her ability to secure an adult's attention before requesting something, but required prompting.

23. Student's progress on her prior goals was reported at the April 3, 2013 IEP meeting. By that date, Student had met 11 goals, and had not met, but had made progress on, the other seven goals.

24. In the area of reading, Student met both of her goals. Student expanded her reading-with-comprehension vocabulary from 42 words to 105 words.

25. In the area of written language, Student met one of her three goals. Student expanded her spelling from 12 words to 26 words. She made progress towards her goal of being able to write simple three to four word sentences about a given picture, using a capital

letter at the beginning, a period at the end, and correct spacing between words, on four out of five opportunities in that she was successful in two out of five opportunities and still had trouble with spacing between words. She also made progress towards her goal of confining her writing to a defined space on lined paper.

26. In the area of receptive language, Student met two of her three goals. Student expanded her ability to follow directions from those with only a single step to those with two steps. She expanded her ability to respond to directions involving prepositions by moving beyond “put it on” and “put it here” to directions that included the prepositions under, over, in front, in back, up, down, top, and bottom. Student had been answering yes/no questions, but it was unclear that her response had any valid significance (as opposed to just being an utterance of either one or the other of the anticipated responses). To develop Student’s abstract or critical thinking, she was shown silly pictures asked “absurdities” such as, “Does an elephant moo?” Student’s goal had been to answer yes/no questions regarding absurdities in 40 percent of opportunities. She had 30 percent accuracy when independently answering, and 60 percent accuracy with prompting.

27. Student met her goals in expressive language, articulation, and math.

28. In the area of social skills, Student met three of her goals and made progress on the other three. Student met her goal of participating in a playground schedule of three activities with a general education peer. Student had been attending music and physical education classes with general education peers, and she expanded to maintaining appropriate behavior with general education peers in the library with standby adult assistance during a library activity. Student did not improve the length of time she maintained appropriate behavior with general education peers in Art class (10 minutes), but she did improve her length of time of appropriate behavior with general education peers in Performing Arts (music) class, from 20 minutes to 35 minutes. Student had been protesting undesired items by physically blocking a person’s access to the item, by banging her head, yelling, or leaving the room. By March 2013, she was demonstrating an appropriate protest toward undesired items and activities “with 90-100% accuracy.” Student made progress toward her goal of getting the attention of and responding to peers using their names and a short phrase related to the activity with minimal adult prompting; by April 2013, full prompting from an aide or teacher was still required. Student had been requesting items without noticing whether the person she was making a request to was paying attention to or could hear her. Student made progress toward her goal of, prior to making a request, getting the attention of an adult by saying the person’s name and sustaining eye contact. Her goal had been to gain an adult’s attention prior to making a request in seven out of ten opportunities. She was inconsistent at doing this and

in March 2013 was successful four out of ten times in a group, and five out of ten times individually.

29. Finally, Student's sensory goal was in progress and, because of the date it was created, the goal was not scheduled to be achieved until October 10, 2013 (six months after the other goals). Student's sensory goal was to improve her ability to use sensory information (with the use of the sensory diet), to improve her ability to calm herself and decrease behavioral overreactions, which was to be demonstrated by participating in a structured non-preferred classroom activity for 30 minute increments, with less than two behavioral overreactions in one day. As of March 2013, sensory breaks throughout the day appeared to help with self-regulation and to help Student's ability to function appropriately in class without behavioral overreactions. Student continued to engage in behavioral overreactions. District employee Heidi Hansen, a Board Certified Behavioral Analyst (BCBA), believed Student's self-injurious behaviors had decreased from when she started at Easterbrook and she attributed that to the classroom staff's faithful implementation of the BSP, and to following Parent's suggestion of offering Student water at least once every 30 minutes. The IEP team discussed setting Student's goal at four incidents per week, which would be less than once per day, because, given how difficult it is to extinguish head banging behavior, that was perceived as a realistic, achievable goal.

30. Parent requested more academic, grade-level compatible goals. The team proposed continuing Student's placement in Mr. Pierce's Moderate/Severe SDC, along with all other related services she was receiving (speech therapy for 30 minutes per week pull-out and 30 minutes per week push-in; occupational therapy consultation for 90 minutes per month; 1:1 aide throughout the school day; behavior support services [consultation with teacher and classroom staff] for one hour per week; and use of visual schedules, visual timers, visual communication tools, sensory diet and sensory tools). The team proposed expanding Student's mainstreaming classes and having Student attend a general education language arts class (a once per week "Writer's Workshop") in addition to arts and performing arts (music) classes. Parent asked to take and consider the IEP before consenting. About two weeks later, Parent made a written request that Student be placed in a Mild/Moderate SDC.

31. The IEP team met again on May 6, 2013, to discuss Student's placement for the fourth grade and to review data that had been collected regarding Student's self-injurious behavior. District collected data from November 8, 2012, through May 30, 2013. Ms. Hansen converted the classroom data logs into a line graph using Microsoft Excel. Over the six and one half months reflected on the graph, the frequency of Student's self-injurious behavior varied from zero to 16 occurrences per day. Totals of 16 incidents per day were recorded through mid-November, 11 incidents were recorded on one day in late November or

early December, and totals of 10 incidents per day were recorded on two dates in mid-January and one date in mid-May. Several other dates reflect nine incidents per day and most dates appear to be in the range of two to seven incidents per day. Many more days in March, April and May than in the prior months reflect head banging in the range of one to six incidents per day.

32. Ms. Hansen used a function of Microsoft Excel to insert a “trend line” into the graph; the line is higher on the edge of the graph showing data from November 2012, and lower on the edge of the graph showing data from May 2013. Based on this “trend line,” Ms. Hansen concluded that Student’s self-injurious behaviors decreased over the school year, and she believed that the BSP and the teacher and classroom staff’s implementation of the BSP with fidelity were the reason Student’s self-injurious behaviors had decreased over the school year. Based on the data available at the time of the April 3, 2013 IEP meeting, Ms. Hansen represented to the IEP team that the self-injurious behavior data showed a “downward trend.”

33. Joseph Woolwine was Student’s 1:1 aide during the 2012-2013 school year. Parent believed that Student’s behavior was better with Mr. Woolwine than with the other aides. Although school started at 8:00 a.m., Mr. Woolwine began work at 8:45 a.m. most days, and so, for the last few weeks that Student attended school in the 2012-2013 school year, Student came to school at 8:45 on Mondays, Thursdays and Fridays. Student arrived at school on time on Tuesdays and Wednesdays. The fact that Student was not present the first 45 minutes of school on three days of the week for a few weeks is very unlikely to be the reason school personnel recorded zero to three incidents of self-injurious behavior per day, and a grand total of 12 incidents, between May 9 and May 30, 2013.

34. At the IEP meeting on May 6, 2013, the team agreed to increase behavior support services to two hours per week for the remainder of the school year. District informed Parent that IEP team members believed that placing Student in a Mild/Moderate SDC would lead to an increase in Student’s negative behaviors due to her anticipated frustration with the higher academic demands of the class. Although Student was doing work at an academic level that was the highest in her Moderate/Severe class, District personnel did not think a Mild/Moderate SDC would be appropriate for Student based on her level of performance in academics. In response to Parent’s request for a more academic focus, the team added more academic goals to the IEP.

35. Parent withdrew Student from school (by non-attendance) on June 4, 2013. Parent cancelled a further IEP meeting scheduled for June 10, 2013. On August 15, 2013, Parent informed District that she was formally declining District’s offer of placement at

Easterbrook in the Moderate/Severe SDC. Parent stated Student's self-injurious behavior had escalated in that environment and that it was a risk to her safety. Parent advised District she would establish a private program at home and seek reimbursement for all costs for school, language and speech and occupational therapy services. District responded by asserting that its offer of placement and services would provide Student a FAPE and refusing to reimburse Parent for the cost of the unilateral home placement and language and speech and occupational therapy services.

Student's Expert Testimony

36. Student's expert, N. Rebecca Fineman, Ph.D., evaluated Student during July and August 2013, and wrote her psychological evaluation report in October 2013. Dr. Fineman used the Diagnostic and Statistical Manual of Mental Disorders, fifth edition (DSM-5) and diagnosed Student as having Autism Spectrum Disorder (299.00) with accompanying intellectual and language impairment, with an autism severity level of level 3, severe. Dr. Fineman also diagnosed Student as having Unspecified Intellectual Disability (Intellectual Development Disorder – 319).

37. Dr. Fineman was a licensed psychologist who, in the last seven years, assessed approximately 400 students, 70 to 80 percent of whom had autism. During testing and observation in Dr. Fineman's office, Student attempted to throw her head against a glass window. When describing the incident at hearing, Dr. Fineman stated that the level of force with which Student banged her head was significant and bent the venetian blinds, and she had never been so concerned about her own ability to assure the safety of a child in her office. Dr. Fineman noted in her report, "despite this examiner's expertise and experience testing children with autism, there were times when, given [Student's] explosive and unpredictable propensity for severe head banging, this examiner was highly concerned and immediately enlisted [Parent's] assistance. . . . Eventually, it was necessary to have [Parent] present in the room during testing in order to ensure [Student's] safety."

38. Dr. Fineman reviewed the data collected during the FBA conducted in October and November 2012, and the data collected in Student's classroom from November 2012 through May 2013. Dr. Fineman's interpretation of this data was that there was no change in the predictability of Student's self-injurious behavior after six months of behavioral interventions and that the BSP therefore was not effective at addressing Student's self-injurious behaviors. Dr. Fineman's opinion did not focus on the fact that, on average, the frequency of Student's head banging was lower at the end of the 2012-2013 school year than at the beginning. Dr. Fineman instead emphasized the unpredictability of Student's head banging, in that some days Student didn't engage in much or even any head banging, and then

the next day she engaged in a lot of head banging, and there was no telling whether any given day would involve none, a little, or more than hourly head banging.

39. Dr. Fineman opined that Student needed “autism specific services” in specific quantities. Her recommendations were based on her testing of Student and observation of Student at home and in Dr. Fineman’s office. Dr. Fineman observed Mr. Pierce’s Moderate/Severe SDC without Student present (after Student was no longer attending school), but Student did not offer as evidence the separate report Dr. Fineman wrote about her observation of the Easterbrook SDC (although the existence of the report is mentioned in her Psychological Evaluation). Dr. Fineman recommended “intensive autism specific services” as follows: a 30-hours-per-week program to be administered on a 1:1 basis including Applied Behavioral Analysis (ABA) and an Augmentative and Alternative Communication (AAC) emphasis, delivered primarily through ABA methodology, in a school site that is autism specific with staff members who had extensive background, training and experience in developing and administering ABA programs; 10 hours per week of in-home ABA service; no less than two hours per week of 1:1 occupational therapy; no less than two hours per week of 1:1 speech language therapy with a speech language therapist who had extensive background training and a credential in AAC devices and developing AAC programs; and a school site that has an occupational therapist, speech language therapist and certified behaviorist on site full-time.

40. Dr. Fineman was not an occupational therapist nor a speech language pathologist. While she could perform assessments and identify language and speech impairments and motor delays in children she evaluates, she was not qualified to make specific service recommendations regarding speech language or occupational therapy. Student attempted to overcome this deficiency in her expert’s qualifications by relying on those with whom Dr. Fineman is affiliated. There were two occupational therapists (one licensed, one registered and licensed) and a speech language pathologist within her practice group. Dr. Fineman’s Psychological Evaluation report did not reflect that any of these professionals assessed or observed Student, or that Dr. Fineman consulted with these professionals regarding Student. At hearing, Dr. Fineman generically described the interdisciplinary process used within her office and stated that it was used in developing her report for Student. But when Student’s attorney specifically asked Dr. Fineman about the bases of her recommendations for two hours per week of one-on-one occupational therapy and two hours per week of 1:1 speech language therapy, Dr. Fineman testified that her recommendations were based upon her own review of Student’s educational record, her own testing, her own observations and Parent interview. She did not mention consultation with her colleagues. Dr. Fineman’s recommendations of specific levels of occupational and speech language therapy services are outside her scope of practice and are not persuasive.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*³

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

2. A FAPE means special education and related services 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 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); 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 (2006); 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.)

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

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 (2006); Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528]; 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, Student, as the complaining party, bears the burden of proof.

Issue 1: Appropriateness of 2012-2013 Placement, Supports, and Services to Address Student’s Behavior Needs

5. Student contends District denied her a FAPE for the 2012-2013 school year by failing to offer appropriate placement, supports, and services to address Student’s unique needs in the area of behavior. Student argues that she was less dependent on prompting by adults and engaged in less frequent self-injurious behaviors when she attended Forest Hill, therefore Student’s need for a 1:1 aide and her increased head banging while attending Easterbrook proves that the classroom placement, supports, and services District provided did not appropriately address her behaviors. District contends that it continually assessed Student and developed, modified, and delivered programs and services using methodologies that were reasonably calculated to address Student’s behavioral challenges, and that its programs and services actually were effective at reducing Student’s long-standing maladaptive behaviors.

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

7. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley*, supra, 458 U.S. at p. 209; *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.)

8. If a child's behavior interferes with her learning or the learning of others, the IDEA requires the IEP team, in developing the IEP, to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (2006); Ed. Code, § 56341.1, subd. (b)(1).)

9. 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) (2006); Ed. Code, § 56031.)

10. 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 (2006).)

11. 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].)

12. 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.)

13. In the fall of 2012, when it was first determined that Student would attend a District school, District provided Student the classroom placement at the school nearest her home that most closely resembled the out-of-district placement that had been agreed upon in the April 2012 IEP. District offered and provided the types and frequency of supports and services that had been agreed upon in the April 2012 IEP while new assessments were conducted to determine if a different placement, supports, or services were necessary in light of Student’s transition to a new school, new classroom, new teacher and new classmates.

14. Even before the new assessments were completed, District recognized that Student’s behaviors presented a barrier to her accessing her education. After Student had been in District’s school for 30 days, District provided Student a 1:1 aide and developed and implemented a sensory diet and added sensory tools to the classroom to support Student’s sensory-input needs and attempt to minimize her self-stimulatory and self-injurious behaviors. After the language and speech and occupational therapy assessments were completed, Student’s IEP was amended to add language and speech and occupational therapy goals, some

of which were aimed at decreasing Student's behavioral overreactions, and occupational therapy consultation services were tripled, from 30 minutes to 90 minutes per month.

15. Student's IEP called for visual aids to support communication development and access to classroom schedules and routines. Mr. Pierce's non-categorical Moderate/Severe SDC used individual and whole class visual schedules, and used visual timers. The classroom had picture icon books for students to use. Occupational therapy, language and speech and behavioral supports were integrated into the classroom program throughout the day. In the 2012-2013 school year, the classroom had nine students who were supported by two classroom aides, and there were two 1:1 aides, one of whom was assigned to Student. Student attended art and music classes with general education peers and twice per week, general education students came to Student's SDC to participate in reading and socialization activities.

16. After the FBA was conducted and the BSP was developed three months into the school year, the BSP was implemented, data was collected, and behavior intervention services consultation was provided weekly. In May 2013, behavior intervention services consultation was doubled to two hours per week. Student's classroom had used visual schedules, visual timers and picture icon books, in alignment with her IEP. Other related services such as language and speech and occupational therapy supported implementation of the BSP through antecedent management and teaching replacement behaviors.

17. Student met or made progress on her behavior goals.

18. In determining whether District placed Student in the least restrictive environment, many factors indicate that Student's placement was the least restrictive environment for her in the 2012-2013 school year. Student attended the school she would have attended if she were non-disabled in that Easterbrook is the public elementary school closest to her home. Applying the four factor test from *Rachel H.* shows that general education was not appropriate, and that Student was provided exposure to typical peers to the maximum extent appropriate. The educational benefits of placement full-time in an age-appropriate general education class would have been very low due to Student's severe autism and accompanying intellectual impairment and the fact that her then-present levels of performance were markedly below grade level. There would have been non-academic benefits of such placement, and in recognition of these Student was mainstreamed for art and performing music classes. There was no evidence regarding the effect Student had on the teacher and children in her regular classes, or the cost of mainstreaming Student. However, Student's 1:1 aide was always present with Student in her regular classes to support and assist her interactions with her classmates and her focus and attention in class. Weighing the above

shows that it would not have been appropriate for Student to be placed full-time in a general education class. Along the continuum of program options, Student was placed in an appropriate SDC and received designated instruction and services which supported her in attending regular education classes to the maximum extent appropriate for Student. Student was therefore placed in the least restrictive environment.

19. The classroom placement, with its low teacher-student ratio, additional adult support staff, visual schedules and communication tools, and integrated occupational therapy, language and speech, and behavioral supports, was designed to meet Student's unique needs in the area of behavior. The placement comported with her IEP and was reasonably calculated to and in fact did provide Student some educational benefit in the least restrictive environment. Student's placement therefore provided her a FAPE.

20. Student argues that her perceived success in Forest Hill demonstrated that District did not offer a FAPE. The fact that Student did not need a 1:1 aide in her first and second grade classroom but did need one upon transitioning into third grade at a new school in a new classroom with a new teacher, new classroom staff, and new classmates does not demonstrate that the supports and services District provided were inappropriate. Just the opposite, District's prompt response to Student's behavior needs demonstrated that it was attentive and active in addressing Student's unique needs in the area of behavior and provided supports and services that seemed appropriate at the time they were deployed.

21. Student posits that the facts that her head banging increased when she started at Easterbrook and that it was not essentially extinguished by the end of the school year proved that the placement and behavioral supports and services District provided were not appropriate. Although Student and District argue over whether the data indicated Student's self-injurious behaviors actually decreased over the school year, even if there was no change, that would not mean that District failed to offer Student a FAPE. At best, Student's head banging and other self-injurious behavior was unpredictable. Based on what was reasonable at the time, District developed and implemented a positive behavior intervention plan to address Student's disruptive behaviors, provided training and support to Student's teacher and classroom staff, and collected data regarding Student's target behaviors to assess the efficacy of the program. Student made progress on numerous IEP goals, including those related to reducing the antecedents for self-injurious behavior.

22. Student's expert advocated educating Student with "autism specific services," but she never defined or detailed what that meant or how it was distinct from other methods of educating children with autism. Dr. Fineman recommended that Student be provided with 30 hours per week of ABA services at a school program providing "autism specific services" via

staff members who had extensive background, training and experience in developing and administering ABA programs, as well as no less than two hours per week each of speech language therapy and occupational therapy. To the extent this opinion was offered to suggest what an appropriate placement and program should have looked like in 2012-2013, the adequacy of District's program cannot be measured against a parent's preferred program, even if that program would have resulted in greater educational benefit to a student. Additionally, Student's complaint did not expressly allege a defect in the amount of the related services of speech language and/or occupational therapy and relief cannot be granted for issues that were not raised in the due process hearing request notice. (Ed. Code, § 56502, subd. (i).) But even if this legal barrier did not impede Student's claim in part, Student did not meet her burden of demonstrating that the supports and services District provided were not adequate.

23. First, the supports and services District provided Student were designed to meet her unique needs in the area of behavior. Student's progress towards and achievement of her goals related to her behavior (appropriate protest of undesired items, gaining the attention of adults before making requests, and appropriate use of sensory information to improve self-regulation and decrease behavioral overreactions) are proof Student actually received some educational benefit from the placement and behavioral supports and services provided. The placement, supports, and services provided to Student therefore afforded her a FAPE. Second, Student's expert was not persuasive about the specific quantities of speech language and occupational therapy Student should have been provided (or possibly, as discussed below, currently needs) because although she is qualified to identify language and speech impairments and motor delays in children, she is not qualified to make specific service recommendations regarding speech or occupational therapy.

24. In light of the above, Student did not meet her burden of proof that the placement, supports, and services provided to her during the 2012-2013 school year were not reasonably calculated to provide some educational benefit to her in light of her unique needs at the time in the area of behavior.

Issue 2: Appropriateness of 2013-2014 Offer of Placement, Supports, and Services to Address Student's Needs

25. Student contends that District denied her a FAPE for the 2013-2014 school year by failing to offer her appropriate placement, supports, and services to address her unique needs. Student contends that because the placement and services District offered for 2013-2014 are the same ineffective and inappropriate placement and services District provided the year before, Student was not obligated to accept them and is entitled to reimbursement for the home school program and speech and occupational therapy services that Student procured.

District contends that based on the progress Student demonstrated in academics, social skills, and behavior in the Moderate/Severe SDC in 2012-2013 with the supports and services that were provided, the same placement and services were reasonably calculated to provide Student with some educational benefit in the least restrictive environment in the 2013-2014 school year.

26. Legal Conclusions 6 through 12 are incorporated by reference.

27. Although Student had some intellectual impairment, Student was performing academic work at a level higher than the other students in the class. Over the 2012-2013 school year, Student met her goals in reading and math, and met one of her goals in written language. Student met or made progress on the other goals of her IEP, including, as described above, those goals designed to address Student's behaviors. Information from Student's triennial assessments as well as Student's track record of responses to the placement, supports, and services District provided in the 2012-2013 school year were considered by the IEP team in developing recommendations for the remainder of the 2012-2013 school year, 2013 ESY, and the 2013-2014 school year.

28. In the April and May 2013 IEP meetings, District offered to place Student in the same Moderate/Severe SDC classroom in the 2013-2014 school year, with the same, as well as one additional, mainstreaming activities. Notably, at the time of the IEP team meetings, Parent was requesting more academic goals and placement in a Mild/Moderate SDC.

29. In the April and May 2013 IEP meetings, District offered to provide Student the same related services in the 2013-2014 school year (speech therapy for 30 minutes per week pull-out and 30 minutes per week push-in; occupational therapy consultation for 90 minutes per month; 1:1 aide throughout the school day; behavior support services [consultation with teacher and classroom staff] for one hour per week; and use of visual schedules, visual timers, visual communication tools, sensory diet and sensory tools). The classroom placement, with its low teacher-student ratio, additional adult support staff, and integrated occupational therapy, language and speech, and behavioral supports, was designed to meet Student's unique needs, comported with her IEP and, based on past benefit achieved in that placement, was reasonably calculated to provide Student some educational benefit in the least restrictive environment. The supports and services of speech therapy, a 1:1 aide, behavior support services and occupational therapy consultation, sensory diet, and implementation of the BSP were designed to meet Student's unique needs, comported with her IEP and, based on past benefit achieved with those supports and services, was reasonably calculated to provide Student some educational benefit in the least restrictive environment.

30. In light of the above, Student did not meet her burden of proof that the special education placement and related supports and services offered to her for the 2013-2014 school year were not reasonably calculated to provide some educational benefit to her in light of her unique needs at the time.

ORDER

All relief sought by Student is denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District is the prevailing party on all issues presented.

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: January 3, 2014

_____/s/
KARA K. HATFIELD
Administrative Law Judge
Office of Administrative Hearings