

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

WHITTIER AREA COOPERATIVE
SPECIAL EDUCATION PROGRAM
AND WHITTIER CITY SCHOOL
DISTRICT.

OAH Case No. 2015031257

DECISION

Parent, on behalf of Student, filed a due process hearing request with the Office of Administrative Hearings, State of California, on March 30, 2015, naming Whittier City School District (Whittier) and Whittier Area Cooperative Special Education Program (WACSEP). The matter was continued for good cause on April 16, 2015.

Administrative Law Judge, Christine Arden, heard this matter in Whittier, California, on January 6, 7, 19 and 20, 2016.

Attorney Matthew Pope represented Student. Student's mother and father attended the hearing. Student did not attend the hearing.

Attorneys Darin W. Barber and Jeremy J. Rytky represented Whittier and WACSEP. Frances Hampson Stearns, Director of Pupil Services and Special Education, attended the hearing on behalf of District. Program Manager, Kristine Ramos, attended the hearing on WACSEP's behalf.

A continuance was granted for the parties to file written closing arguments and the record remained open until February 8, 2016. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES

- 1) Did Whittier and WACSEP deny Student a free appropriate public education in the May 14, 2014 individualized education program by:
 - a. Predetermining the placement offer of a special day class;
 - b. Failing to offer an appropriate placement, specifically a general education classroom;
 - c. Failing to offer appropriate related services, specifically:
 - i. Behavior support plan and services, with supervision by a board certified behavior analyst; and
 - ii. One-to-one behavior aide?

- 2) Did Whittier and WACSEP deny Student a FAPE in the December 12, 2014 IEP by failing to offer appropriate related services to Student at her private school, specifically:
 - a. Behavior support plan and services with supervision by a board certified behavior analyst;
 - b. One-to-one behavior aide;
 - c. Occupational therapy;
 - d. Speech and language therapy; and
 - e. Inclusion specialist services?

- 3) Did Whittier and WACSEP deny Student a FAPE by refusing Parents' December 12, 2014 request to conduct a behavior assessment of Student and develop a behavior support plan for Student?¹

¹ 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.)

SUMMARY OF DECISION

On Issue 1, Student did not establish Whittier and WACSEP predetermined the May 14, 2014 IEP placement offer to Student. Student also did not establish Whittier and WACSEP failed to offer Student a FAPE by offering her placement in a mild-to-moderate special day class, rather than in a general education class, because the special day class was the least restrictive environment in which Student could receive educational and social benefit. Student also did not establish Whittier and WACSEP denied her a FAPE by failing to offer Student a behavior support plan with supervision by a board certified behavior analyst and a one-to-one behavior aide in the May 14, 2014 IEP.

On Issue 2, Student did not establish Whittier and WACSEP denied Student a FAPE in the December 12, 2014, IEP by failing to offer Student related services at her private school. Because Parents unilaterally enrolled Student in a private school, District was not required to directly provide Student any related services.

On Issue 3, Student also did not establish Whittier and WACSEP denied Student a FAPE by refusing Parents' December 12, 2014 requests to conduct a behavior assessment of Student and develop a behavior support plan for Student. Whittier and WACSEP had recently completed a thorough behavior assessment, finding Student's problem behaviors were minor and manageable through behavior goals offered in the December 12, 2014 IEP. Therefore, District was not required to conduct a functional behavior assessment and provide a behavior support plan. Student is entitled to no remedies.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is an eight-year-old female, who resided with her Parents in the Whittier boundaries at all relevant times. Student is eligible for special education under the primary category of autism and the secondary category of language or speech disorder. At the time of hearing, she was attending Whittier Christian School, a private school.

2. WACSEP is a Special Education Local Plan Area, which is a legally mandated consortium of seven public school districts, including Whittier, formed to provide special education services to children residing within the geographic boundaries of those seven school districts.

Student's Preschool Years

3. District found Student eligible for special education services when she was three years old under the category of speech or language impairment. In February 2013, the UCLA Semel Institute Autism Evaluation Clinic diagnosed Student with autistic spectrum

disorder and borderline intellectual functioning. UCLA estimated Student's intellectual ability was in the extremely low to borderline level. In May 2013, Whittier changed Student's primary eligibility category to autistic-like behaviors.

IEP Dated May 20, 2013

4. Whittier held an IEP meeting on May 20, 2013, to review Student's completed assessments, develop goals and address Student's transition from preschool to kindergarten. This meeting took place over four sessions between May 20, 2013 and June 13, 2013.

5. Whittier Program Specialist, Andrea Fulford, testified credibly at the hearing. She was a member of Student's IEP team. Ms. Fulford has been employed by Whittier for 15 years. She has a bachelor's degree and a mild-moderate special education teaching credential; a master's degree in educational administration; and is a Behavior Intervention Case Manager, trained to draft behavior support plans and analyze functional behavior. She has significant experience working with autistic students and has completed many training programs in various techniques designed to teach autistic students. She visits all Whittier mild-to-moderate special day classes. Based upon her observations, Student's needs were "moderate" rather than "mild" on the spectrum of children in "mild-to-moderate" special day classes.

6. Whittier special day classes have between 12 to 15 students with one teacher and at least one aide. Classes at the kindergarten and first grade levels often have an additional classroom aide. Some students also have their own assigned aides. The special day class curriculum has a behavior management plan incorporated into it. Children with serious behavior problems are not placed in the mild-to-moderate special day classes. Each student's academic work is individually tailored in special day classes, but students work in clusters of three to four students. Special day classes move through the curriculum at a slower pace than general education classes. Whittier uses behavior goals to address mild problem behaviors. It uses behavior support plans² only with children having more serious behavior problems. It uses behavior intervention plans³ only with children having the most severe behavior problems.

7. At the June 4, 2013 session of the IEP meeting Whittier offered Student the following program as a FAPE for the 2013–2014 school year: placement in a mild-to-moderate special day class; participation in general education for recess, lunch, social studies and science; occupational therapy once a week for 25 minutes with six 25-minute

² Whittier used the term behavior support plan to describe a plan for behavioral interventions, usually developed by a school psychologist, to deal with moderate behavioral issues.

³ Whittier used the term behavior intervention plan to describe a more detailed behavior support plan designed by a board certified behavior analyst.

consultations per year with Parents and Student's classroom teacher; speech therapy twice a week for 30 minute small group sessions and speech therapist consultation once a week with Student's classroom teacher; transportation; and extended school year (summer school) in a mild-to-moderate special day class. Parents were concerned about Student modeling the inappropriate behaviors of pupils in a special day class and wanted to visit it.

8. Mother observed the proposed kindergarten special day class after the June 4, 2013 IEP meeting. The IEP team reconvened on June 13, 2013, to finalize services and placement. Mother told the team she preferred placement in a general education kindergarten class with supports, rather than a special day class. After discussion, the IEP team changed its prior offer of FAPE for the 2013-2014 school year to: general education kindergarten class; resource specialist program for 30 minutes per day; occupational therapy once a week for 25 minutes with six 25-minute consultations per year; speech therapy twice a week for 30 minutes per session and speech therapist consultation with Student's classroom teacher once a month. Parents consented to the IEP. The IEP team agreed to reconvene by October 2013, to evaluate the appropriateness of Student's kindergarten placement and program.

Student's Kindergarten Year

9. In the 2013-2014 school year Student was in Leticia Mendoza's general education kindergarten class at Hoover Elementary. Ms. Mendoza, who testified credibly and competently at the hearing, has been a kindergarten teacher at Hoover Elementary for 16 years. She previously worked as a classroom instructional aide for five years. She holds a bachelor's degree and a California State Professional Teaching Certificate for teaching multiple subjects to students in kindergarten through sixth grade. The class had 31 students. Ms. Mendoza did not have a classroom aide at the beginning of the school year. Student received the following services outside of the classroom: resource services daily for 30 minutes in academics; speech and language therapy; and occupational therapy.

10. Student experienced mild behavior problems in kindergarten, consisting mostly of lack of task completion, inattention, and distractibility. The general education curriculum was beyond Student's cognitive abilities, according to Ms. Mendoza, resulting in Student's problem behaviors. Student could not remain seated at her assigned table for the first six weeks of the school year. As the school year progressed, Student experienced increasing difficulty in doing the same work as the rest of the class. Student struggled because the academic gap between Student and the rest of the class increased steadily as the school year progressed.

11. In Ms. Fulford's credible opinion, Student's behavior problems could be effectively handled through behavior goals in the IEP; Student did not need a behavior assessment nor a behavior plan of any kind.

October 7, 2013 IEP Meeting

12. On October 7, 2013, Student's IEP team, including Mother, met to evaluate the appropriateness of Student's program and to determine if Student needed an instructional aide. Student had difficulty counting and problem solving, and identifying numbers, letters, letter sounds and high frequency words. Student struggled when interacting with peers and frequently engaged in self-stimulatory behavior (also called "stimming") by moving her fingers, particularly when she was anxious or felt under pressure. Ms. Mendoza and Mother requested an aide for Student.

13. Shauna Allen, Whittier school psychologist, has a master's degree in educational psychology, a master's degree in counseling and California pupil personnel credentials in both educational psychology and school counseling. She has been a school psychologist for 20 years and has worked at Whittier for the last 18 years. She has completed over 1,000 assessments of students. She has extensive training and professional experience working with and evaluating autistic children, and addressing their behavior problems with behavior goals, as well as behavior plans. She testified credibly at the hearing. In instances when an IEP team member suggested a student might need an aide, Ms. Allen's practice was to first conduct a Support Services Assessment. A Support Services Assessment was a type of behavior assessment covering social/emotional and adaptive behavior that Whittier used to determine if a student needed an aide. A Support Services Assessment required observing Student in her classroom and at recess, and a review of Student's previous psycho-educational assessments.

14. The IEP team members discussed Student's behavior problems and stimming. Student did not like people to be close to her or stare at her, and had a hard time staying seated. Mother asked about a behavior assessment. Ms. Allen recommended Whittier conduct a Support Services Assessment to evaluate Student's behaviors and determine if Student needed an aide. Mother consented to the assessment.

15. Ms. Allen and her intern conducted a Support Services Assessment on Student from October through December 2013, by observing Student and collecting data from Parents and the professionals who worked with Student. Ms. Allen analyzed Student's functional behaviors by considering Student's behaviors, noting antecedent circumstances to the behaviors and the consequences of Student's behaviors. At the completion of this assessment Ms. Allen recommended Whittier assign an aide to Student.

December 11, 2013 IEP Meeting

16. The IEP team, including Parents, reviewed the results of the Support Services Assessment, developed behavior goals for Student and agreed Student required an aide to receive educational benefit. The IEP team determined Student did not need a behavior support plan because her behaviors could be effectively managed via her behavioral goals with the help of the aide.

17. Whittier designated Lauren Alfonso as Student's aide in December 2013, to assist Student academically and with inappropriate behaviors. Ms. Alfonso received monthly training on autism and managing behaviors. Ms. Alfonso frequently prompted Student to redirect her back on task. To foster Student's independence, Ms. Alfonso "faded out" and assisted other students when she observed that Student acted independently without an aide.

18. Student's behaviors significantly improved after Whittier assigned Ms. Alfonso as her aide. Student no longer presented problem behaviors in class. However, Student's academic performance did not improve because the general education curriculum was too difficult for Student, according to Ms. Mendoza. Ms. LaClair, resource specialist teacher, developed an alternative curriculum for Student. Ms. LaClair and Ms. Alfonso worked with Student on the alternative curriculum. Ms. Allen communicated with Ms. Alfonso about Student and her progress and observed Ms. Alfonso working with Student in the classroom. Ms. Alfonso worked effectively with Student and Student's behaviors improved significantly.

19. As the school year progressed Student could not do the same academic work as the other kindergartners, according to Ms. Mendoza. Student was sometimes very stressed by the academic pressures of the kindergarten curriculum. Ms. Mendoza testified that Student was aware she was not academically at the same level of other students in her class and became frustrated. Student occasionally expressed her frustration by interfering with other students' work. Much of Student's academic work was merely scribbling. Student was not able to focus on Ms. Mendoza's class presentations. Student's aide had to constantly redirect Student to her work. Ms. Mendoza credibly opined that Student had difficulty with task completion and distraction because the academic work was too difficult for her. Despite the occupational therapist's attempts to get Student to write with one dominant hand, Student continued to try to write alternatively with both her left and right hands throughout kindergarten, causing further delays in Student's academic progress.

20. Student did not make academic progress during the 2013-2014 school year. At the end of the school year her academic level was comparable to the level of children entering pre-school.

May 14, 2014 IEP Meeting and FAPE Offer

21. Ms. Allen observed Student in the classroom three more times before the May 14, 2014 IEP meeting. Student progressed significantly on her problem behaviors, except for inattention because the academic work was too difficult for her. During her observations, Ms. Allen did not see Student receiving social benefit from the general education kindergarten class.

22. Both Parents attended and participated in the May 14, 2014 IEP meeting along with all required staff. The IEP team informed Parents about Student's problems in the general education kindergarten class. Parents participated with the rest of the team in developing Student's IEP.

23. Ms. Mendoza and Ms. LaClair reported Student did not receive educational benefit from the general education kindergarten class, even with resource support and other related services. They recommended placing Student in a small mild-to-moderate special day class with a modified curriculum taught by a special education teacher for first grade. Ms. Allen reported Student also did not receive social benefit from the general education classroom.

24. At the May 14, 2014 IEP meeting, the IEP team discussed the following placement and related service options for Student for the upcoming school year: general education with support; general education without support; resource specialist support; mild-to-moderate special day class; speech/language support; and occupational therapy support. The entire IEP team, including Parents, acknowledged Student did not receive educational benefit in the general education kindergarten class, and a mild-to-moderate special day class was the appropriate placement for Student for the first grade. The IEP team developed three annual goals addressing Student's social skill deficits and her negative behaviors, which were minor and manageable.

25. District offered the following as FAPE for the 2014-2015 school year: a mild-to-moderate special day class at Longfellow School; speech/language therapy twice a week for 30-minute small group pull-out sessions; occupational therapy twice a week for 30-minute individual and small group pull-out sessions; transportation; extended school year (summer school) program with one 30-minute weekly speech group; and one 25-minute weekly group or individual occupational therapy session. The offer included participation in the general education setting with peers for non-academic activities.

26. Ms. Fulford had many conversations with Mother during the 2013–2014 school year and over the summer in 2014, regarding Student's placement and the differences between private schools and non-public schools.

27. Mother observed the special day class at Longfellow School, which included students with a variety of disabilities, after the May 14, 2014 IEP meeting. After that visit Parents changed their minds about placing Student in a special day class for the 2014–2015 school year. Parents decided they preferred a general education class placement, with “pull-out” for resource specialist and other related services. Whittier did not agree to the Parents' preferred general education placement. On May 21, 2014, Mother partially consented in writing to Whittier's May 14, 2014 offer of FAPE, agreeing to the related services, but not to the special day class and summer school placement.

28. Parents actively participated in the decision-making process at the May 14, 2014 IEP meeting. Although, at hearing Mother claimed the IEP team did not “hear” her opinions regarding placement for Student in the least restrictive environment, Mother's testimony on this issue lacked credibility. On May 21, 2014, Mother checked and initialed a box on the parent consent page to the IEP indicating the school had facilitated parent involvement in the IEP. The notes of the IEP meeting memorialized that Mother raised the least restrictive environment issue and that both Parents agreed by the end of the meeting that

Student could not receive educational benefit in a general education classroom. Moreover, both Mother and Ms. Fulford offered testimony establishing Mother had many conversations with Ms. Fulford regarding Student's needs and the appropriate placement and services for Student.

29. Whittier and WACSEP address a child's minor behavior problems first with behavior goals in the IEP. If behavior problems are more serious (such as self injurious and dangerous behaviors, like eloping from school and destroying property), and cannot be remedied through goals, they are addressed through a behavior support plan. At the time of the May 14, 2014 IEP, Student's behavior problems were minor and could be managed by behavior goals in her IEP. Student's mildly problematic behaviors did not require a behavior support plan and the services of a board certified behavior analyst.

Parents Unilateral Private School Placement for 2014-2015 School Year

30. On August 6, 2014, Parents removed Student from District and enrolled Student for first grade in Broadoaks Children's School of Whittier College (Broadoaks), a private school with 363 students in preschool through 8th grade. On August 6, 2014, Mother notified Ms. Fulford and Kay Oborn, principal of Hoover Elementary, in writing that Student would attend Broadoaks in the 2014–2015 school year.

31. On August 18, 2014, WACSEP Private School Coordinator, Maria Wood, notified Parents in a telephone conversation with Mother and in writing, that neither Whittier, nor WACSEP, would implement Student's current IEP because Parents had unilaterally placed Student in a private school. Ms. Wood's written notice further informed Parents that Whittier would develop a new IEP if Parents decided to re-enroll Student in Whittier in the future. Mother requested Whittier and WACSEP continue to offer Student occupational therapy at Broadoaks.

32. Whittier and WASCEP did not offer or agree to directly provide any related services to Student while she attended Broadoaks. Instead, Whittier and WASCEP offered Student an Individualized Service Plan. The Individualized Service Plan included multiple training sessions in various special education areas for all teachers employed by private schools located within the Whittier and WASCEP geographic district boundaries, including Broadoaks. Whittier and WACSEP also offered consultation services to teachers at these private schools who wanted advice regarding strategies for dealing with special education students who live within Whittier boundaries, but attended private schools. Ms. Wood gave Parents an Individualized Service Plan for Student on August 19, 2014, which Mother accepted in writing on September 1, 2014.

Mother Requests Assessments in August 2014

33. In August 2014, Mother requested Whittier and WACSEP assess Student for dyslexia and dysgraphia. Whittier and WACSEP did not use specific instruments to assess for dyslexia and dysgraphia, but these areas of suspected disabilities are covered by other

assessment instruments used to assess Student. Ms. Wood sent Parents a written assessment plan dated August 19, 2014, for evaluations in: academic achievement; health; intellectual development; language/speech communication development; motor development; social-emotional; and adaptive behavior. The proposed assessment plan involved a record review, observations of Student, and use of criterion referenced assessments and non-standardized assessments. Mother consented in writing to the assessment plan.

34. In the fall 2014 semester, Whittier and WACSEP staff comprehensively assessed Student using 18 different assessment instruments addressing all areas of Student's suspected disabilities, including behavior, language pragmatics, and social skills. The Whittier and WACSEP assessors used standardized measurement instruments, observed Student's behaviors multiple times at Broadoaks private school, and interviewed Student's Broadoaks' teachers and Parents regarding Student's behaviors and other areas of suspected disability.

35. Ms. Casillas, WACSEP School Psychologist, who has been a school psychologist for 28 years, and has worked at WACSEP for nine years, credibly testified at the hearing. She has significant training in working with and assessing autistic students. She has conducted over 2,000 student assessments. She spoke with Mother twice about the assessments Mother requested. Ms. Casillas and Ms. Wood, who is a speech and language pathologist, conducted the multidisciplinary assessments of Student from August 21, 2014, through October 3, 2014. Ms. Casillas and Ms. Wood both observed Student at Broadoaks. Ms. Casillas opined Student had borderline intellectual disability and scored well below average with a full-scale intellectual function of 57 on the Wexler Intelligence Scale for Children, fourth edition. Ms. Wood, who also assessed Student, credibly testified at the hearing that Student did not have the cognitive ability to access the curriculum in a general education class. Ms. Wood further opined that a special day class with a modified curriculum was a proper placement for Student.

36. The assessments results revealed Student did not interact much with her peers; her behaviors were manageable; and she drew lines and circles, instead of writing letters per the teacher's instructions. Student's autism and borderline intellectual disability prevented Student from accessing the curriculum at Broadoaks. Student did not need a behavior support plan and the behavior goals offered in the IEP were adequate to handle Student's minor behavior problems, along with the behavior management component built into the special day class curriculum.

37. In Ms. Casillas' credible opinion, Student did not need behavior services from a board certified behavior analyst, and those services were only needed by children with extreme behaviors, such as dangerous or threatening conduct, self-injurious behaviors and elopement from school.

First Grade at Broadoaks (2014-2015 School Year)

38. Student attended Broadoaks in the 2014–2015 school year. Student’s general education first grade classroom had 36 or 37 students and four teachers. Student’s teacher adjusted the first grade curriculum to the kindergarten level so Student could access it because Student functioned at a lower level than her classmates. At the end of the 2014-2015 school year Student was performing at the beginning kindergarten level across all content areas, according to Dr. Judith Wagner, Director of Broadoaks.

December 12, 2014 IEP Meeting

39. Whittier held an annual and triennial IEP meeting on December 12, 2014. Ms. Casillas reported the assessment results. Mother complimented Ms. Casillas on the thoroughness of the assessments and agreed the assessment results were accurate. The IEP team discussed Student’s present levels of academic achievement and functional performance and Parents’ concerns about Student’s educational progress. The IEP team developed six annual goals and objectives in the areas of behavior and pragmatics.

40. Parents requested reimbursement for Broadoaks’ tuition. Whittier declined reimbursement because the Whittier IEP team members believed the Broadoaks program was inappropriate for Student.

41. Parents also requested Whittier and WACSEP provide the related services offered in the May 21, 2014 IEP to Student at Broadoaks. Parents also requested a behavior assessment, services of a board certified behavior analyst, and a one-to-one aide, supervised by board certified behavior analyst, to be provided at Student’s private school.

42. Whittier denied Parent’s request for a behavior support plan, services of a board certified behavior analyst, and a one-to-one aide, based upon the IEP team’s determination that Student’s behaviors could be addressed by her annual behavior goals because Student’s behaviors were not of the intensity that required a behavior support plan or the intervention of a board certified behavior analyst.

43. Ms. Allen and Ms. Casillas both credibly opined that Student’s behaviors, particularly after working with Ms. Lorenzo, were mild and not so extreme as to warrant a behavior assessment or a behavior support plan.

44. Student completed first grade at Broadoaks in June 2015. At the end of the school year, she was performing at the beginning kindergarten level across all content areas, putting her two grade levels behind.

LEGAL AUTHORITY AND CONCLUSIONS

*Introduction – Legal Framework under the IDEA*⁴

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and the California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)⁵ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (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 individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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

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.

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, 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. 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. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Because Student is the filing party in this matter, Student has the burden of proving the essential elements of her claim.

Issue 1a: Predetermination of May 14, 2014 FAPE Offer

5. Student contends Whittier and WACSEP denied Student a FAPE in the May 14, 2014 IEP by predetermining the placement offer of a mild-to-moderate special day class. Whittier and WACSEP contend they did not predetermine the offer of a FAPE in the May 14, 2014 IEP of placement in a mild-to-moderate special day class.

6. A District may not predetermine its IEP offer. Predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.)

7. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-858; *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267, 274.)

8. Special education law places a premium on parental participation in the IEP process. School districts must guarantee that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1).) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Parental participation in the IEP process is also considered "(A)mong the most important procedural safeguards." (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.)

9. An educational agency must permit a child's parents "meaningful participation" in the IEP process. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131-1132.) The standard for "meaningful participation" is an adequate opportunity to participate in the development of the IEP. Although a student's parents have a right to meaningful participation in the development of an IEP, a district "has no obligation to grant [a parent] a veto power over any individual IEP provision." (*Ibid.*) Merely because the IEP team does not adopt the placement, services, or goals advanced by parents, does not mean that the parents have not had an adequate opportunity to participate in the IEP process. (*B.B. v. Hawaii Dept. of Educ.* (D.Hawaii 2006) 483 F.Supp.2d 1042, 1051.)

10. A district's IEP team members may consider placement options or have opinions about placement before an IEP team meeting. (*Nack v. Orange City Sch. Dist.* (6th Cir. 2006) 454 F.3d 604, 610-611.) They need not arrive with blank minds, merely open minds. (*Doyle v. Arlington Sch. Bd.* (E.D. Va.1992) 806 F.Supp. 1253, 1262.) However, they may not arrive at an IEP meeting with closed minds.

11. In this case, both Parents attended and participated meaningfully in the May 14, 2014 IEP meeting. The IEP team informed Parents about Student's problems in the general education kindergarten class and Parents shared their observations of Student. Parents discussed Student's proposed IEP with the rest of the team. The IEP team heard and considered Parents' opinions. Student did not introduce any evidence that the IEP team failed to consider Parents' concerns and opinions in the development of Student's May 14, 2014 IEP. The evidence showed Parents were very involved in all decisions regarding Student's education.

12. The evidence also established Mother interacted with Whittier program specialist Ms. Fulford, and other Whittier and WACSEP professional staff members, many times during the 2013-2014 school year concerning the appropriate placement for Student. The placement of a special day class for Student's first grade year was not decided upon by

the IEP team prior to the May 14, 2014 IEP meeting, even though some team members had already developed opinions regarding the appropriate placement for Student. In fact, the team contemplated a continuum of alternative programs and related services to meet Student's needs in the 2014-2015 school year. The team did not arrive at the IEP meeting with closed minds regarding Student's placement.

13. The fact that the rest of the IEP team ultimately disagreed with Parents regarding the appropriate placement for Student does not establish that Whittier and/or WACSEP predetermined the May 14, 2014 FAPE offer of placement in a mild-to-moderate special day class, or deprived Parents of an adequate opportunity to participate in the IEP process. Student failed to meet her burden of persuasion that Whittier and WACSEP predetermined its offer of placement in a special day class for first grade.

Issue 1b: Placement in the Least Restrictive Environment

14. Student contends she was denied a FAPE in the May 14, 2014 IEP because it failed to offer her placement in the least restrictive environment, specifically a general education classroom with supports. Whittier and WACSEP contend Student was not denied a FAPE in the May 14, 2014 IEP because a special day class was the least restrictive environment in which Student could receive educational benefit.

15. To provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate that: 1) children with disabilities are educated with non-disabled peers; and 2) 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); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) A student should be removed from a regular classroom only if education in the regular classroom, with the use of supplementary aids and services, cannot be achieved satisfactorily. (20 U.S.C. § 1412 (5)(B); (*Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036,1043.)

16. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals 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 has 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 Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].)

17. If it is determined 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. v. State Board of Ed.*, *supra*, 874 F.2d at p. 1050.) “Mainstreaming” is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir.2005) 394 F.3d 634, 640, fn. 7.)

18. The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

19. An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.) Whether a student was denied a FAPE is ultimately evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Adams*, 195 F.3d at 1149.)

20. 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.*)

21. The May 14, 2014 IEP team thoroughly and effectively analyzed information about Student they had at that time, including data showing Student did not receive either academic or social benefit in a general education kindergarten setting, even with significant supports. Student could not focus on Ms. Mendoza’s presentations to the kindergarten class. Student’s academic delays were measurable and significant. Student’s low cognitive functioning prevented her from accessing the curriculum in a general education classroom, even with supports and modification of the curriculum. Student occasionally interfered with the work of her kindergarten classmates because she was frustrated by her inability to keep up academically with the other children in the class. As the kindergarten school year progressed and the academic work of the class got harder, Student became increasingly frustrated, even though she was on a modified curriculum, was assisted by an aide and had daily help from the resource specialist. Student’s increasing frustration caused her to become anxious, manifesting in some minor behavioral problems when Student interfered with other

children's work. Therefore, Student's placement in the general education kindergarten had a negative effect on her classmates. Ms. Allen observed Student three times before the May 14, 2014 IEP meeting and concluded Student was not receiving any social benefit from being in the general education classroom. No one offered evidence regarding cost. However, the evidence established that when Student was in the general education kindergarten classroom she required daily resource services from a special education teacher, a modified curriculum and a full time aide, in addition to other related services.

22. After spending two years in general education classrooms (kindergarten and first grade), Student's academic level across all content areas was at the beginning kindergarten level. The evidence of Student's lack of meaningful progress in the general education class at Broadoaks supported the finding that a general education class was not an appropriate placement, even with supports and modifications. Student did not offer testimony of an expert witness, or anyone else, that Student would have received educational or social benefit from a general education setting as of May 14, 2014. Parents' testimony did not support the conclusion that Student would have received benefit from a general education setting in first grade. The evidence persuasively established that a general education class was not an appropriate placement for Student.

23. In considering the continuum of options in the least restrictive environment, the IEP team reasonably concluded, despite parental preference, a mild-to-moderate special day class was the least restrictive environment for Student to access the curriculum.

24. The weight of the evidence established Student's unique educational and social needs would be met in a mild-to-moderate special day class, particularly because Student's needs were comparable to those of children with "moderate" needs, rather than children with "mild" needs on the spectrum of children in "mild-to moderate" special day classes. The evidence also established Student would be most likely to make progress in a small class with 12 to 15 students, taught by a special education teacher, who was supported by one or two instructional aides. The slower pace, behavior management systems and visual supports integrated into the special day class curriculum were appropriate to meet Student's special needs. Moreover, since children in small day classes work with two or three other students in small groups, Student would have the opportunity to develop her social skills in that setting.

25. The behavior management plan incorporated into the special day class curriculum was well suited to address Student's social deficits and her minor behavior problems. The evidence did not support Parents' concerns about Student's exposure to and possible modeling of negative behaviors of students in a special day class. Ms. Fulford credibly testified that children with serious behavior problems were not placed in mild-to-moderate special day classes at Whittier. The May 14, 2014 FAPE offer included mainstreaming Student in nonacademic portions of the school day, such as lunch and recess. This limited inclusion for Student was the maximum mainstreaming which would permit Student to receive an educational benefit.

26. The preponderance of the evidence established Whittier's May 14, 2014 offer of placement in a mild-to-moderate special day classroom for the 2014-2015 school year was designed to meet Student's unique needs, comported with the student's IEP, and was reasonably calculated to provide the student with some educational benefit in the least restrictive environment, based on the information about Student available at the time the IEP was developed. Student failed to meet her burden of proof that the May 14, 2014 IEP did not offer a FAPE in the least restrictive environment.

Issue 1c: Behavioral Services

27. Student contends Whittier and WACSEP denied her a FAPE in the May 14, 2014 IEP because she needed a behavior support plan, supervised by a board certified behavior analyst, and a one-to-one behavior aide, in order to receive educational benefit. Whittier and WACSEP contend a FAPE for Student did not require a behavior support plan, supervised by a board certified behavior analyst and a one-to-one behavior aide because Student's behaviors were not extreme and could be handled effectively through her behavior goals.

28. In the case of a child whose behavior impedes the child's learning or that of others, the IEP team must 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)(1); Ed. Code, § 56341.1, subd. (b)(1).) However, the IDEA generally gives IEP teams discretion to determine when a behavior intervention plan is necessary for a student to receive a FAPE. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028.)

29. The absence of a functional behavior assessment does not render an IEP procedurally inadequate, as long as the IEP itself considers behavioral strategies. (*A.C. ex rel. M.C. v. Board of Educ. of The Chappaqua Central School Dist.*, (2d Cir. 2009) 553 F.3d 165, 172 .) (holding that the failure to conduct a functional behavior assessment did not render the IEP legally inadequate.); (*W.S. and K.M. v. Nyack Union Free Sch. Dist.*, (S.D.N.Y., March 30, 2011, No. 09 Civ. 10139) 2011 WL 1332188.) (observing that the lack of a functional behavior assessment does not render an IEP procedurally inadequate; the IDEA requires only that the IEP team consider behavior interventions and strategies.)

30. Behavior intervention plans and behavior support plans are not required components of the IEP. (34 C.F.R. § 300.320.)

31. Student's behaviors, other than her inattention, greatly improved after Ms. Alfonso became Student's aide in fall 2013. Ms. Allen and Ms. Fulford both credibly testified Student's behaviors were manageable and not so extreme as to warrant a functional behavior assessment or a behavior support plan. Ms. Allen and Ms. Casillas testified that the behavior goals contained in Student's May 14, 2014 IEP were adequate to handle any of Student's continuing behavior problems.

32. Student did not introduce expert testimony or any credible evidence to support her contention that Student was denied a FAPE in the May 14, 2014 IEP because Student needed a behavior support plan, supervised by a board certified behavior analyst, and a one-to-one behavior aide, in order to receive educational benefit.

33. The May 14, 2014 offer of a FAPE was for placement in a small mild-to-moderate class, with only 12 to 15 pupils. The IEP team contemplated that the teacher and the one or two aides assigned to the class could address Student's behavior goals. Behavior management was integrated into the special day class curriculum. The slower pace and modified curriculum of the special day class would likely alleviate Student's anxiety, which was the cause of Student's minor inappropriate behaviors in the general education setting. Therefore, Student's manageable behaviors did not require a one-to-one behavior aide supervised by a board certified behavior analyst.

34. Student failed to establish that she was denied a FAPE in the May 14, 2014 IEP because the offer did not include the related services of a behavior support plan and services, with supervision by a Board Certified Behavior Analyst, and a one-to-one behavior aide.

Issue 2: Related Services to be Provided at Student's Private School

35. Student contends she was denied a FAPE in the December 12, 2014, IEP because Whittier and WASCEP failed to offer her the following related services to be provided at her private school: (a) behavior support plan and services, with supervision by a board certified behavior analyst; (b) one-to-one behavior aide; (c) occupational therapy; (d) speech and language therapy; and (e) inclusion specialist services. Whittier and WACSEP contend Student was not denied a FAPE in the December 12, 2014, IEP because Student is not entitled to related services to be provided at her private school because Parents unilaterally placed Student in private school and the Student had been offered FAPE for the 2014–2015 school year.

36. A local educational agency is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the local educational agency made a FAPE available to the child and the parent of the child elected to place the child in the private school or facility. (34 C.F.R. § 300.148(a); Ed. Code § 56174.)

37. Children with exceptional needs in private schools may receive a different amount of services than individuals with exceptional needs in public school. No private school individual with exceptional needs is entitled to any amount of service the child would receive if enrolled in a public school. (Ed. Code § 56174.5(a); 34 C.F.R. §§ 300.137(a) & 300.138(a)(2).)

38. Student failed to meet her burden of proof that Whittier or WACSEP had any obligation to provide Student related services called for in her May 14, 2014 IEP at her private school. Whittier offered Student a FAPE for the 2014-2015 school year in the May 14, 2014 IEP. Parents unilaterally placed Student at Broadoaks for the 2014-2015 school year beginning in August 2014, rather than accept Whittier's offer of placement in a mild-to-moderate special day class. Consequently, Whittier and WACSEP had no obligation to provide the related services offered in the IEP to Student at Broadoaks. Student was not entitled to related services from Whittier and WACSEP while attending a private school of Parents' choosing.

Issue 3: Behavior Assessment and Behavior Support Plan

39. Student contends she was denied a FAPE by Whittier and WACSEP's refusal of Parents' December 12, 2014 request for a behavior assessment and a behavior support plan to be implemented at Student's private school. Whittier and WACSEP contend Student was not denied a FAPE by their refusal of Parents' December 12, 2014 request because Student's behavior problems had been recently assessed and were not extreme enough to warrant a functional behavior assessment and a behavior support plan.

40. A district's violation of its obligation to assess a student in all areas of suspected disability is a procedural violation of the IDEA and the Education Code (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) A procedural error, including a failure to assess, does not automatically require a finding that a FAPE was denied. A procedural violation denies a child a FAPE only if it impedes the right of the child to a free appropriate public education, significantly impedes the opportunity of the parents to participate in the decision making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); 20 U.S.C. § 1415(f)(iii)(E)(ii).)

41. Functional behavior assessments, behavior intervention plans and behavior support plans are not required components of an IEP under 34 CFR 300.320.

42. The only circumstance in which a district is required to conduct a functional behavior assessment is when a special education student is removed from her placement due to disciplinary reasons and the student's conduct is found at a hearing to be a manifestation of the student's disability. (34 CFR 300.530 (f).)

43. Whittier and WACSEP did not commit a procedural violation by refusing to conduct a functional behavior assessment and create a behavior support plan as requested by Mother on December 12, 2014.

44. At Mother's request in fall 2014, Whittier comprehensively assessed Student in all areas of suspected disability, including behavior. The assessments were thorough and accurate. In addition to collecting data from Student's teachers at Broadoaks and Parents,

Ms. Casillas and Ms. Wood observed Student multiple times at Broadoaks. The entire IEP team discussed the results of these assessments at the December 12, 2014 IEP meeting. In response to the behavior assessment Whittier offered six behavior goals at the December 12, 2014 IEP.

45. Ms. Casillas and Ms. Allen credibly testified that the behavior goals offered in the IEP were adequate to address Student's behavior issues. The evidence established that Student's main behavioral problem was inattention. Student did not introduce evidence contradicting the testimony of Whittier and WACSEP's witnesses that Student's problem behaviors were mild and manageable and could be effectively addressed by the behavior goals in her IEP. Student also did not introduce any evidence establishing that Student's problem behaviors were extreme, created a serious danger to Student or anyone else, or were unmanageable through behavior goals in the IEP.

46. Student did not cause serious harm or create a threat of serious harm to others, herself, or property. Therefore, Student's behavior problems did not necessitate a functional behavior assessment, a behavior support plan and services from a board certified behavior analyst. Student offered no evidence that the minor and manageable problem behaviors of the nature Student exhibited at school required Whittier to agree to Parents' request for a functional behavior assessment and a behavior support plan.

47. Student failed to meet her burden of proof that Whittier and/or WACSEP denied Student a FAPE by refusing Mother's December 12, 2014, request for a functional behavior assessment and a behavior support plan.

