

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLOVIS UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2013090883

DECISION

The Clovis Unified School District (District) filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on September 24, 2013, naming Student. The matter was continued for good cause on October 18, 2013.

Administrative Law Judge (ALJ) Adeniyi A. Ayoade heard this matter in Clovis, California, on November 12 and 13, 2013.

Karen Samman, Attorney at Law, represented District. Mary Betry Bass, Special Education Local Planning Area Administrator, attended the hearing on behalf of District.

Parents and their attorneys did not participate in the due process hearing.

On November 13, 2013, the last day of the hearing, a continuance was granted for District to file its written closing arguments and the record remained open until December 2, 2013. Upon timely receipt of the written closing arguments, the record was closed and the matter was submitted for decision.

MOTION FOR CONTINUANCE

At the beginning of the hearing, Parents and Ms. Barbara Ransom (Educational Advocate for Student) were present, but only to argue Student's request to continue the due

process hearing.¹ Student prepared a motion for a continuance dated November 8, 2013, that was faxed to OAH on Saturday, November 9, 2013, when OAH was closed. The motion was deemed filed with OAH on November 12, 2013, the first business day after a three-day holiday weekend. The motion was accompanied by attached federal court documents.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

In his motion to continue the hearing, Student contends: 1) that he had filed a request with the United States District Court for the Eastern District of California to challenge an October 14, 2013 ruling by OAH denying Student's request to dismiss the instant matter for lack of jurisdiction; and 2) that he had requested a temporary restraining order from the federal court to enjoin this due process hearing from moving forward because OAH lacks jurisdiction to hear the case. District opposed the motion on the grounds that the motion failed to establish good cause for a continuance because OAH has the proper jurisdiction to hear and determine the pending dispute. The motion was argued orally on the record.

Upon considering Student's written continuance request and subsequent arguments by the parties on the record, Student's motion was denied. Student failed to establish that he timely petitioned the federal court to issue a stay of these proceedings and remove this matter to the federal court. Furthermore, Student failed to establish that he timely filed this instant continuance request beyond the date of the prehearing conference in this matter. As there was no order from the federal court staying these proceedings and Student's prior motion to dismiss this action had been denied, Student failed to establish good cause for a continuance. Following the denial of Student's continuance request, Parents and Ms. Ransom left the

¹ Student's attorney of record is Yvette C. Sterling, with whom Ms. Ransom is associated as an advocate. Ms. Sterling did not appear and Ms. Ransom was permitted to present oral argument on Student's motion to continue.

hearing. The matter continued for the remainder of the hearing with District's counsel and representatives.

ISSUES²

1. Was District's May 13, 2013 individualized education program (IEP) offer,³ developed at the April 19, April 25, and May 13, 2013 IEP team meetings reasonably calculated to provide Student with a free appropriate public education (FAPE)?
2. Was District's IEP offer, as revised in a prior written notice letter dated June 5, 2013, reasonably calculated to provide Student with a FAPE?

SUMMARY OF DECISION

District requests an order from OAH deeming its May 13, 2013 IEP and June 5, 2013 prior written notice to have offered Student a FAPE. Parents had argued that District's offered program was not the least restrictive environment for Student, and that Student should be fully included and placed in a general education setting for 100 percent of his school day for both his social skills and academic needs. As Student did not present a defense, Student's position was gleaned from Parents' comments in the IEP documents, testimony of District witnesses, and other documentary evidence submitted into the record. Student's objections to District's offer were not persuasive.

As discussed below, District prevailed in establishing that the IEP and prior written notice offered Student a FAPE because they were designed to meet Student's unique needs in the areas of reading, writing, math, functional skills, and independent communication and socialization, and were reasonably calculated to provide Student with a FAPE.

FACTUAL FINDINGS

1. Student is a 14-year-old boy who resided within the District's geographical boundaries at all relevant times, and was eligible for special education under the category of intellectual disability. Student is currently in eighth grade, and has attended District's Alta Sierra Middle School (Alta Sierra School) since seventh grade during the 2012-2013 school year.

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

³ This IEP is referred to as the 2013 IEP offer in this decision.

2. Based on his triennial psychological assessment results conducted in 2011, Student has significant cognitive delays, with a full scale nonverbal intelligent quotient score of 46. His is below the 0.1 percentile in memory, reasoning, symbolic and non-symbolic quotient. As confirmed by his triennial psychological assessment results, and an independent psychological assessment, Student's cognitive abilities are significantly below average and those of his same-age peers.

3. Due to the impact of Student's disability and his unique needs, Student has participated in the California Alternate Performance Assessments (CAPA) tests, and has utilized a modified and alternative academic curriculum focusing on functional academic needs, and independent living skills.⁴ The CAPA is the alternate statewide educational assessment test for students with severe cognitive disabilities.

Student's Placement for the 2012-2013 School Year

4. For his seventh grade year, Student's operative IEP was the April 16, 2012 IEP. Based on that IEP, Student's placement was comprised of three special day classes⁵, including reading, writing and math, and four general education periods comprised of two elective classes (beginning drama, and arts and crafts), physical education and lunch. The purpose of Student's academic program was for him to learn functional life skills. The purpose of his general education placement was to provide him with opportunity to engage with his typically developing peers, socially and communicatively, in mainstreamed settings in order to develop his social and communication skills. In accordance with the IEP, as related services, Student received one-on-one instructional aide services in the general education setting for his social and communication skills facilitation needs, 30 minutes of direct-collaboration speech and language therapy and 30 minutes of speech and language consultative services per week. Based on the breakdown of Student's educational program, he was placed in the general education setting for 57 percent of his school day, and in the special education environment for 43 percent of his school day.

⁴ While the common core state standards (describing what students should know and be able to do in each subject in each grade) are used in public schools and students must participate in the statewide assessment and accountability system, the CAPA has been developed and implemented as an alternate assessment for children with disabilities who cannot take part in general statewide assessment programs due to significant cognitive impairment.

⁵ A special day class is a class usually located in a public school and provides specialized instruction for children with disabilities if they are unable to benefit from the mainstream general education academic environment. Special day classes are smaller in size compared to typical general education classes. They are taught by credentialed special education teachers, usually assisted by paraprofessionals (instructional aides), and have low student-to-staff ratios. District's special day class, where Student was placed, is a functional skills class, taught by a credentialed special education teacher, and assisted by about four instructional aides.

5. The appropriateness of the April 2012 IEP was challenged by Parents in a prior case filed by Student with OAH, OAH Case No. 2012110503. On April 5, 2013, after eight days of hearing, OAH found that District's April 2012 IEP offer provided Student with a FAPE in the least restrictive environment. That decision is currently on appeal. The April 2012 IEP has been, and is currently being implemented.

Annual IEP Review

6. Student's last triennial reassessment took place in April 2011. Therefore, his next triennial reassessment is not due until April 2014. Through the testimony of Judy Heidebrecht,⁶ Student's special day class teacher, Tacy Kroell,⁷ District's program specialist, Debra Tetz, speech and language pathologist,⁸ and Scott Berglund, school psychologist, District established that it appropriately identified all areas of need in Student, and obtained useful information regarding his present levels of performance as needed to appropriately develop his May 2013 IEP as required by law.

7. As part of Student's annual IEP review, District conducted an updated academic skills assessment of Student. The updated academic skills assessment of Student was conducted by Ms. Heidebrecht on April 5, 8 and 11, 2013, as part of the 2013 annual IEP review. Academically, Student was functioning between the kindergarten and first grade

⁶ Ms. Heidebrecht was Student's special day class teacher. She has a master's degree in special education, and holds a special education teaching credential, a Cross-cultural, Language, and Academic Development credential, and a credential for Mild-to-Moderate Disabilities with Autism Supplementary Authorization. She has taught the special day class at Alta Sierra School since 2009. At the hearing, Ms. Heidebrecht demonstrated that she was familiar with Student, his present levels of performance and his unique needs. She was credible in her testimony in these areas.

⁷ Ms. Kroell has worked for District for about 12 years, and has been its program specialist for about two years. She holds a master's degree, an Education Specialist Instruction (mild-to-moderate) credential and a Cross-cultural, Language, and Academic Development credential. She supervised Ms. Heidebrecht and the implementation of Student's IEP's. Ms. Kroell was knowledgeable about Student's disability, his levels of functioning and his unique needs. She attended and facilitated Student's IEP team meetings on April 19 and 25, and May 13, 2013, as District's administrative designee.

⁸ Ms. Tetz has been District's speech and language pathologist for about six years. She has a master's degree in speech pathology, and holds a Clinical Rehabilitative Services credential, and a Certificate of Clinical Competence as a speech and language pathologist. Ms. Tetz was familiar with Student, his current levels of functioning in the area of speech and language, and his unique needs in the areas of pragmatic communication. She has provided services to Student and worked with Student's teacher to implement his 2012-2013 school year language and communication goals.

levels. He was able to read at about the pre-kindergarten level, and in math, he was learning basic foundational concepts such as identification of money (bills and coins), colors, simple mathematical calculations involving addition and subtraction of one- to two-digit numbers. His reading comprehension skills were between the pre-kindergarten and first grade levels, and he had difficulty answering inferential questions. He had great difficulty with reading and writing. The result of the academic assessment showed that Student continued to have significant needs in the areas of reading, reading comprehension and writing.

8. In addition, District reviewed Student's educational records, his prior IEP and prior assessments' results. More specifically, District reviewed Student's triennial psychological assessment report completed in April 2011 by Mr. Berglund,⁹ Student's triennial speech and language assessment conducted by Leanne Rosa, a licensed speech and language pathologist, in March 2011, and the independent psychological evaluation conducted by Dr. Robert Wells, a licensed psychologist, in June and July 2011.

9. Based upon the IEP team's review of Student's education and assessments' records, District determined that Student was significantly delayed cognitively. He was below the 0.1 percentile when compared to his same-age peers and his overall intelligence quotient score was 40. He had significant weaknesses in expressive language reasoning, problem solving, working memory, and processing speed, and his skills in the areas of communication, daily living skills and socialization were markedly deficient. He had significant expressive language delays.

10. Also, Ms. Heidebrecht reviewed Student's annual IEP goals and his progress towards his prior year goals. Student had 16 goals in his IEP during the 2012-2013 school year, including 13 academic goals and three communication and language goals. Student made significant progress towards all goals and met 10 of his 13 academic goals. Finally, Ms. Heidebrecht collected data regarding Student's language and communication goals (for requesting and reciprocating) in collaboration with Ms. Tetz. Based on the data collected, Student continued to have significant difficulty with requesting and reciprocal exchanges, and pragmatic communication. The areas of needs addressed by these goals remained areas of need for Student at the time of Student's 2013 IEP annual review.

Student's Unique Needs at the Time of the 2013 IEP Review

11. Overall, based on the review of the various assessments' data, the results from Dr. Wells' and Mr. Berglund's assessments of Student's cognitive abilities, and review of Student's educational records, the evidence established that Student had significant cognitive

⁹ Mr. Berglund has a master's degree in school psychology. He holds a Pupil Personnel Services credential. Mr. Berglund has been District's school psychologist for about seven years. Mr. Berglund was familiar with Student, his unique needs and his performance levels. He participated in several of Student's IEP team meetings since the 2010-2011 school year.

delays that negatively impacted his ability to access educational curriculum and instructions. He had significant weaknesses in the areas of reading, written language, and mathematics skills, and had ongoing needs in the areas of pragmatic communication at the time of his annual IEP in April 2013. He continued to require verbal prompts to make requests or engage with others. The assessment results showed that Student's ability to access the academic curriculum was significantly impacted and his specialized instruction involved significant modification of the curriculum.

The April 19, 25 and May 13, 2013 IEP Team Meetings

12. While Student's annual IEP was due to be developed by April 16, 2013, at the request of Parents, the parties agreed to meet on April 19, 2013, for the development of Student's annual IEP. The meeting did not finish and was continued to April 25 and May 13, 2013, in order to complete the IEP. Student's annual IEP was timely scheduled and held. Before the April 19, 2013 IEP team meeting, Parents presented District with their input about what they would like to see in Student's IEP for the 2013-2014 school year. The evidence established that the District properly provided Student with notices of the IEP team meetings and worked cooperatively with them to schedule the meetings on mutually agreeable dates.

The April 19, 2013 IEP Team Meeting

13. Student's April 19, 2013 IEP team meeting was attended by Parents, Ms. Kroell, Ms. Theresa Pafford, Speech Program Specialist, Ms. Tetz, Ms. Noelle Golling and Mr. Paul Babcock, general education teachers, Ms. Heidebrecht, special education teacher, Barbara Ransom, Student's advocate, and Karen Samman, District's attorney.¹⁰ The evidence established that all required individual attended all of Student's annual IEP team meetings.

14. At the April 19, 2013 IEP team meeting, Parents were informed of their procedural rights and safeguards under the law. Assessment results and information about Student's progress on his 2012-2013 school year goals were reviewed. Information about Student's present levels of performance was presented by Ms. Heidebrecht, Mr. Babcock, Student's general education physical education teacher, and Ms. Tetz. His present levels in reading, math and writing skills, gross and fine motor skills, and social emotional/behavioral functioning were discussed. In addition, the team reviewed and discussed Student's vocational skills, health, and adaptive and daily living skills. After the review of Student's present levels of performance, the team determined that Student had needs in the areas of

¹⁰ The April 25, 2013 continued IEP team meeting was attended by Ana Bustos-Ponce, Student's advocate, and all of the individuals that attended the April 19, 2013 meeting with the exception of Mr. Babcock, Ms. Ransom, and Ms. Samman. Finally, the continuation IEP team meeting held on May 13, 2013 was attended by Rod Lowder, general education teacher, and all of the individuals that attended the April 19, 2013 meeting with the exception of Mr. Babcock, Ms. Ransom, and Ms. Samman.

reading, writing, math, and communication, and that goals should be written to address all areas of need identified. At the April 19, 2013 IEP, Parents' concerns were discussed, the team considered Parents' input, and answered Parents' questions about various issues, including annual proposed goals, services and placement for Student, and the need for home-school communication between District and Parents. The team discussed Parents' homework expectations for Student, and whether Student's goals should be targeted towards increased reading and vocabulary skills, spelling skills, computer-based instruction, and use of assistive technology. The team discussed Parents' suggestions that State academic standards for the core curriculum should be used with Student, and that his social interaction goal should foster independence.

The April 25 and May 13, 2013 IEP Team Meetings

15. The presentation and discussion of the Student's proposed annual goals began on April 25, 2013, but the review of the goals was not completed until the continued IEP team meeting on May 13, 2013. At the April 25, 2013 IEP team meeting, the team discussed and considered Parents' concerns about Student's money goal, and their requests that Student be exempted from state testing for the general education physical education class. At the IEP team meetings, Parents requested that District should accommodate Student by reducing the expected length of his sentences, and were able to discuss Student's placement in the special day class, with which they disagreed.

16. At the May 13, 2013 IEP team meeting, one of Student's reading goals was updated based on input from the team. At the May 13, 2013 IEP team meeting, Parents discussed their home-school communication need, and particularly requested more communication with Ms. Tetz about Student. Finally, at this meeting, the team discussed Student's placement, as discussed in more detail below.

17. In connection with all three of the above IEP team meetings, the evidence established that District complied with the procedural requirements for meaningful participation because Parents were provided the opportunity to meaningfully participate in the meetings and in the IEP decision-making process. Parents concerns were listened to, discussed and considered. They were able to ask questions and receive answers to their questions. At two of the meetings, Parents had their advocate in attendance. The advocate, and both Mother and Father, provided input about Student, and Student's goals, services and accommodations were discussed and finalized. Overall, the evidence established that Parents were able to meaningfully participate in Student's IEP development process and District complied with the procedural requirements applicable to the development of an IEP for Student.

Annual Measurable Goals

18. At the April 25, 2013 IEP team meeting, the proposed goals for the 2013-2014 school year were presented and discussed, and the discussion was finalized at the May 2013 meeting. Ms. Tetz presented the proposed communication goals, and Ms. Heidebrecht

presented Student's reading, writing and math goals. District's IEP offered 12 annual measurable goals, comprising of three reading goals, two written language goals, five math goals, and two goals targeting Student's pragmatics skills deficits relating to "requesting" and social interaction/reciprocal exchanges. These goals followed up on Student's goals from his last annual IEP, and used the information about his overall baseline performance and progress on those goals to adjust or modify them to support his continued progress.

Annual Reading Goals

19. Student's reading goals were aimed at improving his reading and comprehension skills, and ability to answer inferential questions, which were all areas of need for Student. The first reading goal was to improve Student's ability to read beginning second-grade book passages with eight to twelve word sentences, with 90 percent accuracy over three consecutive trials, as measured by data collection. The baseline data showed that Student was able to read eight-to-ten-word sentences in the "PCI reading program"¹¹ he used with 96 percent accuracy.

20. Student's second reading goal targeted his reading comprehension needs. The goal was to improve his ability to recall and retell stories in his own words, using two- to three-word details, and with no more than one prompt in four of five opportunities, as monitored by staff. The baseline information for the goal provided that Student was able to read stories at a pre-kindergarten level, and recall some details using one to two words of details.

21. Student's last reading goal targeted his difficulties with answering inferential questions and providing sequential information with accuracy. The goal provided that, when given four to six pictures showing sequence of events, Student would answer inferential questions, like, "What happened first, second, ... next, and last?" in a multiple-choice format with 80 percent accuracy with no more than one prompt, in five consecutive trials as measured by data collection. The baseline data described Student's struggles in this area of need. Student had averaged about 50 percent accuracy when answering inferential questions involving three to four pictures.

Annual Written Language Goals

22. Student's written language goals targeted Student's sentence-level writing and spelling skills, and were aimed at improving his writing and spelling accuracy skills. They also targeted story-retelling and comprehension skills. More specifically, the first written

¹¹ The PCI Reading Program is a research-based reading program created to be used with individuals with developmental disabilities, intellectual disabilities, autism, and significant learning disabilities.

language goal targeted Student's baseline inability to rewrite accurate sentences from provided materials with correct capitalization and punctuation, and with more than four to five words. Thus, the goal provided that Student would write two sentences retelling a portion of a story provided to him on cue cards. He would use correct capitalization and punctuation, with no more than one verbal prompt in four of five opportunities as measured by teacher and work samples. The baseline data provided that Student was able to write four- to five-word sentences with correct capitalization and punctuation with 80 percent accuracy with no more than one prompt.

23. Student's second written language goal targeted Student's spelling skills. The goal was created to improve Student's ability to write and spell 25 high-frequency words, and sight words taken from instructional materials at Student's academic level. The goal was to have Student write words dictated to him from a list, with 85 percent accuracy over three consecutive trials as measured by data collection. The baseline information showed he was only able to spell beginning sight words from his reading program and consonants-vowel-consonant words (for example, "cat"), or consonants-vowel-consonant-consonant words, with 90 percent accuracy.

Annual Math Goals

24. Student's five math goals targeted his math areas of need. The baseline information showed that Student: 1) was able to compute single-digit subtraction with a calculator, and count 10 to 1 backwards with prompting; 2) was able to add single-digit numbers independently with 87 percent accuracy; 3) was able to receptively and expressively identify coins and bills with 80 percent accuracy in two trials, but was unable to count mixed coins and/or bills or determine their values; 4) was prompt dependent when using money for purchasing one item, and was only able to do so with 50 percent accuracy and with prompting; and 5) could count by fives, and was only able to identify the correct hour in an analogue clock, respectively. Therefore, District offered five math goals targeting the above-identified areas of needs.

25. Student's first math goal was to improve Student's skills in computing single-digit subtraction. The goal provided that Student would compute single-digit subtraction with 80 percent accuracy in four of five trials as measured by work samples. His second math goal provided that Student would compute double digits without regrouping with 80 percent accuracy in four of five trials with no more than one prompts as measured by teacher's observation, work samples and data collection.

26. Student's third math goal was designed to improve Student's money skills and his knowledge of coins and their values. The goal provided that when presented with mixed coins (quarters, dimes, nickels, and pennies), Student would expressively and receptively identify the values of each coin with 80 percent accuracy in four of five trials with no more than one prompt. His fourth math goal was also aimed at improving Student's money skills. The goal provided that Student would practice purchasing items with money, and would round off the price of a single item to the next whole dollar amount with 70 percent accuracy

over three consecutive trials, as measured by data collection. Lastly, Student's fifth math goal was aimed at helping him develop time-telling skills to the minutes, and Student would learn to tell time to 30 minutes after the hour with 80 percent accuracy as measured by work samples and data collection.

Annual Pragmatic Communication Goals

27. Finally, Student's communication goals targeted his needs in the areas of pragmatic communication and socialization, and his inability to make requests and interact with his peers independently. The baseline data provided that Student had difficulty making requests independently, and would do so independently about 25 percent of the time when given such opportunities. With prompts, his percentage for making requests rose to about 70 percent. Also, when reciprocal exchanges were initiated by a peer or an adult, Student could engage in such exchange once with one or no prompts or gestures. Student was only able to initiate reciprocal exchanges about 25 percent of the time when provided with opportunities. Therefore, District wrote a requesting goal and a social interaction goal for Student.

28. The requesting goal was to improve Student's ability to make requests independently from adults or peers for a needed or preferred item, in the educational setting and across different locations on campus, on at least four of five opportunities provided, and with no verbal or gestural prompts, as measured by observation and data collection.

29. Student's reciprocal exchange goal indicated that Student would initiate one or more reciprocal exchange/social interaction or greeting with an adult or a peer on a given topic in the educational setting, on at least four of five opportunities with no more than one verbal or gestural prompt, as measured by teacher observation and data collection.

30. The evidence established that Student's 12 goals targeted areas of need for Student. Each of the goals included short-term objectives enabling District's staff to work with Student and measure his progress progressively. Each of the goals would be measured and reported upon three times prior to the next annual IEP review. At the hearing, District demonstrated that it had available accurate present levels of performance information about Student at the time the 2013 IEP was developed. The goals were based on Student's actual levels of performance as District relied on assessment results and data, reviewed Student's records and past IEP's, and obtained input from Parents and Student's teachers. It conducted an updated academic reassessment of Student that it considered necessary. There was no evidence that Student demonstrated another area of need not addressed by these goals, or that either Parents or District requested or believed that additional assessments were required to obtain additional present levels of performance data on Student at the time the goals were developed and offered.

31. Overall, the evidence established that Student's reading, writing, math and pragmatic communication goals were appropriate to address Student's identified and unique needs. The goals were measurable and attainable, and were appropriately based on the alternative curriculum and standards required by Student. Based on the evidence, Student

functioned significantly below grade-level, and thus required an alternative and functional academic curriculum due to his cognitive delays. The goals were based on Student's levels of functioning, and thus were appropriate for Student.

Student's 2013 IEP Placement and Services Offer

32. The IEP team, including Parents, discussed educational placement options for Student for the remainder of the 2012-2013 school year, and for the 2013-2014 school year. After much discussion and consideration of parental input, the District members of the IEP team concluded that Student continued to require significant mainstreaming opportunities as well as access to specialized academic instruction in the special education environment. Therefore, District offered that Student would continue to be placed in the blended educational program comprising of 57 percent general education placement, and 43 percent special day class special education placement.

33. Specifically, District offered that Student would participate in three functional academic special day classes, including reading, writing, and math for 43 percent of his time in school, and in four general education periods comprised of two electives, physical education and lunch for 57 percent of his school day. Drama, arts and crafts, and teen living were discussed as possible electives for Student (but Parents had to make the selections). Based on the record, Parents agreed during the IEP team meetings that Student would take Teen living and intermediate drama as his two electives for the 2013-2014 school year. As in the prior school year, the purpose of Student's academic program would be to learn functional academic and functional life skills based on his alternative academic curriculum. The purpose of the general education placement was to continue to develop his pragmatic communication and socialization skills.

34. Regarding services, District's IEP offered that Student would continue to receive one-on-one instructional aide services in the general education setting for social and communication skills facilitation, 120 minutes per month (30 minutes per week) of direct collaboration speech and language therapy, and 60 minutes per month of speech and language consultative services. The duration and frequency of the speech and language consultative services offered by District was a 50 percent reduction in what Student had received under the April 2012 IEP. In that IEP, Student received 120 minutes per month, or 30 minutes per week, of speech and language consultative services. At the hearing, Ms. Tetz testified that the 60 minutes per month reduced speech and language and speech consultative services time, as contained in the 2013 IEP, would be have been appropriate to implement Student's language and communication goals, and would have been adequate to meet his needs and enable him to continue making progress in the area. Ms. Tetz's testimony on this issue was not rebutted or challenged by the evidence. Parents disagreed with the proposed reduction in Student's speech and language consultative services at the May 13, 2013 IEP team meeting.

The 2013 Extended School Year Services

35. Extended school year services (summer school services) for Student were discussed, and the team agreed that Student qualified for the 2013 summer school services to avoid regression in skills over the summer months. At the May 13, 2013 IEP team meeting, Parents declined the offer, and indicated that they did not want Student to participate in District's 2013 summer school program. While the team did not discuss the summer school services offer further, at the May 13, 2013 IEP team meeting following Parents' rejection of the services, the 2013 IEP document indicated that District's 2013 summer school services would be provided to Student consistent with District's summer school program's calendar and scheduled services.

Accommodations, Modifications and Supplementary Aids and Supports

36. The 2013 IEP included several accommodations and supports to address Student's significant needs and deficits. As offered in the IEP, Student would receive: 1) multi-cueing with auditory instruction and visual models; 2) visual schedules for classroom organization; 3) study guides; 4) modeling by adults and peers; 5) breakdown of materials, instructions, and activities into multiple steps (chunking); 6) modification of grade-level work; and 7) extra time for tasks. District would check with Student to make sure he understood what was being taught to him, provide him with prompts to aid him during writing tasks, and provide him with manipulatives¹² for math. He would receive extra time for testing, quiet instructional space, prompts and visual aids, and verbal cues for his pragmatic communication goals. Student would participate in a modified curriculum both in the general education and special education settings based on his levels of functioning, and his significant cognitive and communication needs.

37. Overall, the evidence established that Student 2013 IEP offer, including its goals, services, accommodations and modifications, offered Student a FAPE in the least restrictive environment. The general education core academic curriculum for Student's chronological age or grade level, according to State standards, was far advanced beyond his reach, and the District was persuasive that it would have been impossible or impracticable to modify that curriculum for him in a general education classroom, even with supplementary aids and supports. The evidence supports a conclusion that Student continued to require an alternative modified academic curriculum and the support of a specially designed instruction in the special education environment. He required the skills being taught in the special day class, including functional academic skills, and survival and life skills with the goals of ensuring that Student would be able to meaningfully participate in the society with greater independence. He continued to require a meaningful mainstreaming opportunity and access

¹² "Manipulatives" are concrete objects used in teaching mathematics, and can include blocks, geometric shapes of different colors and sizes, or cubes for counting to solve simple addition and subtraction equations.

to typically developing peers in the general education setting to enable him develop his pragmatic communication skills.

Typographical Errors in the 2013 IEP Document

38. There were typographical errors in the 2013 IEP document that was provided to Parents at the May 13, 2013 IEP team meeting. In that version of the IEP document, the breakdown of the general education and special education percentages for Student's blended educational program were misstated and inverted. The IEP document erroneously indicated that Student would be in the general education setting for 43 percent of his school day, and in the special education environment for 57 percent of his school day. The evidence established that the numbers were transposed and/or inverted. Through the testimony of Ms. Heidebrecht, Ms. Kroell, Ms. Golling and other District's witnesses at the hearing (District witnesses), District established that the offer was for Student to be in the general education mainstreaming environment for 57 percent of his school day, and in the special education setting for 43 percent of his school day. These percentages were discussed during the meetings, and according to the testimony of Ms. Kroell, Parents understood that Student was participating in the general education setting for 57 percent of his school day, and knew that the percentages contained in the 2013 IEP were mere typographical errors based on her discussion with the Mother.

39. In explaining the error, District's witnesses pointed to the number of classes, periods, and minutes that Student would be taking from the special education environment and those from the general education setting during the remainder of the 2012-2013 school year and the 2013-2014 school year. The number of classes was the same (three special education classes, and four general education periods) as was in Student's April 2012 IEP. In that 2012 IEP, it was correctly stated that Student was participating in the general education environment for 57 percent of his school day and was in the special education setting for 43 percent of his school day. In addition, mathematically, Student's three periods in the special education setting, and the four periods in the general education mainstreaming environment could not have resulted in a greater percentage for Student in the special education setting. Therefore, based on the totality of the evidence, District successfully established that the erroneous 43/57 percentage split contained in the 2013 IEP were mere typographical errors, which could be corrected without a need to hold another IEP team meeting.

Substantive FAPE in the Least Restrictive Environment

40. Based on Student's unique needs, and the documented educational benefit received by Student during the 2012-13 school year in his blended education program, District appropriately determined that Student should continue with 57 percent in the general education setting with modification and supports, and 43 percent in the special day class special education environment. As discussed herein, the blended placement offered by District in the 2013 IEP was substantively unchanged by the June 2013 prior written notice letter. Therefore, Student's 2013 IEP, as revised by the June 5, 2013 prior written notice

letter, is substantively evaluated here to determine whether it was reasonably calculated to provide Student a FAPE.

41. The evidence established that the program offered by District was designed to meet Student's unique needs and enable him to receive educational benefit. As found in more detail below, in order for Student to make progress on the proposed goals he needs the intensity of the special day class to work on functional academics and functional living skills. In order to make progress on his language and socialization skills, Student needs general education electives where he can work on his language and socialization goals with typically developing peers while not subjected to a general education academic curriculum from which he cannot benefit.

42. Thus, Student would be able to work on his social and communication needs in the general education setting with its nonacademic curriculum modified for him and the support of his instructional aide. He would receive specialized instruction and work on his functional academic needs in the small special day class setting, and with adequate supports and alternative academic curriculum based on his present levels of academic functioning. In the four general education periods (intermediate drama, teen living, physical education, and lunch), Student would interact with typically developing peers with the assistance of his aide, and would be able to work on his pragmatic communication and socialization goals appropriately. The evidence showed that Student's blended education program, as designed and offered in the 2013 IEP, would meet his needs during the 2013-2014 school year.

43. During the 2013-2014 school year, District's special day class is taught by Ms. Heidebrecht.¹³ Ms. Heidebrecht has 11 students, and four to five instructional aides at all times,¹⁴ in the Special Day Class for the current school year. The class offers a small class instructional setting with adequate instructional supports required by Student. In the class, due to its size and structured setting, attention and support could be devoted to Student's unique needs and the implementation of his annual academic goals. At the hearing, Ms. Heidebrecht credibly testified that she would be able to appropriately implement Student's reading, writing and math goals in her special day classroom, and was appropriately implementing similar but earlier goals from his last operative IEP. Student's specialized academic instruction to be delivered in the special day class was designed to support his needs for functional academic, life skills, and goals of independence in the community. In the class, he would learn basic reading and writing skills, basic math skills, ability to identify money (coins and bills) and use money purchasing items. He would learn to tell time, make inferences, re-tell stories and learn survival skills, daily living and life skills useable for successful community participation and independence.

¹³ She taught Student in the same class during the 2012-2013 school year.

¹⁴ One of the five instructional aides was a one-on-one aide assigned to another student, and would only be in the classroom when that student was in the class.

44. The least restrictive environment, is, the environment in which a special education student may be included or mainstreamed with his typically developing peers and still receive educational benefit. Student has significant academic needs that required substantial modification of the standard curriculum. He has significant language deficits, and his cognitive delays were in the significantly intellectually disabled moderate to severe range. Academically, Student functions at between kindergarten and first grade levels. He had great difficulties with reading and writing. At the time the 2013 IEP and the June 2013 prior written notice offer were developed, Student was still learning basic foundational concepts such as identification of money (bills and coins), colors, simple mathematical calculations involving additions and subtractions of one to two digit numbers. He was far below where his eighth grade non-disabled peers were functionally.

45. Based on the information that the IEP team members had about Student at the time of the 2013 IEP team meetings, the District members who testified were all persuasive that Student would not be successful in eighth grade general education academic classes and the classes could not be modified to the level where he could meaningfully participate. According to Ms. Golling and Mr. Lowder, even Student's general education nonacademic elective classes' curriculum had to be significantly modified during the 2012-2013 school year, and Student was excused from performing many academically-related tasks such as reading and writing, in order for Student to meaningfully participate in their classes. Both did not believe that Student had the academic skills or abilities to meaningfully participate in seventh or eighth grade core academic classes. Based on their qualifications and experience, their testimony was given great weight.

46. The evidence also established that Student's academic goals contained in his 2013 IEP could not be appropriately implemented in the seventh or eighth grade core academic general education environment. For example, in reading, Student's baseline performance as of April 2013 for the reading and comprehension goals showed that Student was able to read eight-to-ten-word sentences written at between pre-kindergarten and first grade levels, and had difficulties answering inferential questions. His goals were to enable him read beginning second-grade passages with eight to twelve word sentences, and to improve his ability to recall and retell stories in his own words, using two to three word details, and with no more than one prompt. Based on the credible testimony of Ms. Heidebrecht, Mr. Lowder, Ms. Golling, and Mr. Berglund, the levels for Student's academic goals were far too low to be practicably implemented in a general education classroom in an effective manner.

47. Ms. Heidebrecht, Mr. Berglund, Ms. Golling and Mr. Lowder all testified about the difficulties Student would have if required to participate in general education academic classes. Their credible testimony established that Student does not have the skills to participate or benefit from a full-inclusion program, and would be unable to access the eighth grade academic curriculum even with modification and supports. Both Ms. Golling and Mr. Lowder credibly testified that, in their non-academic general education drama, and arts and crafts classes, Student received significant modifications and accommodation, and still struggled to perform at any level close to those of his peers. Both explained that Student

had to be accommodated and excused from completing certain works, assignments and projects especially those requiring academic skills that were above Student's present level of performance. Most of these involved reading and writing, and Student did not have comparable academic or communication skills as his non-disabled peers in their classes. None of the witnesses believed that Student could meaningfully participate in general education core academic classes without significant modifications, accommodations and support.

48. District offered persuasive evidence to show that it could not modify the eighth grade general education core academic curriculum to the level needed by Student to have meaningful access to, and receive educational benefit. Such an attempt would have rendered the curriculum unrecognizable to the extent that Student's instructional materials would have to be dramatically different from those used by his peers. Student would be working alone and apart from the class with a different curriculum, and would not have received any meaningful academic or nonacademic benefit from his participation in such general education academic classes, even with an aide. At best, Student would have to be isolated in the back of the classroom working in isolation with his aide in order receive any benefit from an academic subject or working on goals. His isolated work with the aide would have nothing to do with the class curriculum that the rest of the students would be working on at an eighth grade level. Consequently, such an instructional model would not include Student in any meaningful way in such general education academic class, but isolate and exclude him, and deny him the educational benefit of being placed in such a class.

49. The result would be different for his four non-academic general education classes, as the evidence established that Student has received nonacademic benefit, including social communication benefit, from his inclusion with general education students in classes where he may participate and be included. During the prior school year, Student participated in seventh grade general education beginning drama, arts and crafts, physical education, and lunch periods, and received education benefit from mainstreaming with general education students, according the testimony of Ms. Golling and Mr. Lowder.

50. While the evidence failed to persuasively show that Student would be disruptive in the general education core academic classes, the evidence did show that such placement would not provide Student with educational benefit, academic or non-academic, and District's FAPE obligation to Student could not be met in that placement. Because, the placement would have been inappropriate for Student, an analysis of the least restrictive environment is not required further on this factor. Finally, no evidence was presented regarding the costs of mainstreaming Student, and the factor is also not discussed herein.

51. Based on the testimony of Ms. Heidebrecht, Mr. Lowder, Ms. Golling, and Ms. Kroell, District established that its placement offer contained in the 2013 IEP was designed to provide Student with educational benefit in the least restrictive environment and to mainstream him to the extent possible consistent with receiving educational benefit. Student's academic needs can only be met in the special day class specialized academic, structure and small class, setting. With the District's offers, Student would receive social

communication benefit from his four general education classes. District offered Student mainstreaming time to the extent appropriate, as the 57 percent mainstream time struck a careful balance between Student's competing needs for life skills, functional academics, and pragmatic communication. Student's academic needs could not be appropriately met in the general education environment even with supplementary aids and support due to his significant cognitive delays and academic deficits. None of District's witnesses believed that the eighth grade academic curriculum could be modified to provide Student with educational benefit. Their evidence was not rebutted, and was persuasive.

The June 2013 Prior Written Notice Letter

52. In a June 5, 2013 prior written notice letter sent by District to Parents, District notified Parents of the typographical errors contained in the 2013 IEP document regarding Student's percentages in the general education and special edition settings. The letter provided Parents with the corrected information showing that Student would spend 57 percent of his day in the general education setting, and 43 percent of his school day in the special education setting for, rather than the other way around as contained in the 2013 IEP document.

53. Aside from the above, District's prior written notice letter addressed two other disagreements that arose at the May 13, 2013 IEP team meeting. At that meeting, Parents expressed disagreement regarding the proposed reduction in Student's speech and language consultative services, from 120 minutes per month to 60 minutes per month. Parents also declined District's offer of the 2013 summer school services for Student. Therefore, in its prior written notice letter, District indicated that it agreed to reinstate Student's speech and language consultative services to the original 30 minutes per week (120 minutes monthly), consistent with what Student had during the 2012-2013 school year.

54. Lastly, the letter informed Parents that, despite their decision to decline 2013 summer school services for Student at the May 2013 IEP team meeting, District continued to believe that Student was eligible for the summer school services, and that it was encouraging Parents to consent to the services. Therefore, through its letter, District offered Student the 2013 summer school services and provided Parents with the name of the school where its 2013 summer school program would take place, and the dates and times for the class. The letter informed Parents that the 2013 summer school services would take place between June 24 and July 25, 2013, from 7:45 a.m. through 11:45 a.m. on each day of school.¹⁵ The prior written notice letter provided Parents with a written notice of procedural rights and safeguards, and informed Parents of their right to request an IEP if they wished to discuss the Student's 2013 summer school services further at an IEP team meeting.

¹⁵ District's 2013 summer school program was similar to its 2012 summer school program offer to Student, in that each lasted for about one month, with total minutes of services at 4,200 yearly (2012 IEP) and 4,300 minutes yearly (2013 IEP).

55. While the written 2013 IEP offer erroneously inverted the percentages of Student's participation in the general education and special education settings, the evidence established that Parents understood that Student was remaining in four general education periods for 57 percent of his school day, and in three special education periods for 43 percent of his school day, as it was in his 2012 IEP. According to the testimony of Ms. Kroell, based on her discussion with Mother, Parents understood that the percentages contained in the 2013 IEP were mere typographical errors and that Student was participating in the general education setting for 57 percent of his school day. In this hearing, no evidence was offered to show that Student's 57 percent and 43 percent percentages in the general education and special education settings, respectively, were not discussed at the IEP team meetings with Parents' participation, or that Parents did not fully participate in the discussion, or in the formulation or development of the IEP offer. Therefore, overall, the evidence did not show that an IEP team meeting was necessary or required for the District to offer the amended IEP, or to clarify, modify, or correct the 2013 offer relating to the typographical errors regarding the percentages of Student's participation in the general education and special education settings, respectively.

56. Regarding the speech and language consultative services issue addressed in the letter, the evidence also failed to show that an IEP team meeting was necessary or required in order to District to acquiesce to Parents' demand that Student's reduced speech and language consultative services minutes be reinstated. During the 2013 annual IEP review, Student's speech and language consultative services were discussed by and with Parents and discussion about his unique communication needs took place. Thus, while the June 5, 2013 prior written notice letter reinstated Student's speech and language consultative services back to 120 minutes per month, as requested by the Parents, the evidence failed to show that District's action, agreeing with Parents and reinstating the amount of speech and language consultative services as requested by Parents, was done without parental participation, or that such an action deprived Parents the opportunity to fully participate in the formulation or development of Student's IEP.

57. Lastly, the evidence showed that the discussion about Student's 2013 summer school services was not formalized or completed during the 2013 annual IEP review for Student because Parents indicated that Student would not be participating in the 2013 summer school services. Therefore, it was in the prior written notice letter that Parents were first provided the total minutes, dates and times for the 2013 summer school services, as well as the location for the services. Because these issues were not fully discussed at the IEP team meeting, and during Student's annual IEP review, it is unclear whether Parents could be said to have been able to fully participate in the discussion involving District's 2013 summer school services' offer.

58. However, despite the above obvious issue regarding District's 2013 summer school services' offer, the evidence failed to establish that a denial of FAPE occurred, even if it could be argued that the offer was made without parental participation. First, according to Parents, Student was not going to participate in the 2013 summer school program, and he did not. Therefore, this error, if any, did not result in a significant deprivation of Parental right

to participate in the IEP development process, and a loss of educational benefit was not established. Therefore, this appears to be a harmless error, from which a denial of FAPE is not found. Lastly, as the time for the implementation of the 2013 summer school services have passed, it is unnecessary to require District to take any remedial action to address an arguable procedural failure that might have resulted from its offer of the 2013 summer school program in its June 5, 2013 prior written notice letter.

59. Therefore, the prior written notice letter, which reinstated Student's consultative speech and language services minutes, offered the 2013 summer school services to Student, and corrected errors in describing the percentages of the blended placement offer, did not deprive Parents of their right to participate, or meaningfully participate, in the development of Student's educational program, or in the IEP development process. Rather, it ensured such meaningful participation.

60. Overall, the evidence established that District's blended educational program offered to Student was designed to meet Student's unique needs and provide him with meaningful educational benefit. Therefore, District's IEP offer, including placement and services, contained in the 2013 IEP, and its June 2013 offer, is reasonably calculated to offer Student a FAPE in the least restrictive environment.

LEGAL CONCLUSIONS

Introduction – Legal Framework under the IDEA¹⁶

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; 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

¹⁶ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services.]) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically 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.] (*Mercer Island.*) 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. (*Mercer Island, supra*, 592 F.3d at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) 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, 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].)

Issue 1: Was District's 2013 IEP offer reasonably calculated to provide Student with a FAPE in the least restrictive environment?

Requirements for Annual Review of IEP's and Amendments

5. A school district must conduct an IEP team meeting for a special education student at least annually to review the IEP to determine whether the annual goals are being achieved, to make any necessary revisions to address any lack of expected progress, and to consider new information about the student. (20 U.S.C. § 1414(d)(4)(A); 34 C.F.R. § 300.324(b)(1); Ed. Code, §§ 56380, subd. (a)(1) & 56343, subd. (d); *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055-56.)

IEP Requirements

6. The IEP is the “centerpiece of the IDEA’s education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401(14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA. The IEP must include an assortment of information, including a statement of the child’s present levels of academic achievement and functional performance. The IEP must also include a statement of measurable annual goals and objectives that are based upon the child’s present levels of academic achievement and functional performance, and designed to meet the pupil’s needs that result from the disability. It must include a description of the manner in which progress of the pupil towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the pupil can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3) (2006); Ed. Code, § 56345, subs. (a)(2), (3).) It shall also include a statement of the program modifications or supports for school personnel that will be provided to the pupil to allow him or her to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii) (2006); Ed. Code, § 56345, subs. (a)(4)(A), (B).)

7. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, there must be a determination whether a district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. 176, 206-207.) Second, there must be a determination of whether the IEP developed through those procedures was designed to meet the child’s unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. The Ninth Circuit has endorsed the “snapshot” rule, explaining that “. . . an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at

the time the IEP was drafted.” (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041).)

8. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District’s proposed program. If the school district’s program addresses a student’s unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if student’s parent preferred another program that would result in greater educational benefit to the student. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

9. Procedural errors do not necessarily deprive a student of a FAPE. There must be a substantive harm to the student such as a loss of an educational opportunity. (See Ed. Code, § 56505, subd.(j) [hearing officer may not base a decision solely on nonsubstantive procedural errors, unless that error caused pupil to lose educational opportunity or interfered with parent’s opportunity to participate in the formulation process of the IEP]; *W.G. v. Bd. Of Trustees* (9th Cir. 1992) 960 F.2d 1479, 1484; *DiBuo v. Bd. Of Educ.* (2002 4th Cir.) 309 F.2d 18.)

Education in the Least Restrictive Environment

10. Federal and state law require a school district to provide special education in the least restrictive environment. A special education student must be educated with nondisabled peers “to the maximum extent appropriate,” and may be removed from the general education environment only when the nature or severity of the student’s disabilities is such that education in general education 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)(2)(ii) (2006).) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403 (*Rachel H.*), adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a less restrictive class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the less restrictive class; and (4) the costs of mainstreaming the student. However, if it is determined that a child cannot be educated in a general education environment, then the 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 Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1050)

Parental Participation in the Decision-making Process

11. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C.

§ 1414(d)(1)(B)(i); 34 C.F.R. § 300.322(a); Ed. Code, §§ 56304, 56341.5, subd. (a).) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (20 U.S.C. § 1414(e); Ed. Code, § 56342.5.) Accordingly, at the IEP team meeting parents have the right to present information in person or through a representative. (Ed. Code, § 56341.1, subd.(f).) “Among the most important procedural safeguards are those that protect the parents’ right to be involved in the development of their child’s educational plan.” (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) Parents have meaningfully participated in the development of an IEP when they are informed of their child’s problems, attend the IEP team meeting, express their disagreement with the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693.)

12. District established that Student’s 2013 IEP was procedurally compliant and appropriate. All required IEP team members attended the IEP team meetings of April 19, April 25, and May 13, 2013, including Parents. Parents were informed of their procedural rights and safeguards, and were able to meaningfully participate in the IEP development process. Parents’ advocates were present at two of the meetings and actively participated. Parents were able to provide input, propose and make suggestions about Student’s goals, discuss services and dispute the proposed reduction in Student’s speech and language consultative services. Parents participated in all discussions about Student’s educational placement, services, supports, accommodations and modifications.

13. The IEP offered by the District as a result of these IEP team meetings contained all requisite elements, including Student’s unique needs, present levels of performance, proposed annual goals and educational placement, related services, modifications and accommodations offered for the remainder of the 2012-2013 school year and the 2013-2014 school year. The fact that the offer contained typographical errors regarding the percentages of time in the blended program for general education and special education did not render the IEP offer fatally defective, as the Parents were presented with an understandable offer of placement and services. Parents knew precisely the number of classes Student would be taking in the special day classroom, and the extent of his participation in the general education environment.

14. Regarding the substantive evaluation of Student’s 2013 IEP (developed at the April 19, April 25, and May 13, 2013 IEP team meetings), District reviewed his prior educational records, including his prior 2011 triennial assessments and an independent assessment by Dr. Wells, procured by Parents. District had useful and accurate information about Student’s unique needs and present levels of performance, conducted an update of his academic performance and collected further data, to prepare for the 2013 IEP annual review. District used the information about Student’s present levels of performance to develop measurable annual goals for Student to meet his needs in all areas related to his intellectual disability. The goals targeted and met Student’s unique needs in the areas of functional reading, writing, math and pragmatic communication. The goals were measurable for

Student, and were able to be implemented in his special and general education settings appropriately.

15. Student's 2013 IEP provided him with specialized academic instruction in the special day classroom for three periods per day, with significant mainstreaming in four general education periods. Student also received related services reasonably designed to support his education, including a one-on-one aide in the general education setting, and instructional aide services in the special day classroom. Pursuant to the IEP, he would receive: 1) direct collaborative speech and language services 30 minutes per week for a total of 120 minutes per month; 2) speech and language consultative services for a total 60 minutes per month; and 3) summer school services. Based on the 2013 IEP offer, District maintained the level of Student's direct collaborative speech and language services that Student had received under his operative April 2012 IEP, but reduced his speech and language consultative services by 50 percent from the 120 minutes per month of the services that was in his April 2012 operative IEP.

16. At the hearing, Ms. Tetz persuasively testified that the level of Student's speech and language services (both direct-collaborative and consultative services) were appropriate and adequate to meet Student's unique needs and appropriately implement his communication and speech goals, and would have enabled him to receive meaningful benefit and make progress. Ms. Tetz also believed that Student's 60 minutes per month of speech and language consultative services, would have been appropriate to implement Student's language and communication goals and meet his needs. Nonetheless, District reinstated Student's speech and language consultative services back to 120 minutes per month through its June 5, 2013 prior written notice letter, due to Parents' disagreement with the reduction.

17. Student's nonacademic curriculum would be modified in the general education setting for two elective classes, lunch and physical education. In addition, Student would participate in an alternative (modified) academic curriculum in the special day classroom that was appropriate to his functional performance at the kindergarten-to-first-grade levels in academic subjects. He would receive multiple accommodations and supports to enable him meaningful access to instruction, and assist him to make progress towards his goals. The supplementary aids and supports, accommodations and modifications offered to Student were both adequate and appropriate.

18. District offered Student a blended educational program, which Student required. While the written 2013 IEP offer erroneously showed the blended program percentages as 57 percent special education and 43 percent general education, the evidence established that Parents understood that Student was remaining in four general education periods and three special education periods. Student's time in the general education setting, and his time in the special education setting, were remaining the same as in his April 2012 IEP. In the April 2012 IEP, Student was participating in the general education mainstreaming environment for 57 percent of his school day, and in the special education setting for 43 percent of his school day. Ms. Kroell credibly testified that she spoke with Mother who indicated that she understood that the 43/57 inverted percentages in the 2013

IEP document were in error. The evidence showed that Student's time in the general and special education settings was discussed during the meetings because Parents requested a full-inclusion placement in general education and District staff explained their offer. Parents understood that Student was remaining in the general education setting for only 57 percent of his school day.

19. As discussed, above, District's offer of educational placement for Student was appropriate, as it would enable Student to work on his functional academic and life skills needs in the special day class, and his social communication needs in the general education setting. While Student's teachers have been modifying his special day class and his general education electives' curriculum as needed, the evidence showed that the curriculum for the eighth grade core academic classes could not be modified to the extent needed by Student to meaningfully participate in the classes and receive educational benefit. The evidence showed that if Student were to be placed in an eighth grade general education core academic class, his curriculum and instructional materials would be so different from those of his peers and would barely be recognizable when compared with those used by his peers. Student would have to be isolated, and would be working alone with his aide and apart from the classroom peers. Student would not have received meaningful academic or nonacademic benefit from his participation in such general education academic classes, as he would not have been included in any meaningful way. He would have been isolated and excluded from the classes, and would not have received the educational benefit of being placed in such a class.

20. The evidence showed that the 2013 IEP, placement and services, accommodation, supplementary aids and supports offered in the 2013 IEP were adequate and appropriate, and were designed to meet Student's unique needs. District's 2013 IEP offer would allow Student the opportunity to participate in the general education curriculum and enable him to be educated with his nondisabled peers to the extent practicable, while still ensuring that he could obtain functional and academic benefit from his special education classes. The 2013 IEP offer was designed to meet Student's unique needs, and was reasonably calculated to enable Student to receive educational benefit. The evidence established that the 2013 IEP offer was a FAPE in the least restrictive environment for Student.

Issue 2: Was District's IEP offer, as revised in a Prior Written Notice letter dated June 5, 2013, reasonably calculated to provide Student a FAPE in the least restrictive environment?

Prior Written Notice

21. The law requires that District provide Parents with prior written notice of its proposal or refusal to initiate or change the identification, evaluation, or educational placement of Student or the provision of a FAPE to him. The notice must include a description of the action refused by District, an explanation of why District refused to take the action, and a description of each evaluation procedure, test, record, or report used as a basis for the refused action. Also, the notice must include a description of any other factors

relevant to District's refusal, a statement that the parents have protection under the procedural safeguards of IDEA, and information about sources for Parents to contact to obtain assistance. (20 U.S.C. § 1415(c); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.; 20 U.S.C. § 1415(b)(3); Ed. Code, § 56500.4.) District complied with the requirements regarding the provision of prior written notice to Parents regarding the proposed changes to Student's April 2013 IEP.

22. The procedures relating to prior written notice "are designed to ensure that the parents of a child with a disability are both notified of decisions affecting their child and given an opportunity to object to these decisions." (*C.H. v. Cape Henlopin School Dist.*, (3d Cir. 2010) 606 F.3d 59, 70.) When a violation of such procedures does not actually impair parental knowledge or participation in educational decisions, the violation is not a denial of FAPE under the IDEA. (*Ibid.*) District complied with the requirements regarding the provision of prior written notice to Parents regarding the proposed changes to Student's April 2013 IEP.

23. Thus, as noted above, the procedures requiring the provision of a prior written notice to Parents are to ensure that Parents were notified of the decisions affecting Student, and were provided with the opportunity to object to those decisions. According to the law, a denial of FAPE does not occur unless a violation of the prior written notice procedures impaired parental knowledge or participation in the development of Student's IEP. In this hearing, the evidence showed that the June 5, 2013 prior written notice letter sent to Parents contained three important items of information regarding Student's educational program and District's 2013 IEP offer.

24. First, the letter corrected the typographical error contained in the 2013 IEP regarding Student's general education/special education percentages split. Second, the letter informed Parents that District was reinstating Student's speech and language consultative services back to 120 minutes per month, as requested by the Parents and as contained in Student's prior year April 2012 IEP. Student's speech and language consultative services time were reduced in the 2013 IEP by 60 minutes per month but Parents disagreed with the reduction. The prior written notice letter, informed Parents that District had reinstated Student's speech and language consultative services back to 120 minutes per month.

25. The evidence established that the typographical errors contained in the 2013 IEP, which were corrected in the June 5, 2013 prior written notice letter, did not result in a denial of FAPE to Student. Further, the evidence showed that Student was not denied a FAPE, either as a result of District's proposed reduction of Student's speech and language consultative services in the April 19, 2013 IEP, or as a result of District's agreement to reinstate the speech and language consultative services to the 2012-2013 levels as requested by Parents. Even though the additional services were not required to offer a FAPE, District hoped to obtain Parents' consent to the IEP, and thus offered the additional speech and language consultative services' time. Between May 2013 when the IEP offer was made, and June 5, 2013 when the 2013 IEP offer was clarified and/or revised through the prior written notice letter, the 2013 IEP was never relied upon or implemented, and the school year ended

with Student's last operative IEP in place. The services in the April 2012 IEP were substantially similar to those that District offered in its 2013 IEP.

26. Third, the prior written notice letter provided Parents with the dates, times, location and the total services times for Student's 2013 summer school services/program that Parents had declined at the May 13, 2013 IEP team meeting. While Student's 2013 IEP indicated that Student was eligible for the 2013 summer school services and that District was offering the services, the 2013 IEP did not contain the above specific details about the summer school services because the team did not discuss the services further after Parents indicated that Student would not be participating in the program. Therefore, the above details regarding the dates, times, location and the total services times for the 2013 summer school program were first presented to the Parents in the June 5, 2013 prior written notice letter.

27. As discussed above, even if a procedural failure is found as a result of these facts relating to the details of the 2013 summer school program first contained in the prior written notice letter, a denial of FAPE was not found. The totality of the evidence showed that Parents were notified of, and were part of the decision regarding Student's 2013 summer school services. They were given the opportunity to provide input and object to the decision regarding the program. The evidence showed that parents had knowledge of, and participated in educational decision relating to the 2013 summer school services for Student, and their rights to fully and meaningfully participate were not impaired or impeded. Overall, whatever procedural violation occurred, if any, regarding Student's 2013 summer school services' offer, as detailed in the June 5, 2013 prior written notice letter or the 2013 IEP, did not result in a denial of FAPE to Student under the IDEA. Finally, the evidence failed to establish a denial of FAPE between May 13, 2013, when the 2013 IEP was concluded and June 5, 2013, when District re-offered the declined services and provided details to parents through its prior written notice letter. The additional information provided to Parents in the June 5, 2013 prior written notice letter, regarding Student's 2013 summer school services, did not result in a denial of FAPE to Student as discussed above.

28. Based on the totality of the evidence and while incorporating Legal Conclusions 1 through 8 and 11 through 21, District's June 5, 2013 prior written notice letter did not require a further IEP team meeting due to its correction of typographical errors in the 2013 IEP, and/or its offer to reinstate Student's speech and language consultative services back to the amount requested by Parents. These issues were thoroughly discussed during Student's 2013 annual IEP review meetings. Lastly, the evidence showed that the 2013 summer school services' offer was not fully discussed or developed during the 2013 annual IEP review for Student because Parents had declined the offer during the 2013 annual IEP team meetings. However, as discussed above, a denial of FAPE was not established because the prior written notice letter provided Parents with additional information regarding District's 2013 summer school program offer for Student. The evidence failed to show that parental rights to meaningfully participate were impeded, or that a loss of educational benefit occurred regarding Student due to these facts. Therefore, the revised and modified offer

continued to be reasonably calculated to provide Student with educational benefits, and thus continued to constitute a FAPE in the least restrictive environment for Student.

ORDER

District's 2013 IEP offer and June 5, 2013 prior written notice offer constitute an offer of FAPE in the least restrictive environment for Student. If Student wishes to access public education, District may implement Student's 2013 IEP, as corrected and revised in the prior written notice letter dated June 5, 2013.¹⁷

PREVAILING PARTY

Pursuant to 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 prevailed on both issues presented.

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: December 23, 2013

/s/
ADENIYI A. AYOADE
Administrative Law Judge
Office of Administrative Hearings

¹⁷ This Decision does not make any findings regarding the matter currently upon appeal that may affect Student's placement and services at the time of issuance of this Order.