

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

CASE NO. 2022080234

FRUITVALE SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

DECISION

October 11, 2022

On August 9, 2022, the Office of Administrative Hearings, called OAH, received a due process hearing request from Fruitvale School District, called Fruitvale, naming Student. Administrative Law Judge Cynthia Fritz heard this matter via videoconference on September 7, 9, 13, and 14, 2022.

Attorney James Simson represented Fruitvale. Director of Special Education Dr. Becky Rocha attended all hearing days on Fruitvale's behalf. Attorney Janeen Steel represented Student. Parent attended all hearing days on Student's behalf.

At the parties' request, OAH continued the matter to October 3, 2022, for closing briefs. On October 3, 2022, the record closed and the matter was submitted.

ISSUE

Did Fruitvale's May 17, 2022 individualized educational program, called an IEP, offer Student a free appropriate public education, or FAPE, such that Fruitvale may implement it without parental consent?

JURISDICTION

This hearing was held under the Individuals with Disabilities Education Act, called IDEA, its regulations, and California statutes and regulations. (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 to ensure:

- 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 further education, employment, and independent living, and
- the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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, assessment, 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 (2006); Ed. Code, §§ 56501, 56502, and 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, and has the burden of proof by a preponderance of the evidence. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *Schaffer v. Weast* (2005) 546 U.S. 49, 57-58, 62 [126 S.Ct. 528, 163 L.Ed2d 387]; 20 U.S.C. § 1415(i)(2)(C)(iii).) Accordingly, Fruitvale bears the burden of proof. The factual statements in this Decision constitute the written findings

of fact required by the IDEA and state law. (20 U.S.C. § 1415(h)(4); Ed. Code, § 56505, subd. (e)(5).)

Student was eight years old and in the third grade at the time of hearing. Student resided with Parents within Fruitvale's geographic boundaries at all relevant times. On June 2, 2017, Student qualified for special education and related services, and is special education eligible under the categories of speech and language and other health impairment. Student enrolled in Fruitvale in October 2018.

Student's needs include expressive language, articulation, health, reading, writing, social-emotional, and behavior. Student's behavior intervention plan addresses disruptive and aggressive behaviors.

Student suffers from autonomic neuropathy with a seizure history, orthostatic hypotension, and gastroparesis. Student's gastroparesis required a gastronomy tube for feeding and specialized nursing services while at school. Since spring 2022, Student's health needs decreased as Student no longer has a gastronomy tube, but began choking while eating, requiring continued feeding supervision while at school.

DID FRUITVALE'S MAY 17, 2022 IEP OFFER STUDENT A FAPE, SUCH THAT FRUITVALE MAY IMPLEMENT IT WITHOUT PARENTAL CONSENT?

Fruitvale contends its May 2022 IEP offer to Student, which spanned over two meeting days, on May 17, and 24, 2022, legally complied with all procedural and substantive IDEA requirements. Thus, Fruitvale argues, the offer should be implemented despite the lack of parental consent.

Student asserts Fruitvale's May 2022 IEP offer failed to comply procedurally and substantively with the IDEA. Specifically, Student maintains Fruitvale predetermined

placement; offered unmeasurable goals; failed to make a clear written offer; failed to have a general education teacher at the May 24, 2022 IEP team meeting; and failed to offer appropriate academic, social, and behavior services and supports. Therefore, Student maintains, the May 2022 IEP did not offer Student a FAPE, and should not be implemented without parental consent.

In general, a child eligible for special education must be provided access to specialized instruction and related services which are individually designed to provide educational benefit through an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. (*Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201-204 (*Rowley*); *Endrew F. v. Douglas County School Dist. RE-1* (2017) 580 U.S. 386 [137 S.Ct. 988, 1000].)

A FAPE means special education and related services that are available to an eligible child that meets state educational standards at no charge to the parent. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006).) Parents and school personnel develop an IEP for an eligible student based upon the IDEA and state law. (20 U.S.C. §§ 1401(14), 1414(d)(1); Ed. Code, §§ 56031, 56032, 56341, 56345, subd. (a), and 56363 subd. (a); 34 C.F.R. §§ 300.320 (2007), 300.321 (2006), and 300.501 (2006).)

In general, an IEP is a written statement for each child with a disability that is developed with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and the student's special education program and related services. (20 U.S.C. §1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).) If the parent refuses to consent to an IEP program component necessary to provide student a FAPE, after previously consenting to special education for the student, the local educational agency must file a due process hearing request. (Ed. Code, § 56346, subd. (f).)

Here, Fruitvale held an IEP team meeting on May 17, 2022, that was continued to May 24, 2022, and offered Student a special education program. On August 9, 2022, the date Fruitvale filed its due process hearing request, Parent had not consented to the May 2022 IEP offer. However, before the hearing commenced, Parent consented to it except for the one-to-one aide support offer.

Courts routinely determine whether a district offers FAPE by looking at all IEP components. Under *Rowley*, an IEP provides a FAPE if it offers a child access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Rowley, supra*, 458 U.S. at pp. 203-204.) It is the “individualized education program,” not some portion of it, which must be reasonably calculated to confer benefit. (*Ibid.*) The IEP has been described by the Supreme Court as the “modus operandi” of the IDEA; and “a comprehensive statement of the educational needs of a handicapped child, and the specially designed instruction and related services to be employed to meet those needs.” (*School Comm. of Town of Burlington, Mass. v. Department of Educ.* (1985) 471 U.S. 359, 368 [105 S.Ct. 1996].)

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.) In *Gregory K. v. Longview School District*, (9th Cir. 1987) 811 F.2d 1307, the court acknowledged the need to evaluate the full educational program being offered to determine whether the student had been offered a FAPE. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of school district’s proposed educational program, not that preferred by the parent. (*Ibid.*)

These cases and their progeny consistently recognize the interrelationship of all the IEP elements in providing FAPE. Accordingly, despite the parties' dispute centering around aide support, as this is a school district filed case, all components of Fruitvale's May 2022 IEP offer must be analyzed for legal compliance to establish that it can be implemented without parental consent.

A student may challenge a single element of their IEP because the student is asserting a FAPE denial due to a potentially fatal defect in one of its elements. However, proof that one element of a program is appropriate does not prove that the entire program is an offer of FAPE. Thus, the singular focus in this Decision is whether Fruitvale established that it complied with the IDEA's procedural, and if so, substantive legal requirements when it made its FAPE *offer* to Student such that it can be implemented over parental objection. No determinations are made in this Decision whether Student was denied a FAPE in any respect as would be at issue in a student filed case where the student has the burden of proof.

The legal analysis of a school district's IDEA compliance consists of two parts. First, the tribunal must determine whether the district has complied with the IDEA procedures. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid; Andrew F., supra*, 137 S.Ct.at p. 1000.) Procedural inadequacies such as denying meaningful IEP parental participation in the IEP formulation process deny student a FAPE. (*Amanda J. v. Clarke County Sch. Dist.* (9th Cir. 2001) 67 F.3d 877, 892.)

IEP PROCEDURAL LEGAL COMPLIANCE

The IDEA and state law delineate numerous procedural IEP team meeting and IEP document requirements. The school district must notify the parents of the IEP team meeting early enough to ensure that they will have an opportunity to attend and schedule the meeting at a mutually agreed upon time and place. (34 C.F.R. § 300.322(a) (2006).) The IEP team meeting notice must indicate the purpose, time, and meeting location, and who will be in attendance. (34 C.F.R. § 300.322(b)(1)(i) (2006).)

The IEP team meeting must include one or both of the student's parents or their representative; a regular education teacher if a student is, or may be, participating in the regular education environment; a special education teacher; a school district representative who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about available resources; and an individual who can interpret assessment results and its instructional implications. (34 C.F.R. § 300.321(a) (2007).) At the school district or parent's discretion, the meeting may also include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a) (2007).) Whenever appropriate, the disabled child should also be present. (34 C.F.R. § 300.321(a) (2007).)

The IEP document for each disabled child must include a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2007).) It must also contain a statement of measurable annual goals. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2007).) An IEP must further include a statement of the special education, related services, and supplementary aids and services, based on peer-reviewed research to the

extent practicable; and program modifications or supports that will be provided to the student to advance in attaining the goals, make progress on the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4) (2007); Ed. Code, § 56345, subd. (a)(4).) The IEP document must include the information designated in title 20 United States Code section 1414(d)(1)(A)(i) and that information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d) (2007); Ed. Code § 56345, subds. (h) and (i).)

In developing the May 2022 IEP offer, Fruitvale complied with several of the procedural IDEA and state law requirements. Fruitvale provided Parent an appropriate IEP team meeting notice and procedural safeguards. And the IEP document included a statement of present levels of performance, offered an education program that included related services and accommodations, and delineated Student's level of interaction with non-disabled peers.

Fruitvale, however, failed to prove that it procedurally complied with the IDEA in other areas, including offering measurable goals and making a clear FAPE offer. The IDEA places great importance on procedural compliance. "When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g., §§ 1415(a)-(d), as it did upon the measurement of the resulting." (*Rowley, supra*, 458 U.S.

at pp. 205.) As discussed more fully below, Fruitvale did not meet its burden of proof that it complied with several procedural rules.

While the parties principally disputed the adequacy of the aide support offer, this Decision does not reach a determination on that substantive claim because Fruitvale failed to meet its burden of proving that its May 2022 IEP procedurally complied with the IDEA and state law. When an IEP offer fails as a matter of procedure, no further exploration of the substantive appropriateness need take place. (*W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485; superseded by statute on other grounds as stated in *J.K. v. Missoula County Public Schools*, (9th Cir. 2018) 713 Fed. Appx 666.) Thus, a substantive analysis under the two-part inquiry is not required.

FRUITVALE FAILED TO PROVE THAT IT OFFERED MEASUREABLE GOALS IN
READING, WRITING, SOCIAL SCIENCE/SCIENCE, AND COMMUNICATION
AT THE MAY 2022 IEP TEAM MEETINGS

Fruitvale contends that it offered Student measurable goals at the May 2022 IEP that enabled Fruitvale's providers to measure Student's progress and understand Student's current educational needs. Student asserts that the reading, writing, and social science/science goals were unmeasurable, such that they impeded the providers' ability to accurately measure Student's progress on those goals, understand Student's needs, offer appropriate placement and services, and allow for meaningful parental participation in the IEP decision-making process.

School districts must develop measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education

curriculum, and meet each of the child's other educational needs that result from the child's disability; how progress toward meeting annual goals will be measured, and when the periodic progress reports will be provided. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (2007).) The goals must also meet each of the student's other educational needs that result from the disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Measurement can be ordinal or quantitative as long as it is consistent. (*Capistrano Unified Sch. Dist. v. S.W.*, 21 F.4th 1125, 1134-1135 (9th Cir. 2021).) The purpose of annual goals is to permit the IEP team to determine whether the student is making progress in an area of need. (Ed. Code, § 56345, subd. (a).)

At the May 2022 IEP team meeting, the IEP team developed 11 goals for Student to work on over the next 12 months in the areas of math, reading, writing, science/social studies, social-emotional, and communication. Fruitvale failed to establish that six of the offered goals were measurable.

Goal two addressed reading and stated that by May 17, 2023, after reading a passage or being read to, Student would identify the main idea of text, with guidance (e.g.; modeling, visual cues, verbal prompts) with 70 percent correct each opportunity as measured by work samples and observation record. As stated, Fruitvale's assessment data revealed, and Fruitvale's staff agreed, that Student has significant needs in reading. In May 2022, Student could identify the main idea of a text with guidance with zero percent correct using work samples and observation data. However, it is unclear how many opportunities Fruitvale would give Student and how many opportunities were required to meet this goal. Thus, as written, the ambiguity in the goal leaves Student's providers guessing as to how many opportunities to give Student and what is needed to make progress on this goal. Therefore, Fruitvale failed to show that goal two in reading was measurable.

Goal four described that by May 17, 2023, given written prompts, Student will, with guidance and support from adults, produce writing in which the development and organization are appropriate to task and purpose with 75 percent correct each opportunity as measured by work samples. As of May 2022, Student could write sentences using sight words and manipulatives. The goal, however, does not define what “produce writing” means and does not set forth what skill Fruitvale is attempting to address. Thus, measuring progress on this goal is impossible as described without knowing what is supposed to be measured. Further, much like goal two, this goal failed to explain how many opportunities Fruitvale would give Student and how many opportunities were required to reach the goal. Fruitvale failed to establish that goal four was measurable.

Goal five addressed science and social studies. Fruitvale explained the reason for the goal was to enable Student to participate in science and social studies and pass with a C grade or better each quarter. Essentially, Fruitvale asserted Student had both science and social studies needs that result from his disability. The goal stated that by May 17, 2023, each quarter, given core curriculum materials in a shared reading setting, Student would participate in lessons by copying notes, giving answers when called upon, and participating in group work while making measurable progress toward the acquisition of grade level social studies and science standards by maintaining a passing grade of a C or better each quarter as measured by work samples and observation record. The baseline described that Student enjoyed these classes but struggled with copying notes.

The goal failed to measure what was at issue in the baseline data, Student’s struggle with copying notes, and failed to assist in developing this skill. Student could meet this goal with a C grade in science and social studies without any improvement in

copying notes because there is no mechanism in the goal to check for that skill. Further, Fruitvale failed to include any process to monitor Student's improvement in copying notes. Thus, Fruitvale failed to show that this goal is measurable and appropriately improves the skill at issue in the baseline data.

Further, the goal encompassed two different areas of need, social studies and science. By combining two school subjects into one goal, it rendered the goal vague as written. The goals must also meet each of the student's other educational needs that result from the disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) It should have offered separate goals for each school subject with separate baselines and progress measurements so that it could have effectively created strategies to target each school subject. Instead, it wrote an ambiguous and generic goal that failed to measure any specific skill. Additionally, Student could have met the goal in one subject and not the other subject causing confusion as to how to accurately measure and record progress on the goal. For all these reasons, Fruitvale failed to demonstrate that Student's goal five was measurable.

Fruitvale also offered three communication goals. Student's goal eight stated that by May 17, 2023, Student would articulate the "r" and "th" sounds in sentences with 80 percent accuracy. The goal would be measured based on the speech and language pathologist's recorded data. Student's baseline data showed that Student articulated "r" sounds with 50 percent accuracy in May 2022.

Student's goal nine, described that by May 17, 2023, Student would complete complex sentences using past tense verbs when given a dependent clause with 80 percent accuracy. The goal would be measured based on the speech and language pathologist's recorded data. Student's baseline data showed that Student created

complex sentences when given a dependent clause with 25 percent accuracy in May 2022.

Student's goal 10, explained that by May 17, 2023, Student would give a plausible reason why Student or the characters behaved the way they did when discussing a situation from a story, video, or real-life event with 80 percent accuracy. The goal was measured based on the speech and language pathologist's recorded data. Student's baseline data revealed that that Student gave a plausible reason for why Student or a character behaved the way they did in a given situation with 33 percent accuracy in May 2022.

Here, Fruitvale failed to include a mechanism to measure each communication goal. Specifically, each communication goal failed to include a measure, such as a specific number of trials, sessions, or opportunities that Student would be given, to determine Student's percent accuracy when testing goal progress. Michael White, Fruitvale's speech and language pathologist, who drafted the goals, conceded at hearing that a specific number of trials should have been included in the communication goals to quantify Student's progress. As written, a provider is left to guess how these goals should be measured. Thus, Fruitvale failed to show that its offered communication goals eight, nine, and 10, were measurable. Because it failed to establish that six of the offered goals were measurable, it also failed to show that it allowed for meaningful IEP parental participation.

The remaining five goals were measurable. Those included a subtraction goal, one reading goal, and three social emotional goals. Despite the five measurable goals, Fruitvale failed to comply with the IDEA because it failed to meet its burden of proving that the other six goals it offered in reading, writing, social science/science, and communication were measurable.

FRUITVALE FAILED TO PROVE THAT IT MADE A CLEAR WRITTEN OFFER TO STUDENT FOR SPECIALIZED ACADEMIC INSTRUCTION, INTENSIVE INDIVIDUALIZED SERVICES, SPEECH AND LANGUAGE, AND COUNSELING SERVICES

Fruitvale maintains its IEP offer of special education and related services was clear, and Parent understood it. Student asserts the specialized academic instruction offer failed to describe what subjects or areas of need the instruction would cover with Student. The offer for intensive individualized services was unclear because it did not specify when and in what setting Student would receive the one-to-one aide support. And the speech and language and counseling services did not specify if it was group or an individual delivery service model. Because of these ambiguities, Student argues the IEP offer was unclear.

An IEP also requires a clear written placement offer to Student. (*Union Sch. Dist. v. Smith* (9th Cir. 2004) 15 F.3d 1519, 1526 (*Union*)). The requirement for a clear specific written placement offer "should be enforced rigorously" as it creates a clear record to help eliminate factual disputes. (*Union, supra*, 15 F.3d 1519 at p. 1526.) It also assists the parents in presenting complaints with respect to any matter relating to the educational placement of the child and whether to reject or accept the placement and related services. (*Ibid.*; *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 459-460.)

Courts have applied this approach not only to placement offers but also to related services offers. (See, *Knable ex rel. Knable v. Bexley Sch Dist.*, 238 F.3d 755, 769 (6th Cir. 2001); *Bend LaPine Sch. Dist. v. K.H.*, No. CIV 04-1468-AA, 2005 WL 1587241, at 10 (D. Or. June 2, 2005), *aff'd sub nom. Bend -Lapine Sch. Dist. v. K.H.*, (9th Cir. 2007) 234 Fed.Appx. 508 (nonpub. opn.).) The IEP must specify the projected date for the

beginning of the services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); (34 C.F.R. § 300.320(a)(7) ((2007); Ed. Code, § 56345, subd. (a)(7).)

An IEP embodies a binding commitment and provides notice to both parties as to what services will be provided to the Student during the IEP period covered. (*M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1197.) Parents must be able to participate in both the IEP formulation and enforcement. (*Id.* at p. 1199.) Insufficiently specific drafting; however, renders the IEP a useless blueprint for enforcement. (*Ibid.*) Here, Fruitvale failed to establish that it made clear offers to Student for specialized academic instruction, intensive individual services, speech and language, and counseling at the May 17, and May 24, 2022 IEP team meetings.

SPECIALIZED ACADEMIC INSTRUCTION

Specialized academic instruction, sometimes called specially designed instruction, means adapting, as appropriate to the needs of the disabled child, the content, methodology, or delivery of instruction, to address the unique needs of the child that result from the child's disability, and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. (34 C.F.R. § 300.39(b)(3) ((2006).) The May 2022 specialized academic instruction IEP offer to Student was:

- From May 25, 2022, through the end of the 2021-2022 school year, 190 minutes daily of specialized academic instruction in a Fruitvale special day class; and,
- From June 6, 2022, through July 1, 2022, and August 16, 2022, through May 17, 2023, 240 minutes daily of specialized academic instruction in a Fruitvale special day class.

The May 2022 IEP document failed to explain or describe the specialized academic instruction minutes any further, including what areas of specialized academic instruction were covered in the offer. The IEP also failed to include the academic subjects covered in the special day class. The only description in the IEP document of any specifically named academic subject was the reading rotation program, Fruitvale's "Walk to Learn" program offered to Student in the general education setting which did not include any specialized academic instruction. Thus, as written, it is unclear as to what type of specialized academic instruction Student would receive in the special day class and if it met Student's unique needs considering Student's severe deficits in reading and writing.

Specialized academic instruction is an instruction delivery model that can encompass numerous school subject areas and areas of need. It was not until the time of hearing that it was revealed that the daily specialized academic instruction in Student's special day class would include some reading and writing. However, there was no way for the individual implementing the specialized academic instruction or Parent to have understood what was encompassed in the specialized academic instruction offer as written. This is further confused because the IEP document sets forth reading being addressed in the general education setting through the reading rotation program only and not in Student's special day class. Thus, Fruitvale's failed to prove that its specialized academic instruction offer to Student was clear.

INTENSIVE INDIVIDUALIZED SERVICES

Fruitvale described Student's intensive individualized services as one-to-one aide support for Student's behavior and feeding needs. As of May 2022, Student required a behavior intervention plan for aggressive and disruptive behaviors at school. Student also needed supervision during feeding because Student choked at times while eating.

The May 2022 intensive individualized services offer to Student was:

- From May 25, 2022, through the end of the 2021-2022 school year, and August 16, 2022, through May 17, 2023, 105 minutes daily of intensive individualized services provided by Fruitvale; and,
- From June 6, 2022, through July 1, 2022, 15 minutes daily of intensive individualized services provided by Fruitvale.

In the IEP notes, it further described the intensive individualized services were needed during feeding and unstructured times and would take place during Student's Walk to Learn, lunch, and recess. In the General Education Participation Plan portion of the IEP, it described the general education reading rotation or Walk to Learn program, as 400 minutes weekly and lunch and recess as 65 minutes daily, amounting to 145 minutes total daily. Fruitvale's offer, however, specified only 105 minutes daily for intensive individual services, not the 145 minutes daily, and failed to explain what portions of Walk to Learn, lunch, and recess would include the one-to-one aide support and what portions of Walk to Learn, recess, and lunch would not. This would be important for the person implementing the service and Parent to know and understand since this was a highly contested issue among the parties.

Parent believed that Student needed full day aide support as offered in the previous school year while Fruitvale staff opined that Student needed to be tapered off aide support and given more opportunities for independence. According to the information Fruitvale had at the time of the May 2022 IEP, Student's behaviors were severe and occurred across several settings including Walk to Learn, reading, and unstructured time, and disrupted 36 percent of the time with incidents lasting up to 15 to 30 minutes. The one-to-one aide support offer failed to encompass all of Student's Walk to Learn, reading, and unstructured times. Thus, Fruitvale's clarification of the

intensive individual services offer in the IEP notes was inadequate as Parent was still without specific information as to when the aide would be present with Student in school. Thus, Fruitvale failed to prove that its intensive individual service offer was clear.

GROUP VERSUS INDIVIDUAL SPEECH AND LANGUAGE AND COUNSELING SERVICES

Related services means transportation and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26).) Related services include speech and language pathology, and counseling services. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a) (2006).) As of May 2022, Student had receptive and articulation speech and language needs and required counseling for Student's social-emotional needs.

In May 2022, Fruitvale offered Student:

- From May 25, 2022, through the end of the 2021-2022 school year and August 16, 2022, through May 17, 2023, 120 minutes of monthly speech and language services provided by Fruitvale; 60 minutes monthly of counseling and guidance provided by Fruitvale, and 80 minutes monthly of individual educationally related mental health services provided by the special educational local planning area.
- From June 6, 2022, through July 1, 2022, 90 minutes of monthly speech and language services provided by Fruitvale.

Except for the educationally related mental health services, the other counseling and all speech and language service offers failed to state if the services were in a group versus an individual setting, or a combination of the two settings. The same is true for Fruitvale's 2022 extended school year service offer, as it also failed to specify the delivery model for the speech and language service offer. An individual setting means

that the provider only works with the one student when providing the service, while in a group setting, the provider delivers services with a small group of students at the same time.

A school district's failure to specify the service delivery model is an IDEA procedural violation when it fails to commit to a particular means for providing the services, like delineating them as individual or group, such that the service's nature is insufficiently specific to give notice to the parent of what the school district plans to provide to the student. (*Tamalpais Union High Sch. Dist. v. D.W.* (N.D. Cal 2017) 271 F.Supp.3d. 1152, 1160-1161 (*Tamalpais*) [FAPE denial by specifying services as a combination of group and individual without further description]; *S.H. v. Mount Diablo Unified Sch. Dist.* (N.D. Cal. 2017) 263 F.Supp.3d 746, 769 (*Mt. Diablo*) [FAPE denial by failing to specify whether services were group or individual].) However, a recent district court case found that a school district need not specify if the IEP service is group or individual because it held that the type of service as group or individual is a methodology left to the discretion of the school district. (*L.A. Unified Sch. Dist. v. A.O.*, (C.D. Cal., Jan. 26, 2022, No. 2:21-cv-00757-ODW (PDx)) 2022 U.S. Dist. LEXIS 15488, *9 (*A.O.*)). In support of its departure from the Ninth Circuit's holdings regarding methodology, *A.O.* cited *Crofts v. Issaquah Sch. Dist. No. 411* (9th Cir. 2022) 22 F.4th 1048(*Crofts*).

Crofts held "[O]nce a court determines that the requirements of the [IDEA] have been met, questions of methodology are for resolutions for the States." (*Crofts, supra*, 22 F.4th at 1056, quoting *Rowley, supra*, 458 U.S. 176, at p. 208.) However, the *Crofts* case had nothing to do with the service delivery model, such as group versus individual services. Rather, it dealt with the specific curriculum that the school district used with student. In particular, the methodology dispute in *Crofts* centered around the school

district's use of a variety of reading programs when instructing the student and the parent preference and requests to utilize the Orton-Gillingham approach, an instructional reading method that the parent believed would be best for a student with dyslexia. (*I.d.* at 1052.) The school district denied the parent's request stating that it had already chosen research and evidence-based curriculums and methodologies in reading for student, and a due process hearing ensued. (*Ibid.*)

At the hearing, Student's dyslexia expert recommended the school district utilize the Orton-Gillingham approach for student at school. (*Crofts, supra*, 22 F.4th at 1052.) However, the administrative law judge found for the school district and subsequently the district court granted summary judgment for school district and upheld the administrative law judge's order. (*I.d.* at 1052-1053.) Regarding student's argument that student would have progressed more using the Orton-Gillingham approach, the Ninth Circuit affirmed, and held that the school district is not required to use the methodology a parent prefers when providing special education services. (*I.d.* at 1056.)

The *Crofts* holding regarding methodology is wholly distinguishable from *A.O.* in that it aligns with well-settled law in the Ninth Circuit that curriculum as methodology is left to the discretion of the school district. *Crofts* also does not support Fruitvale's argument that its failure to give Parent notice of the service delivery model as group versus individual is a methodology and therefore controlled by the school district, and not a procedural violation. In fact, the Ninth Circuit has not held that the delivery service models, group versus individual, is methodology. And other district courts case holdings contradict the ruling in *A.O.* as well. (See, *Tamalpais, supra*, 271 F.Supp.3d. at 1160-1161; *Mount Diablo, supra*, 263 F.Supp.3d at 769.)

In *J.L. v. Mercer Island Sch. Dist.*, (9th Cir. 2010) 592 F.3d 938, 945 (*Mercer Island*), cited by *Crofts* and in Fruitvale's closing brief, the methodology dispute focused on

parents' request to use a private school's curriculum in student's program at the school district, and to name a particular teaching methodology to be utilized by all teachers for student. The school district did not agree to parents' request. (*Ibid.*) In *Mercer Island*, the court held that the school district need not specify a specific teaching methodology in the IEP for some students, because a single methodology would not always be effective and the teachers needed flexibility. (*I.d.* at 952.) However, the court's holding related to a student's curriculum and not whether student would receive a particular service delivery model, individually or group services.

In *R.P. ex rel. C.P. v. Prescott Unified Sch. Dist.* (9th Cir. 2011) 631 F.3d 1117, (*Prescott*), cited in *Crofts* and in Fruitvale's closing brief, the methodology dispute centered on curriculum and programs, not the service delivery model. In *Prescott*, the parents complained that the school district failed to base its IEP on peer-reviewed research, and the teachers would pick and choose techniques they liked rather than utilize best practices that have demonstrated to be effective. (*I.d.* at 1122.) In particular, the parents disagreed with the methods selected for student, including the Discrete Trial Training, Applied Behavior Analysis, and TEACCH methods. (*Ibid.*) The court held that the IDEA accords educators discretion to select from various methods for meeting the individualized needs of a student, provided those practices are reasonably calculated to provide the student educational benefit. (*Ibid.*) Thus, the Ninth Circuit cases cited in *A.O.* and by Fruitvale in support of the proposition that a service delivery model, individual or group, is a methodology, is unsubstantiated and conflates curriculum and program techniques versus a service delivery model.

Assuming, however, that *A.O.* is correct, although a departure from the Ninth Circuit holdings regarding methodology, this case is distinguishable. Here, Fruitvale's speech and language pathologist White conceded at hearing that the speech and

language service offer could be delivered as group or individual services depending on what students were available that day as determined by the speech and language pathologist. This fact is uncontested as Fruitvale's closing brief concedes it. Thus, the decision regarding whether Student would receive individual or group services was not a methodical choice by the service provider or the IEP team based upon Student's speech and language needs. And it was not to allow teacher's flexibility with Student for the more effective approach, as held in *Mercer Island*. Rather, it depended on other students' schedules and at the sole discretion of the speech and language pathologist, outside of the IEP process.

Not only is a Student's IEP offer supposed be based upon the student's unique individual needs, and not at the mercy of what other students are available that day, but also the decision needs to be made by the IEP team, not the individual provider. Further, the decision to allow the speech and language pathologist to unilaterally decide to hold an individual or speech and language session with Student was not based on any flexibility to find the most effective approach for Student, but rather other student's schedules. Because Student has significant expressive speech and language and articulation needs, the IEP team, including Parent, should have had notice of the type of delivery service model, group or individual, or the combination of both, that Student would be offered and the opportunity to discuss this before consenting to the IEP. Group and individual speech and language services are much different, and work on different communication skills, and Student may have more success with one or the other, or a combination of both, depending on Student's individual needs.

Also concerning is the fact that Fruitvale cannot guarantee that White would be Student's speech and language pathologist in the future. Accordingly, a different speech and language pathologist would not know how to implement Student's speech

and language services consistent with White's understanding. Fruitvale could have further described the speech and language services in the May 2022 IEP notes but failed to do so. Instead, the service description required Parent and any speech and language provider to guess what Fruitvale committed to provide Student in speech and language services.

Similarly, Fruitvale failed to establish the May 2022 IEP offered clear counseling and guidance services. At hearing, the evidence revealed Fruitvale intended to provide individual counseling and guidance services. However, the May 2022 IEP did not clearly enumerate the delivery model of these services. Consequently, Parent and any provider did not have sufficient information at the IEP team meeting to give input, as group counseling services are vastly different than individual counseling services.

Additionally, Fruitvale also offered Student individual educationally related mental health services counseling through the special education local planning area. However, Fruitvale failed to explain to Parent the difference between the two separate counseling services offered and why two different counseling services were necessary for Student to receive a FAPE. At hearing, the evidence established that Fruitvale intended for both to be delivered individually and work with Student's coping skills to assist with Student's behavior and work on other behavioral needs. Given this explanation, it is unclear why both counseling services were working on some of the same things. Parent and the providers should have been given more clarity regarding the two separate counseling services offered as some would argue two separate individual counseling services could lead to inconsistency. No consultation services were offered for these different service providers to interact to ensure they provided complimentary and not conflicting services. Further, Parent or another IEP team member may not have agreed that two separate individual counseling services were

appropriate and why Student should be pulled out of class for redundant services. However, since the counseling services offered to Student that would be provided by Fruitvale failed to specify that it was an individual counseling service, Parent and other IEP team members would not know to ask why Student was offered two separate individual counseling services with two different providers. Parent and the IEP team needed this information to enable them to discuss the pitfalls and positives of separate individual counseling providers for Student.

These examples demonstrate why the unspecified service delivery model in Student's IEP offer caused confusion over the frequency and duration of the speech and language and counseling and guidance services. This rendered the offers too vague and ambiguous for Parent and providers to understand what Fruitvale actually offered in these areas.

Further, the speech and language offer was not based upon Student's unique needs, and the counseling and guidance offer appeared somewhat redundant of the individual educationally related mental health counseling without further clarity. Thus, this matter is distinguishable from *A.O.* Accordingly, Fruitvale failed to prove that it made a clear FAPE offer at Student's May 17 and 24, 2022 IEP team meetings regarding speech and language and counseling and guidance services.

Fruitvale failed to meet its burden of proving that it made a clear written FAPE offer at Student's May 17, and 24, 2022 IEP team meetings in the areas of specialized academic instruction, intensive individual services, speech and language services, and counseling services, and failed to show meaningful parental IEP participation.

Accordingly, Fruitvale failed to meet its burden in proving that its May 17, 2022 IEP continued to May 24, 2022, met the IDEA legal procedural requirements such that it

offered Student a FAPE and may implement it without parental consent. Because Fruitvale failed to establish procedural legal compliance of its May 2022 IEP offer under the IDEA and state law, no decision is reached regarding Student's further procedural argument regarding predetermination and the participation of a general education teacher at the May 24, 2022 IEP team meeting, and the IEP's substantive legal compliance.

CONCLUSIONS AND PREVAILING PARTY

As required by California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided.

Fruitvale failed to meet its burden of proving that its May 17, 2022 IEP, continued to May 24, 2022, offered Student a FAPE such that Fruitvale may implement it without parental consent. Student prevailed on the sole issue in this matter.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Under Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Cynthia Fritz

Cynthia Fritz

Administrative Law Judge

Office of Administrative Hearings