BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: MOTHER ON BEHALF OF STUDENT, v. ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT.	OAH CASE NO. 2017070292

DECISION

Student filed a request for due process hearing with the Office of Administrative Hearings on July 10, 2017, naming the Roseville Joint Union High School District. Administrative Law Judge Charles Marson heard this matter in Roseville, California, on September 6, 2017.

Martha A. Millar, Attorney at Law, represented Student. Student's Mother was present throughout the hearing.

Heather M. Edwards, Attorney at Law, represented Roseville. Craig Garabedian, Roseville's Director of Special Education Services, represented Roseville throughout the hearing.

At the conclusion of the hearing the matter was continued, at the parties' request, until October 16, 2017, for closing arguments. Student and Roseville filed their closing arguments on September 22 and October 16, 2017, respectively, and on the latter date the matter was submitted.

ISSUE

Did Roseville deny Student a free appropriate public education by failing to provide legally compliant prior written notice before withdrawing Student's special education and related services in November 2015?

SUMMARY OF DECISION

Student proved that his Father revoked consent for his special education and related services on November 4, 2015; that Roseville terminated his special education on November 5, 2015; and that Roseville provided prior written notice of the termination to his Father but not his Mother during a time in which his Parents were divorcing and living apart. Student also proved that the notice was not provided to either Parent a reasonable time before the termination was effected. Finally, Student proved that Roseville's failure to provide prior written notice to Mother deprived him of a FAPE because it deprived her of significant participation in decisions affecting his special education and deprived him of educational benefits. Student is awarded compensatory education accordingly.

FACTUAL FINDINGS

Jurisdiction

1. Student was a 14-year-old boy who resided with one or both Parents within the boundaries of Roseville at all relevant times. In April 2015, while he was in the eighth grade at the Roseville City School District's Cooley Middle School, he was made eligible for special education and related services in the category of other health impaired. His cognitive ability is average, but he has attention deficit hyperactivity disorder and narcolepsy and has great difficulty getting up in the morning in time for school.

2. In the spring of 2015 Parents legally separated, sold their home, and acquired different residences. They are now divorced. At all relevant times, however, they shared equally in the power to make educational decisions for Student, and Roseville was aware of their evolving domestic situation and new residence addresses.

3. In the summer of 2015, Parents enrolled Student in Roseville High School for ninth grade. On November 4, 2015, Father revoked his consent for Student's special education, and on November 5, 2015, Roseville terminated his special education and related services.

Student's Difficulties in Attending Class at Roseville

4. Student's education had suffered in eighth grade because he was unable to get to school regularly, and Parents had taken him to Dr. Amer Khan, a specialist in sleep medicine, for diagnosis and recommendation. Dr. Khan wrote a letter on June 2, 2015, stating that Student was being treated for severe hypersomnia and delayed sleep phase, was unable to wake up early enough to attend school, and should be placed on independent study until his symptoms could be better controlled. Parents agreed that Student needed a later start at school in order to accommodate his disability.

5. During his first few weeks at Roseville High, Student came to school less than half the time and produced no classwork or homework. He took classes in computer

applications, health and safety, and English and had one period in an academic lab, but received all F's and accumulated no credits toward graduation.

6. On August 31, 2015, Roseville held an individualized education program team meeting for Student which was attended by Father and, for most of the meeting, by Mother. The IEP team agreed to place Student in general education with 75 minutes a day of specialized academic instruction in a resource room, but his attendance continued to be poor, and he continued to have failing grades. Roseville staff had many discussions with Parents about his poor attendance.

Father's Revocation of Consent

7. Mother testified that about 8:00 a.m. on the morning of November 4, 2015, she went to the office of Jeff Clark, Roseville's Special Services Coordinator and Student's special education counselor, to discuss Student's situation.[1] She and Mr. Clark discussed whether Student could have a later start and be placed on independent study either at Roseville High, or at Roseville's Independence High School if he transferred there. Mr. Clark told her that Independence High was the only high school at which Student could have a later start, and the only one at which he could have independent study, but Mother told Mr. Clark that she did not approve of a transfer to Independence because Student needed more structure, not less. Mr. Clark stated that "kids at Independence High School don't have IEP's," so in order to accomplish a transfer to Independence High and independent study promptly, Parents would have to revoke their consent to Student's IEP. Mother adamantly refused and then left for work, not expecting that Student's IEP would be revoked. She did not find out until several weeks later that Father would revoke the IEP that same day.

8. Mr. Clark did not recall such a meeting that morning. On cross-examination, he was unable to recall any conversation with either Parent about Student having a later start at Roseville High. He "may have" discussed Student's program with Mother on the morning of November 4, 2015; he did not remember whether the discussion was in person. The meeting may have happened, he stated, but he did not recall it. He did not recall whether he spoke with her at all that day. Mr. Clark stated that he had many conversations with Mother, but Mother never told him she opposed revoking Student's IEP. If she had, he would have organized a conference with both Parents to see if they were "on the same page."

9. The preponderance of evidence supported the conclusion that Mother and Mr. Clark did have the conversation on November 4, 2015, that she described. Her memory of it was definite and detailed, while Mr. Clark's memory of the event was quite poor. Mr. Clark did testify definitely that Mother never told him she did not want the IEP revoked, but if he forgot the entire meeting, he could easily have forgotten that part of it. In addition,

[1] Mr. Clark has a bachelor's degree in criminal justice, and a master's degree in counseling from California State University at Sacramento. He is a credentialed school psychologist and counselor, and has worked for Roseville since he was credentialed in 2005.

the existence of the conversation as Mother described it would explain the next step Mr. Clark took, and nothing else in the record does.

10. On the morning of November 4, 2015, Mr. Clark telephoned Father and requested that he revoke his consent for Student's special education. Father testified that he vividly remembered a telephone conversation with Mr. Clark between 8:00 a.m. and 8:30 a.m. that morning. He remembered it because he was sitting in his car in the sun outside a facility of Sutter Health Medical (his employer) in downtown Roseville on his way to doing a special project when Mr. Clark called him and said that if he wanted his son to go to Independence High School, he had to revoke his IEP. Mr. Clark did not further explain. The conversation was very short and did not include any discussion of any other possibilities, such as whether Student could have a later start at Roseville High or could have changes made to his IEP. Since Student was "miserably failing" at Roseville High, Father thought he had no choice but to agree.

11. Father established that Mr. Clark called him again five minutes later to tell him that a written document with certain wording was required for the revocation, and gave him the exact wording to use. At approximately 9:41 a.m. that same morning, at Mr. Clark's request, Father sent an email to Mr. Clark from his telephone stating: "For my son [Student] to begin an independent study program at Independence HS, I am revocating [sic] my consent to his IEP, special services and all related services." The language he used in the revocation message was "coached" by Mr. Clark; Father never would have used such language on his own. Father trusted Mr. Clark, had a hard day of work ahead, and did not consider all the ramifications of the revocation.

12. Mr. Clark testified that he remembered his conversations with Father that morning somewhat differently. He stated that Father told him that he and Mother had decided Student was going to attend Independence High School. Mr. Clark reminded him of their previous conversations in which he had informed Father that the program at Independence could not support the goals or services in Student's IEP, and that Father "would need to revocate [sic] consent for special ed in order to attend that school without an IEP."

13. At the time, Mr. Clark testified, he wanted Student to remain at Roseville High. He never supported a transfer to Independence High, and told both Parents that. Mr. Clark testified further that some students at Independence High do receive special education, though it is infrequent. He did not tell Parents that it was impossible to receive special education at Independence High; he told them that Independence High could not, in his opinion, adequately service Student's IEP because its program lacked the needed structure, as it required students on independent study to appear at the school only once a week or at most twice. He believed that Student could therefore not receive the daily specialized academic instruction required by his IEP or receive help working on his goals of organization and work completion. The evidence showed that Mr. Clark was sincere in this belief, but either did not communicate it accurately to Parents or was misunderstood by them.

14. In seeking Father's revocation of Student's IEP, Mr. Clark did not consider convening an IEP team meeting or whether Student's IEP could have been amended rather than revoked.

The Prior Written Notice

15. Later on November 4, 2015, Mr. Clark wrote a prior written notice and put it in the United States mail, addressed to Father but not Mother. The notice memorialized Father's revocation of consent, explaining its consequences, and stated that, based on the revocation, Roseville would terminate Student's special education on the next day, November 5, 2015. The prior written notice gave Father only until November 5, 2015, to notify Roseville of any questions, comments or concerns about the revocation. Mr. Clark testified he chose that day for the termination because Father was eager to transfer Student and had an appointment at Independence to complete the transfer, and Mr. Clark wanted to help him expedite that. Pursuant to the prior written notice, Roseville terminated Student's special education and related services on November 5, 2015. The evidence showed that there was no pressing reason for Roseville to effectuate the transfer as quickly as it did; Father could easily have made another appointment.

16. Mother testified that she never received the prior written notice dated November 4, 2015, and Roseville does not offer any reason to doubt that testimony. Nothing in the prior written notice indicates it was directed to Mother as well as Father, although Mr. Clark was aware of Parents' new and separate addresses. Mr. Clark did not testify that he sent the notice to Mother, and Roseville did not produce a copy of any document that would suggest he did. The preponderance of evidence showed that Roseville did not send the prior written notice to Mother.

Student's Enrollment and Experience at Independence High School

17. On November 4, 2015, Father emailed Debbie Landis, an attendance official at Independence High, requesting an appointment for November 9. She agreed, but also responded that:

> Since your student is in Special Education classes you would fir E st need to schedule an IEP meeting with Jeff Clark. By law the student's individual Education Plan has to recommend independent study as an appropriate educational placement for the student given their learning disability.

Father, who had just revoked Student's IEP, did not understand that statement.

18. Ms. Landis also explained to Father that Independence had both independent study and small group classes, and expected students to attend two or three times a week "depending on how much help they need." She closed by observing that the school then had 185 students but only 7 percent of them were freshman "because they generally lack the maturity and commitment to complete 30 hours of homework each week on their own."

19. Father met Ms. Landis on November 9, 2015, and enrolled Student in independent studies through Independence High. Mother knew of the enrollment and cooperated with it, but she did not know until several weeks later that Father had revoked Student's IEP and that Student was no longer receiving special education of any kind.

20. Student was allowed to start classes at Independence later in the day than he had started at Roseville High. He had poor attendance at Independence at first, but improved in late fall. He studied math independently, passed physical education, and received C's and D's in Health and Wellness and Study Skills. Mother established that Student's grades improved somewhat at Independence because he got a later start and actually made it to some classes. At Independence he produced minimal work but accumulated 6.5 credits toward graduation, leaving him still needing more than 200 additional credits to graduate with a diploma. Student stayed at Independence through May 26, 2016, and then became the responsibility of a different local educational agency.

Consequences of Failure to Provide Prior Written Notice

21. Mother opined at hearing that Student's education at Independence High School would have been more successful if he had received the supports in his IEP there, especially the 75 minutes a day of specialized academic instruction and assistance with his goals of organization and work completion. Father expressed the same view at hearing. Mr. Clark indirectly supported the same view when he tried to discourage Student's transfer to Independence because it lacked sufficient structure and supports for him. The other evidence in the record confirms that Student would have been better educated at Independence with special education support, particularly in the academic subjects to which the specialized academic instruction in his IEP was directed and in organization and work completion.

22. Mother established in her testimony that if she had had adequate prior written notice of Father's revocation of Student's IEP and the resulting termination of his special education, there were many steps she would have taken to attempt to have that decision changed. She would have attempted to ensure that his IEP and supports would have remained in place either at Roseville or Independence. She would have complained to other district staff. She would have attempted to resolve what she understood as the conflicting information from Mr. Clark and Ms. Landis about whether Student could have had an IEP at Independence. Mother established that by the time of hearing Student was enrolled in Woodcreek High School, also a district school, where he was given a later start with classes pursuant to a 504 plan rather than an IEP.[2] She now believes that Roseville High could have made that same accommodation in 2015, and the record reveals no reason it could not have.

[2] A 504 plan is an educational program created pursuant to Section 504 of the Rehabilitation Act of 1973. (29 U.S.C. § 794; see 34 C.F.R. § 104.1 et seq. (2000).) Generally, that Act requires a district to provide program modifications and accommodations to children who have physical or mental impairments that substantially limit a major life activity such as learning.

23. Mother established further that if she had had adequate notice of the proposed revocation, she would have met with Father to discuss other possible solutions. She had previously been working part-time, while Father worked full-time, and as a result she had been taking the lead role in dealing with Student's special education. She knew more about the IEP and the IEP process than Father did, and believed that Father would have benefited from her opinions on whether the IEP should be revoked. In his testimony, Father agreed that she knew more about the subject matter, and agreed that he would have benefited from further discussion with her.

24. The testimony of both Parents established that, in November 2015, they needed a significant period of time to work through their views and disagreements concerning Student's educational program. They were in the middle of contentious divorce proceedings. Father was working full time and had just moved out of his home of 17 years to an apartment. They were sharing custody of Student on alternate days and weekends. Mother had three other children at home, and had just started a new job. Mr. Clark's testimony showed he was generally aware of the difficulties Parents were having during their divorce.

25. Father did not understand Ms. Landis's email of November 4, 2015, which directly contradicted Mr. Clark's statements in important ways. In his mind the IEP team meeting had already been held. Given the confusion that existed at the time, he testified, he "absolutely" would have benefited from attending another IEP team meeting to discuss Student's placement and the proposed revocation of the IEP. He would have considered having Student remain at Roseville High if a later start could have been arranged.

26. Roseville argues that Father would never have changed his mind about revoking Student's IEP. In support of that argument it relies on an email he sent to Roseville staff on November 30, 2015, in which he addressed Student's failure to attend a truancy board meeting on November 12, 2015. In that email Father stated:

> [Student's] truancy problem has been an escalating problem for the last 2 years. From my perspective this problem has been significantly affected by what I consider an unhealthy focus by [Student's] mother on trying to arrive at a Medical diagnosis to explain [Student's] unacceptable behaviors. Under his mother's direction, [Student] has been under the care [of] a Psychiatrist for 3 years and a Sleep Specialist for over 1 year. Both of them have referred [Student] out of their care.

Father then expanded on his disagreement with Mother about the medical solution she had been seeking:

> I have personally met with all of [Student's] Health Care Providers and they agree that there is no medical reason which justifies his Truancy problem. Unfortunately, the years spent by his mother trying to discover a medical solution have resulted in enabling [Student] and leading him to believe that there is something significantly wrong with him. [¶] I have to take responsibility for perhaps being too trusting, too

> compliant and not being a more vocal opponent to [Student's] mother as she orchestrated a treatment plan which has not produced acceptable results.

Asked about this passage at hearing, Father explained that he was alarmed that Student had missed an important meeting and wrote the email in anger and frustration, and in order to take more responsibility for Student's educational program.

27. Roseville also argues that any failure of prior written notice was harmless because Mother was aware well in advance of the revocation there was a "plan" to revoke Student's IEP and transfer him to Independence. As proof, Roseville points to some notes made by Mr. Clark in October 2015 and to his testimony at hearing.

28. Since Student's attendance had not improved in September and October 2015, truancy proceedings had been started, and one or both Parents met several times with Roseville's Intervention Response Team to discuss the problem. The parties discussed the possibility that Student could be placed on independent study, though it is not clear that any agreement was reached. Mr. Clark was part of the Intervention Response Team. He made brief notes of the meetings in which he memorialized some conversations as he understood them. Mr. Clark's notes for the meeting of October 22, 2015 stated:

> According to mom and dad doctor is reccommending [sic] [Student] attended independence high school . . . Mr. Clark shared with parents they would need to revocate [sic] consent for the IEP in order to attend Independence as Independence HS does not have a special education program that can support [Student's] IEP goals. Dad shared he has no problem with [Student] coming off an IEP (he never wanted his son on an IEP in the first place) and mom shared she does not have a problem with it either but wanted to ask his therapist first.

At hearing, Parents disputed the accuracy of that note. Mother testified she did not make the statement attributed to her about asking the therapist, and Father testified that he was substantially less certain of the wisdom of ending Student's special education than Mr. Clark's note would suggest.

29. It is unnecessary to resolve this factual dispute, as even Mr. Clark's version of the conversation does not indicate the existence of a "plan" to revoke Student's IEP. At most, it shows that Mother intended to consider the option, and that Parents were not in agreement about the revocation. Father's alleged statement that he "had no problem with" revoking the IEP was well less than a definite statement that he was going to do it, especially when Mother wanted more time to consider it. Mr. Clark's notes of the meeting do not demonstrate that Father was determined to revoke the IEP even though Mother was not ready to take that step.

30. Mr. Clark did testify at hearing that he had discussed the possible revocation of Student's IEP with both Parents many times, and that he believed Father wanted to revoke it. However, he usually had these conversations with Parents separately, and he did not

unambiguously testify that he understood that Parents were in agreement with revoking the IEP.

31. On November 2, 2015, two days before Father revoked consent for Student's special education, an attendance clerk sent an email to Mr. Clark asking "Do you know if [Student] is coming back? He has been out for 3 weeks." Mr. Clark responded: "Yup I've been having daily contact with the family." That affirmative response is some evidence that, two days before the revocation, Mr. Clark did not expect that the IEP would soon be revoked, because he expected Student to return to Roseville High. In any event, Mother's visit to Mr. Clark's office on the morning of November 4, 2015, and her unambiguous statement that she would not agree to revoke the IEP, would have informed Mr. Clark that Parents still had not agreed on the revocation. The preponderance of evidence did not show there was a plan to revoke Student's IEP of which Mother was aware.

32. At the time he revoked Student's IEP, Father had not thought through the consequences of the revocation. It was apparent from his testimony at hearing that he now regrets the act and in retrospect may well not have done it. Father testified that he revoked the IEP "based on bad information, based on a lie . . ." His communications with Mother were poor because of tensions surrounding the divorce proceeding, and he was relying entirely on "the educators" to advise him of his options. He was not himself familiar with special education laws, procedures, or terminology. He knew, for example, that he had revoked Student's IEP, but not that Student would as a result receive no special education of any kind. He would have been open to other options if he had learned that they were available.

LEGAL CONCLUSIONS

Introduction: Legal Framework under the IDEA[3]

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);[4] 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 further education, 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).)

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

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

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 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 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 specifies the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. 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.)

4. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. __, 137 S.Ct. 988 [197 L.Ed.2d 335]. It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit a child to achieve passing marks and advance from grade to grade. (*Id*., 137 S.Ct. at pp. 995-996, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Endrew F., supra*, 137 S.Ct. at p. 1001.)

5. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6), (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) By this standard Student, as the filing party, had the burden of proof on all issues here.

6. A procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

Issue: Did Roseville deny Student a FAPE by failing to provide legally compliant prior written notice before withdrawing Student's special education and related services in November 2015?

7. The parties agree that Father had the lawful authority effectively to revoke his consent to Student's special education. A parent may revoke consent to special education at any time. (20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.9(c)(1); Ed. Code, § 56346, subds. (b)-(d).) The United States Department of Education has advised that such a revocation is effective even though the other parent opposes it (*Letter to Ward* (OSEP 2010) 56 IDELR 237), and that the district may not challenge the revocation by filing a request for a due process hearing. (34 C.F.R. § 300.300(b)(4)(ii); *Letter to Gerl* (OSEP 2012) 59 IDELR 200; *Letter to Cox* (OSEP 2009) 54 IDELR 60.)[5] Once consent is revoked, the district must terminate the student's special education and related services. (34 C.F.R. § 300.300(b)(4)(i).)

8. A school district must provide written notice to the parents of a pupil whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The requirement specifically applies to a parental revocation of consent. (34 C.F.R. § 300.503.) The notice must contain: (1) a description of the action refused by the agency, (2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal, (3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards, (4) sources of assistance for parents to contact, (5) a description of other options that the IEP team considered, with the reasons those options were rejected, and (6) a description of the factors relevant to the agency's refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b)(2006); Ed. Code, § 56500.4, subd. (b).)

9. The purpose of the prior written notice requirement is to ensure that parents receive sufficient information about the proposed placement change to reach an informed

[5] The parties dispute whether one parent can use IDEA's due process procedures to overturn the other parent's revocation of consent. The U.S. Department of Education has advised that such relief is not available. (*Letter to Cox*, *supra*.) It is not necessary to explore that dispute here because Student does not seek that relief.

conclusion about whether it will provide an appropriate education. (*Smith v. Squillacote* (D.D.C. 1992) 800 F.Supp. 993, 998.) The notice must be given "a reasonable time before" the district actually changes the student's placement or the provision of a FAPE to the student. (34 C.F.R. § 300.503(a).) This is to ensure that "parents have enough time to assess the change and voice their objections or otherwise respond before the change takes effect." (*Letter to Chandler* (OSEP 2012) 59 IDELR 110.) As the Department of Education has explained:

> Providing such notice a reasonable time before the public agency discontinues services gives parents the necessary information and time to fully consider the change and determine if they have any additional questions or concerns regarding the discontinuation of services.

(Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 73 Fed.Reg. 73006 (Dec. 1, 2008).)

10. The parties agree that the prior written notice requirement applied to Roseville's termination of Student's special education and related services on November 5, 2015. Student argues that Roseville violated the prior written notice requirement because it did not provide the notice to Mother as well as Father, and because the notice was not provided a reasonable time before the decision was put into effect.

ROSEVILLE DID NOT PROVIDE PRIOR WRITTEN NOTICE TO MOTHER

11. Prior written notice must be given to "parents," not just one of them. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a); *C.H. v. Cape Henlopen Sch. Dist.* (3d Cir. 2010) 606 F.3d 59, 70.) Roseville does not argue otherwise. It argues, however, that Student did not discharge his burden of proving that the notice was not provided to Mother because Roseville is entitled to the presumption of regularity; that is, as a governmental agency, it is presumed to have properly performed its lawful duties. (Evid. Code, § 664; see also Civ. Code, § 3529.)

12. It is not necessary to decide whether California's presumption of regularity applies in IDEA administrative litigation. If it does, the presumption was rebutted here. The presumption applies only "in the absence of a contrary showing . . ." (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 928), and an adequate contrary showing was made. Mother testified she did not receive the prior written notice, and nothing in the record contradicted her claim. Nothing in the notice indicated it was directed to Mother as well as Father. Mr. Clark did not testify that he sent the notice to Mother, and Roseville did not produce any documentation that he did. If Roseville had been acting with regularity, it would have made and kept a copy of any prior written notice to Mother, and would have produced it at hearing. Its failure to do so deprives it of the benefit of any presumption that it acted regularly in the matter. The preponderance of evidence showed that Roseville did not provide Mother with prior written notice of its decision to terminate her son's special education on November 5, 2015.

ROSEVILLE DID NOT PROVIDE PRIOR WRITTEN NOTICE TO EITHER PARENT A REASONABLE TIME BEFORE TAKING THE ACTION ANNOUNCED

13. Mr. Clark deposited Father's prior written notice in the United States mail on November 4, 2015, ensuring that Father, who worked during the day, would not receive it until after Roseville terminated Student's services the next day. If Roseville had mailed a similar notice to Mother, it too would have arrived after the termination, not before. The prior written notice gave Father only until November 5, 2015, to notify Roseville of any questions, comments or concerns about the revocation. Since the purpose of the prior written notice requirement is to notify parents of an action *before* that action was taken, in order to allow them time to take any steps they think necessary with respect to the action before it occurs, Roseville's prior written notice failed entirely in its statutory purpose. Roseville did not provide prior written notice to either Parent a reasonable time before it terminated Student's special education.

ROSEVILLE'S FAILURE SIGNIFICANTLY IMPEDED THE PARTICIPATORY RIGHTS OF BOTH PARENTS

14. A legally compliant prior written notice, provided a reasonable time before Roseville proposed to terminate Student's special education, would have allowed Mother, Father, and Roseville time to become aware of and clear up the considerable confusion that existed among them in early November 2015 about the options available for Student's program. Mr. Clark believed that Student could not receive specialized academic instruction at Independence High, primarily because he would not be at school enough to receive it. He believed that at Independence, a student on independent study appeared only once a week for an "appointment," or at most twice. Ms. Landis, an Independence High admissions official who was likely better informed, wrote to Father (but not Mother) that Independence had both independent study and small group classes, and expected students to attend two or three times a week "depending on how much help they need." It was not clear from the testimony of any of the witnesses whether specialized academic instruction could be furnished if Student appeared at Independence three times a week; he would certainly have qualified as a student who needed help. Nor was it clear whether at least some accommodation could have been made for Student to start later in the school day or receive at least some assistance on his organization and work completion goals.

15. Mr. Clark did not effectively communicate to Parents correct information about the prospect that Student could receive special education at Independence. He believed, and attempted to explain to Parents, that Student could not have his existing IEP adequately implemented at Independence because he would not be there often enough to receive specialized academic instruction or help on his goals. However, both Parents understood him to say that no student at Independence could be in special education, which was not correct. Some students there did have IEP's. It can fairly be inferred from the record that this misunderstanding discouraged Parents from exploring the possibility of having some sort of special education support for Student at Independence, for example by his having different arrangements for specialized academic instruction and work on his goals.

16. A legally compliant prior written notice, provided a reasonable time before Roseville proposed to terminate Student's special education, would have allowed the parties to obtain the advice of Student's entire IEP team about the options available to Student. A lawful prior written notice must contain "a description of other options considered by the IEP Team and the reason why those options were rejected . . ." (20 U.S.C. § 1415(c)(1)(E); 34 C.F.R. § 300.503(b)(6); Ed. Code, § 56500.4, subd. (b)(6).) Mr. Clark's prior written notice to Father did not contain that information since the IEP team had not considered the matter.[6] Instead it stated that the district was not required to convene an IEP team meeting "for the revocation of consent" and that "a district representative [no doubt meaning Mr. Clark] has reviewed the student's existing IEP and your written request to revoke consent." While these statements were technically correct, they obscured the fact that either Parent was entitled to ask for an IEP team meeting at any time before the revocation was actually put into effect.

17. Father, Mother, and Mr. Clark all could have benefited from the viewpoints of others on the IEP team who knew both Student and the schools involved. An IEP team must consist of members who have a wide variety of perspectives, such as a general education teacher, a special education teacher, someone who can explain assessment results, and other knowledgeable persons whom the parties invite for a particular purpose, and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).) In this circumstance a meeting would have been an obvious opportunity to invite someone from Independence, such as Ms. Landis, who was familiar with the possibilities of structuring a program there.

18. At a full IEP team discussion before Student's special education was terminated, a larger group may well have arrived on a less drastic solution to Student's situation than termination. That might have included such measures as a later start at Roseville High, which both Parents would have considered and probably supported. For example, Mother established that when Student returned to the district, he was given a late start at Woodcreek High under his 504 plan, and as a result his attendance and grades had improved. Someone at a full IEP team may have known how that could have been accomplished. A member of an IEP team might also have known that shortening a school day is an option available to an IEP team in an appropriate case as long as it documents its decision in the IEP. (See Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(B) [shortened school days in special classes].)

19. Roseville is correct in arguing that if Father had been irrevocably determined to revoke the IEP, Mother could not have stopped him. However, a legally compliant prior

[6] The record does not explain why Student's difficulties in fall 2015 were discussed eight times by the Intervention Response Team but never by the IEP team. As far as the evidence showed, Mr. Clark was the only member of Student's IEP team on the Intervention Response Team. Student argues in his closing brief that since Student was obviously struggling during that time, Roseville was obliged to call an IEP team meeting to discuss his difficulties. (See 20 U.S.C. § 1414(d)(4)(A)(ii)(I); Ed Code, § 56341.1, subd. (d)(1).) However, violation of that obligation is not an issue in this matter and was not litigated.

written notice, provided a reasonable time before Roseville proposed to terminate Student's special education, would have allowed Mother sufficient time to convince Father, if she could, that he should not terminate Student's special education or take other actions. Mother testified she would have tried to do so. Father was commendably candid at hearing concerning his limited knowledge of special education matters, his reliance on others for advice, and his willingness to listen to them. Father realized Mother knew more about the matter than he did and he would have at least listened to her. It was plain from Parents' testimony at hearing that both were deeply dedicated to their son's education and willing to try to put aside their domestic differences in order to improve his program.

20. Roseville's argument that Father would never have changed his mind was refuted by the evidence above, and not contradicted by the passage from Father's November 30, 2015 email quoted in the Factual Findings. That message displayed Father's disagreement with Mother's resort to medical help from a psychiatrist and a sleep specialist, and showed his belief that Student's truancy problem was not medical. But it did not address special education at all, much less indicate an unwavering intent to revoke Student's IEP.

21. If Father had been unwilling to listen to Mother because of the tensions between them, he might have listened better to someone else, such as an IEP team member or district staff person other than Mr. Clark, or an outside consultant. A legally compliant prior written notice requires a district to provide to parents information about "sources for parents to contact to obtain assistance in understanding the provisions of [the IDEA] . . ." (20 U.S.C. § 1415(c)(1)(D); 34 C.F.R. § 300.503(b)(5); Ed. Code, § 56500.4, subd. (b)(5).) Mr. Clark's notice did that, but did not allow sufficient time for Father to consult such sources of assistance, and did not notify Mother of those sources at all. With such assistance, one or both parents might have sought the advice of an attorney, advocate, or educational consultant who could have helped to fashion a less drastic program choice than termination.

22. The evidence was insufficient to show that Mother was aware, in advance of November 4, 2015, of any "plan" by Father to revoke Student's IEP. No such plan existed with sufficient clarity that it would have been fair to expect Mother to investigate the options that a prior written notice would have given her. In addition, no oral plan would have adequately substituted for a prior written notice, since it would not have provided the additional information required in the notice, such as reasons for the action and resources to consult. (See *Union Sch. Dist. v. Smith* (1994) 15 F.3d 1519, 1526.)

23. For the reasons above, Roseville's failure to provide Parents legally compliant prior written notice a reasonable time before Roseville proposed to terminate Student's special education significantly impeded their opportunity to participate in the decision-making process regarding the provision of a FAPE to their son, and therefore denied Student a FAPE. As a result, the purported termination was invalid.

ROSEVILLE'S FAILURE PROBABLY DAMAGED STUDENT'S EDUCATION

24. There is an additional and independent reason that Roseville denied Student a FAPE in this matter. There was not as much evidence at hearing about the impact of the failure of prior written notice on Student's education as there was about its impact on Mother and Father's participatory rights, and the issue inherently involves some uncertainties. It is not possible to be sure how Student would have fared if he had obtained a later start at Roseville High, or if at Independence High he had obtained at least some specialized academic instruction and support for his organization and work completion goals. But there was sufficient evidence to support a finding that it is more likely than not Student would have enjoyed a more effective education between November 9, 2015, and May 26, 2016, had Roseville provided Parents legally compliant prior written notice.

25. As noted above, when Student returned to the district in spring of 2017, he enrolled in Woodcreek High School under the terms of a 504 plan that allowed him to start classes later than usual in the day. The later start allowed him to improve his attendance and participation. One consequence of an adequate prior written notice might have been the making of arrangements for a later start for Student at Roseville High, in which case his special education would have continued uninterrupted.

26. Once Student no longer had special education support, the program at Independence High provided him little structure. He went to the school one or more times a week and met with teachers, but was required to do the majority of his schoolwork at home without the immediate supervision of an educator or assistance by an educator in organization and work completion. Mother, Father, and Mr. Clark agreed at hearing that this lack of structure was or would be damaging to Student's attendance and performance. It follows that if Student had obtained the additional structure that special education support at Independence High would have provided, he would have been more successful in his education than he was.

27. Roseville argues that any failure of prior written notice was harmless because Student's grades actually improved at Independence High when compared to his previous grades at Roseville, where he mostly did not attend and received straight F's. He earned some C's at Independence, though mostly in nonacademic courses. This argument is unpersuasive because it does not compare how he did at Independence without special education with how he would have done if he had been provided special education support. As shown above, he probably would have done better than he did in the absence of that support.

28. For the reasons above, the preponderance of the evidence showed that Roseville's failure to provide Parents legally compliant prior written notice more likely than not impeded Student's right to a FAPE and deprived him of educational benefits. For this reason as well, Roseville denied Student a FAPE, and its purported termination of his special education and related services was invalid.

Relief

29. Roseville argues that OAH has no jurisdiction to award Student any prospective relief because Father revoked consent for special education. Roseville relies on the IDEA's provision that after the revocation of consent, the district cannot be held liable for the provision of a FAPE. (20 U.S.C. § 1414(a)(1)(d)(ii)(II); 34 C.F.R. § 300.300(b)(4)(iii); Ed. Code, § 56346, subd.. (d)(1)(B)(2).) However, this Decision holds that, because of the two violations of FAPE described above, Roseville's purported termination of Student's special education was invalid. Roseville cannot therefore rely on the assertion that Student was no longer eligible for special education after November 5, 2015, since its termination of his special education on that date was prejudicially procedurally defective and therefore had no force or effect.

30. Nor does it matter that Roseville separately found Student ineligible for special education when he returned to the district in 2017. Because the November 2015 revocation of Student's special education was invalid, he remained eligible for special education and related services from November 9, 2015, through May 26, 2016, the period of time for which relief is afforded here. It is well established that a hearing officer may award prospective relief to compensate for IDEA violations occurring during the time a student was eligible for special education, even though he no longer is. Although graduation with a diploma terminates a student's eligibility, for example, a hearing officer may nonetheless award post-graduation relief for violations committed before graduation. (*Zobrest v. Catalina Foothills Sch. Dist.* (1993) 509 U.S. 1, 4, fn. 3 [113 S.Ct. 2462, 125 L.Ed.2d 1]; *Capistrano Unified Sch. Dist. v. Wartenberg* (9th Cir. 1995) 59 F.3d 884, 890.) The same is true for violations committed before a student loses eligibility for special education due to age. (*Maine School Admin. Dist. No. 35 v. Mr. R.* (1st Cir. 2003) 321 F.3d 9, 11, 17-18; *Board of Educ. of Oak Park & River Forest High Sch. Dist. 200 v. Illinois State Bd. of Educ.* (7th Cir. 1996) 79 F.3d 654, 656; see also *Independent Sch. Dist. No. 284 v. A.C.* (8th Cir. 2001) 258 F.3d 769, 774-75 [student left district].) Roseville's jurisdictional argument is therefore unpersuasive.

31. Student proposes two possible forms of compensatory education. First, Student requests that he receive compensatory tutoring until he accumulates sufficient credits to graduate from high school. However, Student was in three schools after May 26, 2015, and his success or failure in accumulating credits in two of those schools was not Roseville's responsibility. It would be inequitable to require Roseville to provide tutoring until Student made up credits lost while out of the district.

32. In the alternative, Student proposes that he be awarded one-to-one tutoring in proportion to the hours of specialized academic instruction he lost between November 9, 2015, when he started at Independence High, and May 26, 2016, when he left it. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not

provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific and be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid*.)

33. Student's proposal that he receive one-to-one tutoring for a time equivalent to the special education instruction he lost is equitable because it more nearly provides what Student lost as the result of Roseville's violation, and it can be granted with sufficient flexibility to fit into his current schedule. One-to-one instruction may be more intense than the small group instruction Student lost, and it could be argued he should therefore need less of it. However, this consideration is balanced by the fact that Student also lost assistance on his organization and work completion goals; any extra learning the one-to-one format provides him can compensate for that loss as well, and may also assist him in credit recovery. No deductions will be made for Student's absences during his attendance at Independence High because, if he had been receiving the additional structure and personal attention provided by special education, as well as the accommodation of a late start, he may not have accrued those absences.

34. Roseville's calendar showed that there were 117 school days at Independence High starting on November 9, 2015, and ending after May 26, 2016. Student lost 75 minutes a day of specialized academic instruction. That loss amounts to 8,775 lost minutes, or 146.25 lost hours. Student will therefore be awarded 146.25 hours of compensatory tutoring in compensation for his loss.

ORDER

1. Roseville shall provide Student 146.25 hours of one-to-one academic tutoring between the date of this Order and October 30, 2019. Roseville is not responsible for any tutoring after that date.

2. The tutoring shall be provided by a teacher with credentials equivalent to or better than a Roseville resource specialist program teacher. The subjects taught shall be the same academic subjects that would have been taught in Student's resource class had his IEP remained in effect during the period of violation. The amount of time dedicated to each such subject shall be decided by Mother after consultation with the tutor.

3. The tutoring shall be provided on days and hours selected by Mother and shall reasonably accommodate the schedule of the tutor. Student, Mother, or Father shall notify the tutor 24 hours in advance of any scheduled tutoring session if Student will be absent from the session, and Roseville shall ensure that those sessions are made up only if the absence is an excused absence according to Roseville's generally applicable rules. Roseville shall not be responsible for making up tutoring sessions lost due to unexcused absences. Roseville

shall also not be responsible for making up tutoring sessions lost due to absences for which the required notice was not timely given, unless Student was absent for a clear emergency that precluded such notice.

4. The tutor may be either a Roseville employee or an independent contractor, at Roseville's option, except that if Student ceases to be a resident of the district before the tutoring is complete, Roseville shall employ an independent contractor to provide it.

5. The terms of this Order may be altered by the written agreement of the parties. An IEP can be such an agreement.

6. All of Student's other requests for relief are denied.

PREVAILING PARTY

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

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: November 2, 2017

DocuSigned by:
Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings