

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

RINCON VALLEY UNION
ELEMENTARY SCHOOL DISTRICT.

OAH Case No. 2018050651

DECISION

Parent on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings on May 14, 2018, naming the Rincon Valley Union Elementary School District. On June 5, 2018, OAH advanced the matter on the calendar and set it for hearing. On June 19, 2018, OAH granted a continuance at Student's request.

Administrative Law Judge Charles Marson heard the matter in Santa Rosa, California, on July 25, 2018.

Joe Rogoway, Blair N. Gue and Lindsay Whyte, Attorneys at Law, represented Student, who was not present. Student's mother attended the hearing on Student's behalf.

Jennifer E. Nix, Attorney at Law, represented Rincon Valley. Cathy Myhers, Rincon Valley's Assistant Superintendent for Student Services, attended the hearing on its behalf.

On July 25, 2018, at the parties' request, OAH continued the matter to August 27, 2018, for closing briefs. On that day the parties filed closing arguments, the record was closed, and the matter was submitted for decision.

ISSUE

Does Rincon Valley's April 27, 2018 individualized education program offer to place Student at home with one hour a day of instruction constitute an offer of a free appropriate public education in the least restrictive environment?

SUMMARY OF DECISION

Student has Dravet Syndrome, which causes life-threatening seizures. She proved that prompt access to tetrahydrocannabinol oil as an emergency medication for her seizures is medically necessary for her to attend school. She also proved that, in two years of preschool, Mother and Student's nurse successfully provided her with prompt access to THC oil as an emergency seizure medication.

Student established that Rincon Valley's IEP placement offer effectively barring her from its campus and school bus was based not on her educational needs but on the concern that her presence, with her medication, might violate state and federal law. Student proved, however, that for the past two years, the possession, administration and ingestion of THC oil for Student's seizures strictly complied with California's medical marijuana laws and were lawful under state law.

The offered IEP was not reasonably calculated to allow Student to benefit from it, because its exclusion of Student from the campus and school bus was based on a misunderstanding of state law, and on the remote possibility that possessing THC oil might violate an unenforced and unenforceable federal misdemeanor, prohibiting marijuana possession. Since Student may successfully attend a public school campus and be transported to and from it, while maintaining access to her emergency medication, her least restrictive environment is on a public school campus, not at home. Student therefore proved that Rincon Valley's April 27, 2018 offer of home placement did not offer her a FAPE.

FACTUAL FINDINGS

Jurisdiction

1. Student is a five-year-old girl who lives with Parents within Rincon Valley's boundaries. She has Dravet Syndrome and related illnesses, and has been receiving special education and related services in the primary category of Other Health Impaired and the secondary category of Intellectual Disability.
2. Student's Dravet Syndrome causes serious seizures at unpredictable times, including in school. The seizures are successfully controlled by the immediate administration of THC oil, a derivative of cannabis. The parties agree that at all times while in school, Student must have a nurse present who has ready access to THC oil as an emergency medication to control Student's seizures, and who can administer the THC oil within one to four minutes of the beginning of the seizure. If a seizure lasts longer than that, Student must be taken to the emergency room.
3. In the school years 2016-2017 and 2017-2018, Student attended Humboldt Community School, a private preschool, at Rincon Valley's expense and pursuant to an IEP. Student's IEP provided her the services of a licensed vocational nurse who carried THC oil

as a rescue medication and accompanied Student at all times on the school bus and at school, administering the oil immediately when Student seized.

4. On April 27, 2018, the parties met at an IEP team meeting to create an IEP for the school year 2018-2019, Student's kindergarten year. The parties agreed that Student cannot be safely educated, unless her seizure medication is readily available at all times. Rincon Valley declined to offer Student placement on a public school campus, or transportation by public school bus, because of its concern that possession of the THC oil on a public school campus or bus was prohibited by state and federal law. Rincon Valley therefore decided that the only safe and legal placement for Student was at home, and offered to place Student at home with one hour of instruction a day, along with the continued services of the licensed vocational nurse to administer the THC oil in the event of a seizure. Parents, believing that Student may lawfully attend a public school campus and ride a public school bus, accompanied by her nurse and emergency medication, filed this request for due process hearing.

5. Student's kindergarten year started on August 13, 2018. Student has been attending a Rincon Valley kindergarten class and going to and from school on a public school bus pursuant to a stay put order.

Student's Medical Need for THC Oil

6. Mother established by her undisputed testimony that Student needs close adult supervision at all times to control her seizures. After Student was diagnosed with Dravet Syndrome, Mother quit her job and devoted herself full-time to Student's care, including her housing, health, and safety.

7. The nature of Student's disability was established at hearing by Dr. Joseph Sullivan, who is a pediatric neurologist, an Assistant Professor of Clinical Neurology at the University of California San Francisco, the Director of its Pediatric Epilepsy Center, and the Chair of its Pediatric Epilepsy Research Consortium Steering Committee. He has also founded a Dravet clinic at the university. Dr. Sullivan is a leading expert on Dravet Syndrome, has published many peer-reviewed papers on the subject, and has received numerous honors and awards. Dr. Sullivan has been treating Student for Dravet since she was three years old. His testimony was credible because it was based on his expertise and experience in the field, and on his familiarity with Student. His testimony was not disputed.

8. Dr. Sullivan testified at hearing by declaration. He established that Dravet Syndrome is a rare, catastrophic, lifelong form of epilepsy that begins in the first year of life, with frequent and sometimes prolonged seizures. A seizure that is quickly controlled may not have immediate side effects, but the longer it goes on, the harder it is to treat. A prolonged seizure is one that lasts for more than five minutes. The cumulative effect of hundreds of seizures over time results in developmental stagnation and intellectual disability. A patient with Dravet Syndrome commonly displays frequent and prolonged seizures,

delayed speech and language, behavioral and developmental delays, and movement and balance difficulties. All of these difficulties affect Student.

9. Dr. Sullivan further established that Dravet must be treated with daily medication and sometimes a restrictive diet, but it is “highly resistant to currently available medications.” Multiple medications are used for preventative purposes, although when used together they have side effects such as somnolence, lethargy, behavior difficulties, weight changes and dulling of cognition. Dr. Sullivan and Mother tried numerous traditional medications with Student, such as Keppra, Depakote and Onfi, but they did not alleviate her seizures.

10. Dr. Sullivan also established that Dravet seizures are unpredictable, so it is essential that a Dravet patient have an effective rescue medication nearby at all times to be administered according to a personally tailored seizure rescue plan. If a seizure lasts longer than 15 minutes, secondary brain injury will result.

11. Dr. Sullivan was familiar with the use of cannabis-based medications as a preventive measure for Dravet. He was an investigator on the Epidiolex Expanded Access Program published in *The Lancet Neurology* in 2016. Epidiolex, a cannabis-based product, reduced seizures in patients studied by 37 percent.¹ Dr. Sullivan has concluded that “[c]annabis is effective in reducing seizures in patients with Dravet who are already taking conventional medications, yet still continue to have upwards of 12 seizures a month.” Student was having up to 20 seizures a month when he began to treat her.

12. Dr. Sullivan also believes that cannabis can be used for Dravet patients as an emergency rescue medication. In the event of a seizure, it is sprayed in liquid form inside the cheek and is absorbed quickly into the bloodstream.

13. Under Dr. Sullivan’s supervision, Student’s family began to use cannabis-based CBD oil as a preventative medication and THC oil as an emergency seizure medication. Dr. Sullivan reported that the use of these cannabis-based medications “has reduced the frequency of [Student’s] seizures and given her more seizure-free days.” Parents reported to him, and Mother confirmed at hearing, that while using these medications, Student had enjoyed her longest seizure-free period since her seizures began.

14. Dr. Sullivan credibly declared that if Student were to stop using these cannabis-based medications, “her overall seizure frequency may increase and if not allowed to use cannabis rescue medication, her tendency for longer seizures would go up.”

15. Parents also consulted Dr. Bonni Goldstein of Canna-Centers in Southern California. Dr. Goldstein examined Student in her office and concluded that she “may benefit from the use of medical marijuana.” Dr. Goldstein provided Mother a physician

¹ Epidiolex has recently been approved on a trial basis by the Food and Drug Administration for the treatment of seizures in Dravet patients.

statement concluding: “I approve [her] use of marijuana as medicine.” Because of federal law, Dr. Goldstein did not formally prescribe the medication, but she described her conclusion as her professional opinion and as a “recommendation” within the meaning of California’s Compassionate Use Act. Dr. Goldstein also certified Mother as Student’s primary caregiver for the purpose of the Act.

16. Student has long been a patient at Kaiser Hospitals, and has been treated in several of its emergency rooms and in Oakland, where its child neurologists are based. Kaiser has provided Parents a formal protocol for the administration of THC oil and other medications to Student. The current version of Kaiser’s Plan of Treatment for Student includes a “Seizure Protocol” which requires the administration of THC oil at the first sign of seizure.

17. The evidence convincingly showed that Student’s Dravet Syndrome is life-threatening; that she has seizures at unpredictable times, including in school; that the proximity of THC oil and a caretaker or medical professional trained to administer it, is essential to controlling her seizures, and therefore to her safety and well-being throughout the school day; and that the medication has been successfully administered under the supervision and with the advice of physicians according to a formal seizure protocol.

Student’s Successful Attendance at Preschool

18. By the time Student entered preschool in fall 2016, she was already using cannabis-based medications, including THC oil. Notwithstanding her occasional seizures, she was able to attend preschool for two school years, grow socially and in skills, and learn to interact with other children. Student argues that the medical procedures which allowed Student to succeed in preschool are the same procedures that Rincon Valley should have put in an IEP that placed her on a public school campus for kindergarten.

19. On Student’s third birthday, her education became the responsibility of Rincon Valley. Rincon Valley was willing to provide Student extensive services, but initially took the position that it could not place her on a campus because state and federal law forbade possession of THC oil on a campus. After negotiations, Rincon Valley agreed to place Student in an appropriate private preschool if one could be found. The parties jointly searched for such a school, and found Humboldt Community School, a single-classroom private school for students aged two to five. Rincon Valley placed Student there pursuant to an IEP on which the parties agreed. The IEP provided for nursing services throughout the day, which the parties understood would include possession and administration of the THC oil.

20. Rincon Valley contracted with At Home Nursing of Santa Rosa, for a licensed vocational nurse who would accompany Student and help administer her medications, including the THC oil, throughout the school day in case she seized. Yolanda Brindis was the licensed vocational nurse who cared for Student during the 2017-2018 school year, and

addressed her seizures on the bus and at school. At hearing, she described in detail how she used the THC oil.

21. On a typical school day, Ms. Brindis went in the morning to Parent's home, where Mother provided her two vials, each containing 15 milliliters (0.5 fluid oz.) of THC oil. Ms. Brindis helped with feeding Student breakfast and dressing her, and then she and Student got on the school bus. Ms. Brindis carried the vials of THC oil at all times while caring for Student; no one else had access to them. At school Ms. Brindis remained within a few feet of Student. Student's seizures are usually preceded by warning signs, such as a flushed face, a red neck, spasmodic movement, and the like. As soon as Ms. Brindis saw those signs and knew a seizure was imminent, she took Student to a safe place where she could lie down.

22. Student must always have an oxygen pump available, which she uses frequently and especially during seizures. At the onset of a seizure at school, Ms. Brindis asked another teacher to bring the oxygen equipment, and then administered 0.3 milliliters of THC oil to Student by spraying it on the inside of her cheek. Usually, Student would recover from the seizure within minutes. If the seizure lasted more than four minutes, Ms. Brindis had to call for transportation to an emergency room.

23. At the end of the school day the process was reversed. Ms. Brindis and Student rode the school bus home and entered the house, and at the end of her shift, Ms. Brindis returned the THC oil to Mother. Ms. Brindis's testimony showed that her practice in keeping and administering the THC oil, precluded its possession or use by anyone else on the campus or on the bus, and eliminated any potential for abuse.

24. Supported by this process, Student enjoyed and benefited from her preschool years. Joseph LeBlanc, who was both the Director of the preschool and one of its teachers, observed her in class during her two years there. At hearing, he described Student's growth and change. When she first arrived, she showed no interest in other children and was focused on adults. But over those two years, her awareness of her surroundings and the people around her grew, and her interests expanded, and now she enjoys the company of other children and has learned to interact with them to some extent. Recently, she has joined other children in projects and has learned to share materials with them. Student also progressed in her ability to navigate the classroom physically, which, with approximately 26 other active preschool children, required skill at maneuvering.

25. At hearing, Ms. Brindis and Mother confirmed that Student made substantial progress in preschool. Ms. Brindis thought her progress was "amazing," particularly in socialization. Mother agreed, stating that Student had developed mentally and socially in the preschool. At the beginning, Student was able to greet adults (such as occupational and speech therapists) and ask them to play. By the end of her preschool years, she had refocused those requests on other children.

26. Student's preschool IEP documents describe the progress she made. At a February 27, 2017 IEP team meeting, school staff reported that her social curiosity had recently increased and she had begun to know how to ask for help. By the time of her annual IEP team meeting in May 2017, the preschool instructors reported that Student "made great strides this year in adjusting to new teachers, new therapists, a school routine, and being around peers." In May 2018, the IEP team reported that she had learned colors, letters, and some numbers, and could successfully interact with peers in a small group of five children. The preschool provided progress reports on 11 of the goals in her May 2017 IEP. Student fully met four of them and made partial progress on the rest.

27. Mr. LeBlanc established that Student's medical requirements, including the presence of her nurse and her medicine, did not disrupt the class. Student's presence had no negative impact on the other children in class. Even when she seized, the impact on the other students was "extremely minimal." Ms. Brindis expressed the same opinion.

28. The evidence described above showed that in her two years of attending preschool, Student made significant progress socially and academically. Her occasional seizures were promptly and successfully controlled by her nurse, and were not significantly disruptive for the other students or staff.

29. Rincon Valley does not dispute that Student made such progress. Ms. Myhers, Rincon Valley's Assistant Superintendent for Student Services, supervises the district's special education program, has attended Student's IEP team meetings, and was thoroughly familiar with Student and her educational history. Ms. Myhers was forthright in testifying that, if it were not for the possible illegality of possessing THC oil on the campus and the bus, a public school campus would be Student's least restrictive environment. She testified further that she did not disagree with Dr. Sullivan's conclusion that Student needs to be in a classroom to continue her development.

30. The parties also agree that Student needs help with socialization. The disputed April 2018 IEP observes that she "needs a specialized learning environment for both optimum learning and socialization . . ." The IEP contains 12 annual goals, at least 3 of which require Student to be in the presence of other students. Goal 1 addresses transitions to small group activities. Goal 2 addresses the degree of her participation in morning circle time. Goal 5 seeks to improve her response to a student sitting next to her by handing over a toy, art material or other object.

31. Asked at hearing how Student could make progress on those goals if placed at home, Ms. Myhers described it as "very challenging." She testified that the program specialist serving Student at home would "if possible" attempt to create situations involving other children. Ms. Myhers mentioned the possibility of gathering groups or creating play dates with other children in the neighborhood. The April 2018 IEP does not, however, contain any provision for such activities. On cross-examination, she conceded that some of the goals in the disputed IEP "may not" be capable of implementation in a home environment.

32. Ms. Myhers also testified that Rincon Valley barred Student from its campus in part to avoid jeopardizing the District's funding mechanisms. She testified that to receive federal funding, the district was required to provide a declaration that it would have drug- and alcohol-free campuses. She was concerned that allowing Student on campus with her medication "could potentially jeopardize" funding for the entire district because the "federal guideline is that I have to be able to declare that it's a drug-free campus." However, Ms. Myhers did not identify any particular guideline or requirement of law that caused this concern.

LEGAL CONCLUSIONS

Introduction: Legal Framework under the IDEA²

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);³ 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).)

2. A FAPE means appropriate 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).) Related services, called "designated instruction and services" in California, specifically include nursing services when the student requires them to attend school. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subs. (a), (b)(12).)

3. In *Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court

² Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 in *Endrew F.* 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 the student in *Endrew F.*, 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 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 had the burden of proof.

Issue: Was the April 27, 2018 IEP an offer of FAPE in the least restrictive environment?

A. MOTHER, STUDENT, AND THE NURSE STRICTLY COMPLIED WITH CALIFORNIA LAW IN POSSESSING AND USING THC OIL AS AN EMERGENCY SEIZURE MEDICATION, AND COULD DO SO ON A PUBLIC SCHOOL CAMPUS AND BUS WITHOUT VIOLATING CALIFORNIA LAW

6. The parties agree, and the evidence showed, that the THC oil used as emergency medication for Student’s seizures by Mother and the nurse is cannabis within the meaning of Health and Safety Code section 11018. That definition includes the plant *Cannabis sativa L.* and “every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin.”

7. Section 11357 of the Health and Safety Code has long prohibited the possession of cannabis. In its current form, the section provides that a person less than 21 years of age who possesses not more than 28.5 grams of cannabis, or not more than 8 grams

of concentrated cannabis, is guilty of an infraction. (Health & Saf. Code, § 11357(a)(1), (2).) The statute contains a specific subdivision addressing possession on school grounds by an adult:

(c) Except as authorized by law, a person 18 years of age or older who possesses not more than 28.5 grams of cannabis, or not more than eight grams of concentrated cannabis, upon the grounds of, or within, any school providing instruction in kindergarten or any of grades 1 to 12, inclusive, during hours the school is open for classes or school-related programs is guilty of a misdemeanor . . .

(Health & Saf. Code, § 11357, subd. (c).) Thus, unless Student's nurse was authorized by law to possess and administer the THC oil on a school campus or bus, her possession of it would have been a state law misdemeanor.

8. However, Student's nurse was so authorized. In 1996, California voters removed the legitimate medical use of marijuana from the reach of the criminal law by approving an initiative measure entitled the Compassionate Use Act. (Health & Saf. Code, § 11362.5.) The new statute declared that the purpose of the Act was:

To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(*Id.*, subd. (b)(1)(A).) The new statute also declared the related purpose of protecting patients and their caregivers from prosecution:

To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(*Id.*, subd. (b)(1)(B).) The Compassionate Use Act expressly exempts patients and their primary caregivers from the general criminal prohibition of section 11357:

(d) Section 11357 relating to the possession of marijuana, . . . shall not apply to a patient, or to a patient's primary caregiver, who possesses . . . marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(*Id.*, subd. (d).)

9. The evidence showed that possession and use by Student's nurse of THC oil at the preschool and on the school bus met all the requirements of the Compassionate Use Act, and was therefore "authorized by law" within the meaning of section 11357, subdivision (c). Mother qualified as Student's primary caregiver under the Act's applicable definition:

... "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

(Health & Saf. Code, § 11362.5, subd. (e).) The evidence showed that Parents, acting on Student's behalf, had designated Mother as her primary caregiver, and that Mother had consistently assumed responsibility for Student's housing, health and safety. Dr. Goldstein formally designated Mother as a primary caregiver within the meaning of the Compassionate Use Act. The nurse acted as Mother's agent, as well as, the school's agent, receiving the THC oil from Mother at the start of the day and returning it at the end. Student, Mother and the nurse were therefore exempt from prosecution under section 11357 and were authorized by the Compassionate Use Act to possess and use the THC oil for its medical purpose.

10. The Compassionate Use Act is not to be interpreted to supersede legislation prohibiting persons from "engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes." (Health & Saf. Code § 11362.5, subd. (b)(2).) The evidence showed that Mother and the nurse possessed the THC oil solely for the personal medical purposes of Student, and did so in a fashion that precluded access to it, or abuse of it, by others. The use of the THC oil on Rincon Valley's campus, in the same way that it was used in the preschool, would not endanger others or permit any diversion of the oil for nonmedical purposes.

11. The evidence showed that Student was "a seriously ill Californian." (Health & Saf. Code, § 11362.5, subd. (b)(1)(A).) It showed further that Dr. Goldstein, a licensed physician in California, recommended that Student use marijuana for medical purposes after examining her and determining that such medical use was appropriate, and that Student's health would benefit from the use of marijuana in the treatment of an "illness for which marijuana provides relief," namely Dravet Syndrome. (*Ibid.*) And although Dr. Sullivan's declaration was cautious and did not expressly use the term "recommendation," he made it clear that Student was his patient; that he had discussed the use of medical marijuana with Mother; and that he approved of and supported Student's medical use of marijuana, both as maintenance medication and emergency seizure relief medication, believing that it has significantly reduced her incidence of seizures. Kaiser Hospitals also recommended the use of THC oil in Student's emergencies by requiring its use in the emergency seizure protocol it provided to Mother and the nurse.

12. Nurse Brindis acted under an additional legal authorization. She was a vocational nurse licensed in California and was acting within the scope of her licensure in possessing the TCH oil and administering it to Student in emergencies. The Vocational

Nursing Practice Act allows a licensee, when directed by a physician, to inject medications, to draw blood, and to administer intravenous fluids in accordance with written standardized procedures. (Bus. & Prof. Code, §§ 2840, 2860.5.) Nurse Brindis always followed the emergency seizure protocol for Student provided by Kaiser Hospitals, whose physicians had long managed Student’s health. That protocol required the use of THC oil in the first minutes of a seizure.

13. Because Mother and Ms. Brindis were authorized by law to possess and use the THC oil as they did, their conduct was exempt from another California statute specifically regulating the presence of cannabis on a public school campus. Health and Safety Code section 11362.1 generally authorizes the possession of small amounts of cannabis by persons 21 years of age or older. Section 11362.3 makes exceptions to that rule. It begins by providing that “Section 11362.1 does not permit any person” to do certain acts, including possessing cannabis “in or upon the grounds of a school . . . while children are present.” (Health & Saf. Code, § 11362.3, subds. (a), (a)(5).) But that same section ends by exempting from its limitations any possession allowed by the Compassionate Use Act. Subsection (c) of the statute provides: “Nothing in this section shall be construed or interpreted to amend, repeal, affect, restrict, or preempt laws pertaining to the Compassionate Use Act of 1996.” Section 11362.1 is also not intended to restrict laws pertaining to the Compassionate Use Act. (Health & Saf. Code, § 11362.45, subd. (i).)

14. Section 11362.79 of the Health and Safety Code lists places where the smoking of medical cannabis is prohibited, including “[o]n a school bus.” (*Id.*, subd. (c).) But that statute relates only to the smoking of marijuana, not to its medical use in concentrated form, such as sprayed THC oil, which is how Student receives it.

15. Rincon Valley correctly points out that Student’s nurse would have to transport the THC oil to and from school, and argues that her transportation of it would not be protected by California law. It is true that the original Compassionate Use Act left caregivers vulnerable to charges of transportation of marijuana, because it explicitly protected only possession and cultivation. (See Health & Saf. Code § 11362.5, subd. (d); *People v. Urziceanu* (2005) 132 Cal.App.4th 747, 773; *People v. Young* (2001) 92 Cal.App.4th 229, 237.) However, the Legislature closed that gap in the 2003 Medical Marijuana Program Act (Health & Saf. Code §§ 11362.7 et seq.) by protecting from a charge of transportation any qualified patient, caregiver, or “[a]n individual who provides assistance to a qualified patient . . . or . . . caregiver . . .” (Health & Saf. Code, §§ 11362.765, subds. (b)(1)-(3).)

16. Rincon Valley argues that the language “who provides assistance” in the 2003 Act (Health & Saf. Code §§ 11362.765, subd. (b)(3)) is not broad enough to extend to the transportation of marijuana. However, that unduly narrow interpretation contradicts the purposes of the Compassionate Use Act and the 2003 Medical Marijuana Program Act, which was intended “to address issues not included in the CUA so as to promote the fair and orderly implementation of the CUA.” (*People v. Wright* (2006) 40 Cal.4th 81, 85.) The

2003 enactment expressly extended protection from transportation prosecutions to qualified patients and their caregivers. (Health & Saf. Code, § 11362.765, subs. (b)(1), (2).) It is not likely that, in the next subdivision, it intended the opposite result for those who “provide[] assistance” to those patients and caregivers. (*Id.*, subs. (b)(3).) As the court put it in *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550, “the voters could not have intended that a dying cancer patient's ‘primary caregiver’ could be subject to criminal sanctions for carrying otherwise legally cultivated and possessed marijuana down a hallway to the patient's room.” Nor could they have intended to subject to criminal sanctions someone like Student’s nurse, who was assisting a qualified caregiver and a qualified patient within the terms of her licensure.

17. Properly interpreted, section 11362.765, subdivision (b)(3) of the Health and Safety Code would protect Student’s nurse from state prosecution for transporting marijuana if she followed the same procedures on a public school campus that she did in the preschool. (See *People v. Frazier* (2005) 128 Cal.App.4th 807, 827 [recognizing defense to transportation charges by those providing assistance]; *People v. Roberts* (Oct. 28, 2008, No. C053705) 2008 WL 5098984, p. 45[same].)

18. For the above reasons, the evidence showed that Mother and the nurse strictly complied with California law at school, on the bus and at home, in possessing and using the THC oil as an emergency medication for administration to Student in the event of a seizure.

B. STRICT COMPLIANCE WITH CALIFORNIA LAW BY MOTHER, STUDENT AND THE NURSE MAY HAVE EXEMPTED THEM FROM THE FEDERAL LAW PROHIBITING POSSESSION OF MARIJUANA, AND DID EXEMPT THEM FROM FEDERAL PROSECUTION

MARIJUANA IN THE FEDERAL CONTROLLED SUBSTANCES ACT OF 1970

19. The Controlled Substances Act regulates or prohibits the possession and use of many drugs, including marijuana. (21 U.S.C. § 801 et seq.) It defines “marihuana” in relevant part as including “Cannabis sativa L., . . .; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.” (21 U.S.C. § 802(16).) The parties agree, and the evidence showed, that THC oil is within that definition.

20. The Controlled Substances Act, groups drugs into schedules in order to regulate them in different ways. Marijuana is a Schedule One drug. (21 U.S.C. § 812(b)(1), Schedule I (c)(10).) A Schedule One drug “has no currently accepted medical use in treatment in the United States.” (21 U.S.C. § 812(b)(1)(B).) Prescriptions can be written for drugs on schedules two, three, four and five, but not for drugs on Schedule One. (21 U.S.C. § 829.) The only exception is for a government-authorized research program; there is no defense of medical necessity. (See 21 U.S.C. § 823(f)[last par.]; *Gonzales v. Raich* (2005)

545 U.S. 1, 26–29 [125 S.Ct. 2195, 162 L.Ed.2d 1]; *United States v. Oakland Cannabis Buyers' Cooperative* (2001) 532 U.S. 483, 494-495 [121 S.Ct. 1711, 149 L.Ed.2d 722].)

UNDERMINING THE PREMISE IN THE CONTROLLED SUBSTANCES ACT

Actions by State Legislatures

21. Since 1970, and especially in recent years, Congress's determination that marijuana has no legitimate medical uses has been thoroughly undermined by state legislatures. By 2016 at least 40 states and 3 territories allowed the use of marijuana for medical purposes in some fashion. (See *United States v. McIntosh* (9th Cir. 2016) 833 F.3d 1163, 1175, fn. 3.) Since then the number has grown; an appropriations bill now pending in Congress lists 46 states and 3 territories as having such laws. (H.R. 1625, 115th Cong., 2d Sess., § 538, p. 240 < <https://perma.cc/XQ34-E5Q5>>[as of Sept. 18, 2018].)

22. In addition, several states have enacted legislation specifically allowing the administration of medical marijuana on public school campuses. (See, e.g., Colo.Rev.Stat. Ann., 22-1-119.3(3)(d.5) [Colorado]; 105 ILCS 5/22-33 [Illinois]; 22 M.R.S.A. § 2426, subd. 1A [Maine]; F.S.A. § 1006.062(8) [Florida].) This suggests a growing recognition among states that the Controlled Substances Act is not a bar to the appropriately authorized and regulated use of medical marijuana on public school campuses.

23. On September 5, 2018, the California Legislature enrolled and presented to Governor Brown for signature Senate Bill 1127, which would add section 49414.1 to the Education Code. That section would allow school districts to enact policies permitting a parent or guardian of a pupil who is a qualified patient under the Compassionate Use Act to possess and administer medicinal cannabis to the pupil at a school site. (<http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB1127>[as of September 18, 2018].)⁴

24. Such a consensus among the states is quite likely to alter the interpretation of federal law. “[T]he ‘clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.’” (*Atkins v. Virginia* (2002) 536 U.S. 304, 312 [122 S.Ct. 2242, 153 L.Ed.2d 335] (quoting *Penry v. Lynaugh* (1989) 492 U.S. 302, 331 [109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)] [consensus among states against execution of mentally retarded]; see also *Minnesota Voters Alliance v. Mansky* (2018) 585 U.S. ____ [138 S.Ct. 1876, 1886, 201 L.Ed.2d 201])[consensus among states on need for campaign-free

⁴ If signed into law, the new statute will not entirely resolve this dispute. Student needs her seizure medication within four minutes of the onset of a seizure, and Mother cannot get to the campus that quickly.

zones around polling places]; *Miller v. Alabama* (2012) 567 U.S. 460, 482 [132 S.Ct. 2455, 183 L.Ed.2d 407][consensus among states against execution of minors]; *Jaffee v. Redmond* (1996) 518 U.S. 1, 13 [116 S.Ct. 1923, 135 L.Ed.2d 337][consensus among states on adoption of psychotherapist-patient privilege].) The near-consensus of state legislatures in accepting the medical uses of marijuana strongly suggests that no federal court would now convict Student or her caregivers for the conduct examined here.

Actions by Federal Administrative Agencies

25. Federal administrative action has also undermined the premise of the treatment of marijuana in the Controlled Substances Act. In 2009, the United States Department of Justice announced that prosecutions of medical marijuana users complying with state medical marijuana laws would receive lower priority than other possession cases. (*Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (October 19, 2009) <www.justice.gov/opa/documents/medical-marijuana.pdf>[as of Sept. 18, 2018].) In 2013, the Department of Justice announced it would no longer prosecute marijuana possession cases involving the possession of small amounts of marijuana and would instead defer to state prosecutorial mechanisms. (*Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013) <<https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>> [as of September 18, 2018].) In January 2018, the previous guidances were rescinded in favor of earlier prosecutorial guidelines for the exercise of prosecutorial discretion. (<<https://www.justice.gov/opa/press-release/file/1022196/download>>[as of Sept. 18, 2018].) Judging from the absence in the reported cases of actual federal prosecutions for possession of small amounts of state-sanctioned medical marijuana, the exercise of federal prosecutorial discretion has continued to show deference to state decision-making and abstention from such prosecutions.

26. In addition, in June 2018, after extensive study, the Federal Food and Drug Administration approved the trial use of Epidiolex, a cannabis-based medicine, for the treatment of Lennox-Gastaut Syndrome and Dravet Syndrome (which Student has) in patients two years of age and older. (Federal Drug Administration, Press Release, June 25, 2018, FDA Approves First Drug Comprised of an Active Ingredient Derived from Marijuana to Treat Rare, Severe Forms of Epilepsy <<https://www.fda.gov/newsevents/newsroom/pressannouncements/ucm611046.htm>> [as of Sept. 18, 2018]; see 83 Fed.Reg. 34139 (July 19, 2018).)

Actions by Congress

27. Finally, since 2014, Congress has prohibited the United States Department of Justice from enforcing the Controlled Substances Act against state-sanctioned medical marijuana use. In a series of appropriations bills and short-term spending measures signed by the last two presidents, Congress has prohibited the federal Department of Justice from preventing state implementation of state medical marijuana laws. The prohibition now in effect states:

None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

(Consolidated Appropriations Act, Pub. L. No. 115-141, 115th Cong., 1st Sess., § 538, 132 Stat. 348, 444-445 (2018).)

28. The current prohibition will expire on October 1, 2018, at the end of this federal fiscal year, but it almost certainly will be replaced by a substantively identical prohibition for the 2018-2019 fiscal year. The United States Senate, with bipartisan support, has for the first time placed the prohibition directly into the appropriations act governing the Department of Justice. A House committee has agreed to do the same, and President Trump has announced that he agrees with the measure. (*Forbes Magazine*, “Senators Include Medical Marijuana Protections In Justice Department Bill,” June 12, 2018 <<https://www.forbes.com/sites/tomangell/2018/06/12/senators-include-medical-marijuana-protections-in-justice-department-bill/#3ab235d16b2d>>[as of Sept. 18, 2018].) The language of Section 538 of the pending appropriations bill is the same as the language of the previous riders, except for the number of states and territories affected. (March 21, 2018, Rules Committee Print 115-66, Text of the House Amendment to the Senate Amendment to H.R. 1625, § 538 <<https://perma.cc/XQ34-E5Q5>>[as of Sept. 18, 2018].)

29. In a definitive ruling in 2016, the Ninth Circuit held that the above appropriations language prohibits the federal drug law prosecution of any person whose conduct strictly complied with state medical marijuana laws. In *United States v. McIntosh*, *supra*, 833 F.3d 1163, the court consolidated ten interlocutory appeals and petitions for writs of mandamus arising out of orders entered by three district courts in two states within the circuit, all of which involved the appropriations rider. The Court held:

At a minimum, [the appropriations rider] prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.

(*Id.* at p. 1177.) The *McIntosh* court vacated the federal convictions before it, with this direction to the lower courts:

If DOJ wishes to continue these prosecutions, Appellants are entitled to evidentiary hearings to determine whether their conduct was completely authorized by state law, by which we mean that they strictly complied with all relevant conditions imposed by state law on the use, distribution, possession, and cultivation of medical marijuana.

(*Id.* at p. 1179.)

30. *McIntosh* and the appropriations riders therefore prevent the federal drug law prosecutions of Mother, Student or Student’s nurse in the 2017-2018 federal fiscal year and almost certainly the 2018-2019 federal fiscal year, because they “engaged in conduct permitted by the State Medical Marijuana Laws and . . . fully complied with such laws.” (*McIntosh, supra*, 833 F.3 at p. 1177.) Those fiscal years include Student’s kindergarten year. So even if their conduct did fall within the prohibition of the Controlled Substances Act, under current law there is no realistic prospect that they would be prosecuted for it.

C. THE UNRESOLVED FEDERAL LEGAL QUESTION

31. In light of all these developments undermining the central assumption behind the treatment of marijuana in the Controlled Substances Act, there are plausible ways that a modern court could interpret that Act not to prohibit the conduct examined here. Section 844 prohibits possession of a controlled substance “unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice.” (21 U.S.C. § 844(a).) The evidence showed that Dr. Goldstein, Dr. Sullivan, the Kaiser physicians and the licensed vocational nurse were all practitioners within the meaning of the Controlled Substances Act. (21 U.S.C. § 802(21).)

32. The evidence showed that Dr. Goldstein’s recommendation, Dr. Sullivan’s support (which amounted to a recommendation) and the order contained in the emergency seizure protocol of the Kaiser treatment plan were all obtained while the practitioners involved were acting as authorized by California law and in the course of their professional practices.

33. A modern federal court could easily find that the Kaiser emergency seizure protocol was a “valid . . . order” within the meaning of section 844, subdivision (a), of Title 21 of the United States Code. It was issued by California-licensed Kaiser physicians who had been treating Student most of her life. Dr. Goldstein’s “recommendation” also could be construed as a “valid . . . order.” A valid order does not have to be a formal prescription, or the statute would not distinguish between the two. Dr. Goldstein’s recommendation was the strongest statement she could make without violating federal law. Dr. Sullivan’s declaration, while more cautious, was clearly intended to support Student’s use of THC oil to the extent he could legally do so.

34. In light of Congress's ongoing prohibition of prosecutions for state-sanctioned medical marijuana use, it is unlikely that any definitive federal court decision will resolve the interpretive question discussed above any time soon, if ever. As a result, whether Parent, Student, and the nurse would technically violate the federal law prohibiting possession of marijuana if Student were placed on a public school campus for her kindergarten year cannot be decided here with any certainty. Fortunately, the ultimate question here is not whether federal law prohibits Mother, Student and the nurse from possessing THC oil on Rincon Valley's campus; it is whether the IEP Rincon Valley offered Student met her unique needs and was reasonably calculated to provide her with educational benefit in in the least restrictive environment, thereby constituting a FAPE.

D. THE APRIL 27, 2018 IEP OFFER OF HOME PLACEMENT DID NOT PROVIDE STUDENT A FAPE, BECAUSE IT DID NOT PLACE HER IN THE LEAST RESTRICTIVE ENVIRONMENT AND DID NOT PERMIT HER TO MEET HER ANNUAL GOALS

35. Both federal and state laws require a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.114(a); Ed. Code, § 56040.1.) This means that a school district must educate a special needs pupil with nondisabled peers "to the maximum extent appropriate," and the pupil may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii); Ed. Code, § 56040.1; see *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398,1403; *Ms. S. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

36. In *Sacramento City Unified Sch. Dist. v. Rachel H.*, *supra*, 14 F.3d 1398, the Ninth Circuit set forth four factors that must be evaluated and balanced to determine whether a student is placed in the least restrictive environment: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Id.* at p. 1404.)⁵

37. Application of the *Rachel H.* standards here compels the conclusion that Student could satisfactorily be educated on Rincon Valley's public school campus. The evidence showed that, in preschool among many peers, Student derived significant academic benefit; she learned, for example, colors, letters, and some numbers, and made substantial progress on her goals. It also showed that Student derived a great deal of benefit from learning to socialize with her peers. Finally, it showed that even the emergency treatment of her seizures was not significantly disruptive for the students or teachers of the class. Rincon

⁵ Neither party addressed the cost of a home or school placement, so that factor is not considered here.

Valley agrees that, putting aside the possibility of state and federal law violations, Student's least restrictive environment is among her peers on a campus.

38. Under California law, Rincon Valley's April 2018 IEP team decision to bar Student from its campus and bus was not reasonably calculated to provide her a FAPE in the least restrictive environment. (*Rowley, supra*, 458 U.S. at pp. 203-204; *Endrew F., supra*, 137 S.Ct. at p. 1001.) As shown above, as long as Mother, Student and the nurse adhere to their previous practices at the preschool, Student's presence on campus and on the bus along with her medication would not violate California law.

39. The circumstances require Rincon Valley to resolve a conflict between federal statutes. The possibility that Student's presence with her medication on a campus and a school bus might embroil Rincon Valley in prosecution or controversy under federal drug law is remote and speculative. It is not the job of California political subdivisions to enforce federal drug law policy that conflicts with California law. (*Qualified Patients Assn. v. City of Anaheim* (2010) 187 Cal.App.4th 734, 762-763.) "[A] city may not stand in for the federal government and rely on purported federal preemption to implement federal legislative policy that differs from corresponding, express state legislation concerning medical marijuana." (*Ibid.*) The same is true of a school district.

40. The Ninth Circuit has supplied some guidance to school districts faced with the competing commands of federal law. In *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038 (*Doug C.*), a district had scheduled an annual IEP team meeting just in time to meet the IDEA's requirement that a meeting be held at least annually to consider the student's progress on his goals and make revisions if appropriate. (See 20 U.S.C. §1414(d)(4)(A)(i); 34 C.F.R. § 300.324(b)(1)(i).) The student's parent could not attend because of illness, and sought postponement to a later date. The district refused, citing its obligation to hold the meeting within a year of the previous meeting, but the Ninth Circuit held that this choice denied the student a FAPE because it deprived parents of adequate participation in the IEP process. The Court announced this standard:

When confronted with the situation of complying with one procedural requirement of the IDEA or another, we hold that the agency must make a reasonable determination of which course of action promotes the purposes of the IDEA and is least likely to result in the denial of a FAPE.

(*Doug C., supra*, 720 F.3d at p. 1046.) The Court then held, under that standard, that the district's choice to prefer the annual meeting requirement over the participation of the student's parents was clearly unreasonable and a denial of FAPE. (*Ibid.*)

41. Applying the *Doug C.* standard here, the only reasonable course of action Student's IEP team could have chosen in April 2018, was to comply with the least restrictive environment requirement, rather than a strict interpretation of Section 844 of the Controlled Substances Act. Section 844 has not been enforced against state-sanctioned medical

marijuana use for years, and due to congressional command cannot be enforced by federal prosecutors. The force of that law, if any, is greatly outweighed by the competing federal law command, in the IDEA, that Student be given a FAPE in the least restrictive environment. In her case, that means education on a campus among her peers, and transportation to and from that campus. The former course would have promoted the purposes of the IDEA and was less likely to result in a denial of FAPE. The opposite choice, which Rincon Valley made, denied Student a FAPE.

42. The April 2018 IEP offer was also not reasonably calculated to benefit Student, because it did not even avoid the theoretical federal misdemeanor violation Rincon Valley fears. As noted above, several California statutes distinguish between drug use on campuses and off campuses, but federal law does not. Section 844 of the Controlled Substance Act applies everywhere that federal law applies, and makes no distinction among locations. Section 844 is equally applicable to conduct on a campus, off a campus, or in a home. If the conduct examined here would violate Section 844 on a campus, it would also violate Section 844 under the proposed home-based IEP. Nor did Rincon Valley absolve itself of any theoretical involvement in the misdemeanor by proposing the disputed IEP; that offer would provide Student at home the same District-supported nursing services that she received in her private preschool, including possession and administration of THC oil as an emergency seizure medication. Thus, Rincon Valley's proposed IEP would just move the geographical location of the feared violation; it would not eliminate the violation or change the District's role in it.

43. The April 2018 IEP offer was additionally not reasonably calculated to benefit Student because it provided no mechanism for allowing her to accomplish several of her annual goals, which required interaction with other children. As the parties agree and the evidence showed, one of Student's most pressing unique needs is improvement in her ability to socialize with other children. Ms. Myhers speculated that, in order to address this need, the program specialist who would teach Student at home would make some effort to expose her to her peers, such as gathering groups of children from the neighborhood to substitute for the students otherwise present on the campus and during morning circle time. But nothing in the record shows that this was a practical or likely way to allow Student to accomplish her social goals, and an IEP cannot be defended by reference to possible additional services that go beyond its specific provisions. Such promises are not part of the IEP itself and are unenforceable. (*M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1198-1199.) Retrospective testimony about what would have happened had an offer been accepted must be limited to the actual provisions of the IEP. "Such testimony may not be used to materially alter a deficient written IEP by establishing that the student would have received services beyond those listed in the IEP." (*R.E. v. New York City Dept. of Educ.* (2d Cir. 2012) 694 F.3d 167, 174.)⁶

⁶ Student also argues that Rincon Valley's proposed IEP violated the Americans With Disabilities Act, but that claim is not addressed here because OAH has no jurisdiction over it.

44. Rincon Valley’s argument that it would jeopardize federal funding by allowing Student on its campus with her medication is unpersuasive. Ms. Myhers, a lay witness, suggested the district might violate a federal law or guideline requiring a declaration that the district’s campuses were drug-free, but Rincon Valley in its closing brief cannot cite any specific law, rule, or regulation that requires such a declaration, so the argument cannot be accepted here. Ms. Myher’s opinion, which was admitted over a relevance objection, was admissible to establish the reasons for Rincon Valley’s offer, but not to establish what the law actually is. (*People v. Jo* (2017) 15 Cal.App.5th 1128, 1176; *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178-1184.)

45. Rincon Valley argues that it is required by the federal Drug-Free Workplace Act of 1988 (41 U.S.C., §§ 8103 et seq.) to agree to provide a drug-free workplace as a condition of receiving federal money. That Act requires the recipient of a federal grant to notify its own employees that the “unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the grantee's workplace . . .” (41 U.S.C. §8103(a)(1)(A)). But as shown above, the conduct examined here is lawful under state law, and it is far from clear that it is unlawful under federal law. The Drug-Free Workplace Act is a system of notifications, not prohibitions, and it applies to those who receive “a grant from a federal agency,” which for educational purposes is defined by regulation as including only “an assistance award from the Department of Education . . .” (34 C.F.R. § 84.105(a)(1).) Rincon Valley does not address whether special education funding is an “assistance award” with the meaning of that provision. That is unlikely, because the Department of Education does not award special education funding; that funding is established and primarily regulated by Congress. (See 20 U.S.C. §§ 1407, 1411-1412.)

46. Moreover, the Drug-Free Workplace Act is wholly focused on preventing drug abuse by a grantee’s employees, a concern that does not arise here, both because there is no potential for abuse of the THC oil as presently administered and because the nurse is not Rincon Valley’s employee. In any event, the prospect that the federal government would deprive Rincon Valley of federal funding for allowing Student on its campus with her life-sustaining seizure medication seems even more remote than the likelihood that it would charge Student, Mother, the nurse, or school officials with crimes. And should these extraordinarily unlikely contingencies arise, Rincon Valley would have ample time to seek administrative, legislative or judicial relief.

47. Rincon Valley was aware, in fashioning the disputed IEP offer, that Student had succeeded in two years on a preschool campus while having her medication and her nurse available in case of seizures. It placed her there and paid for her education and her nurse. Rincon Valley has already risked federal misdemeanor prosecution without incident, and should have reasonably concluded that it could continue to do so. If circumstances or law change, the parties can address that change in a new IEP. For now, however, it is not reasonable for Rincon Valley to exclude Student from its campus and bus out of theoretical concern for a federal law that is at present unenforced and unenforceable. Rincon Valley’s failure to offer Student a placement on a campus among her peers denied her a FAPE

because it did not place her in the least restrictive environment in which she could satisfactorily be educated and did not adequately allow her to achieve her annual goals.

ORDER

1. Rincon Valley's April 27, 2018 IEP offer failed to offer Student a FAPE in the least restrictive environment.

2. Within 30 days of this Decision, the parties shall convene an IEP team meeting to place Student on a public school campus among her peers with her emergency seizure medication available, and allow her and her nurse to travel on a public school bus to and from the school and on field trips with her medication. Until the parties reach agreement on and implement such an IEP, Student shall be allowed on the campus and the school bus under the same terms as set forth in the stay put order of July 18, 2018.

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 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: September 21, 2018

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