

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

TUOLUMNE COUNTY SUPERINTENDENT OF  
SCHOOLS AND CURTIS CREEK SCHOOL  
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2019020281

PARENTS ON BEHALF OF STUDENT,

v.

TUOLUMNE COUNTY SUPERINTENDENT OF  
SCHOOLS AND CURTIS CREEK SCHOOL  
DISTRICT.

OAH Case No. 2019010105

DECISION

Parents on behalf of Student filed a request for due process with the Office of Administrative Hearings in OAH case number 2019010105 on January 3, 2019, naming Tuolumne County Superintendent of Schools and Curtis Creek School District. On February 6, 2019, Tuolumne County and Curtis Creek filed a due process hearing request with OAH in OAH case number 2019020281, naming Student. On February 11, 2019, OAH granted Tuolumne County and Curtis Creek's motion to consolidate the two cases, designating Tuolumne County and Curtis Creek's case as primary. OAH granted Tuolumne County and Curtis Creek's request to amend their complaint on February 22, 2019.

Administrative Law Judge Tiffany Gilmartin heard this matter in Sonora, California, on March 19, 20, 21, 25, 26, 27, and 28, 2019, and on April 3, 4, and 5, 2019.

Attorneys Mandy Leigh and Damian Troutman represented Student. Mother and Father attended the entirety of the hearing. Student did not attend the hearing.

Attorneys Marcy Gutierrez and Tilman Heyer represented Tuolumne County and Curtis Creek. Blaine Cowick, executive director of the Tuolumne County Superintendent of Schools SELPA attended part of the hearing; Kathy Northington, Interim Superintendent of Curtis Creek Elementary School District attended part of the hearing. Kylee Luchetti, coordinator of special education for the Tuolumne County Superintendent of Schools attended part of the hearing.

At the parties' request, OAH granted a continuance until April 29, 2019, for the parties to file written closing arguments. The parties timely filed their briefs at which time the record was closed and the matter was submitted for decision. After the record was closed, Student submitted a rebuttal brief on May 2, 2019. Tuolumne County and Curtis Creek submitted a surrebuttal brief on May 6, 2019. At the close of hearing, the undersigned specified that the record would be closed upon submission of the closing briefs on April 29, 2019. No motion to reopen the record was made by either party, nor was there a request for rebuttal briefs. As the record had previously closed, neither brief was considered in this Decision.

## ISSUES<sup>1</sup>

### DISTRICT'S ISSUES:

1. Are Tuolumne County and Curtis Creek entitled to a release of information signed by Parents authorizing Tuolumne County and Curtis Creek to communicate with Student's medical providers and with Devereux Advanced Behavioral Health?
2. May Curtis Creek conduct a functional behavioral assessment of Student pursuant to the February 6, 2019 assessment plan?

### STUDENT'S ISSUES:

3. Beginning January 4, 2017, did Tuolumne County and Curtis Creek deny Student a free appropriate public education during the 2016-2017 school year by:
  - a. failing to offer clear and measurable annual goals reasonably calculated to meet his unique needs, with clear, accurate baselines;
  - b. failing to develop sufficient goals to meet his needs in the area of executive functioning;
  - c. failing to continue his occupational therapy goals;
  - d. discontinuing his occupational therapy goals;
  - e. reducing his educationally related mental health counseling service;
  - f. failing to timely conduct an appropriate functional behavioral assessment;
  - g. failing to offer appropriate behavioral intervention services, functional

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<sup>1</sup> The issues for hearing have therefore been rephrased to conform to Tuolumne County and Curtis Creek's withdrawal of issues and for clarity. The ALJ has the authority to redefine a party's issues so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

behavioral plan, and one-to-one aide support;

h. not offering a more restrictive placement based on his history of frequent, intense, and dangerous behaviors?

4. During the 2017-2018 school year, did Tuolumne County and Curtis Creek deny Student a free appropriate public education by:

a. failing to conduct an assistive technology assessment across all academic settings;

b. failing to offer clear and measurable annual goals reasonably calculated to meet his unique needs, with clear, accurate baselines;

c. failing to develop sufficient goals to meet his needs in the area of executive functioning;

d. failing to offer occupational therapy goals;

e. failing to offer occupational therapy services;

f. failing to offer sufficient educationally related mental health counseling service;

g. failing to offer appropriate behavioral intervention services and instead relying on an inadequate functional behavior assessment and behavior intervention plan;

h. failing to offer and provide a one-to-one aide in a timely matter;

i. not offering a more restrictive placement based on his history of frequent, intense, and dangerous behaviors?

5. During the 2018-2019 school year, did Tuolumne County and Curtis Creek deny Student a free appropriate public education by:

a. failing to offer appropriate behavior intervention services to allow him to access his education in the least restrictive environment;

b. offering a change of placement outside the IEP process;

c. not offering a more restrictive placement based on his history of frequent,

intense, and dangerous behaviors?<sup>2</sup>

## SUMMARY OF DECISION

Tuolumne County and Curtis Creek failed to meet their burden on Issue 1 that they are entitled to a release of information to allow the local education agencies to speak with Student's medical providers and Devereux Advanced Behavioral Health.

Tuolumne County and Curtis Creek met its burden on Issue 2 that they are entitled to perform a functional behavioral assessment of Student.

Tuolumne County and Curtis Creek denied a FAPE from January 4, 2017, through the remainder of the 2016-2017 school year by failing to offer Student clear and measurable annual goals, failing to continue his occupational therapy goals; reducing his educationally related mental health services; failing to timely conduct a functional behavioral assessment, failing to offer appropriate behavioral intervention services, and failing to offer a behavior intervention plan. Tuolumne County and Curtis Creek denied Student a FAPE during the 2017-2018 school year because Tuolumne County and Curtis Creek failed to conduct an assistive technology assessment, failed to offer clear and measurable goals, failed to develop goals to meet his need in executive functioning, failed to offer occupational therapy goals and services, and failed to offer sufficient educationally related mental health counseling. From May 10, 2018, Tuolumne County

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<sup>2</sup> Despite Student's allegations he was denied a FAPE for the entire 2018-2019 school year, the findings in this Decision only run through the date of filing. After Student filed his case, a new IEP offer was made on February 1, 2019. This IEP was originally at issue in respondent's case; however, the issue was withdrawn on the first day of hearing. As that IEP was not developed at the time Student's case was filed and Student did not seek to amend his complaint to place that IEP at issue, no findings regarding Student's claims extend beyond the filing of this case.

and Curtis Creek denied Student a FAPE by not offering a more restrictive placement based on his history of frequent, intense, and dangerous behavior.

## FACTUAL FINDINGS

### BACKGROUND INFORMATION ABOUT STUDENT

1. Student was 11-years old and in fifth grade at the time of the hearing. Parents resided within Tuolumne County Superintendent of School and Curtis Creek's boundaries at all times relevant to this case. Tuolumne County Superintendent of Schools supports 11 school districts within the county with regionalized special education services. Student was eligible for special education and related services under the primary eligibility category of emotional disturbance, and the secondary category of specific learning disability.

2. Student filed for due process against Tuolumne County and Curtis Creek on January 3, 2019. A joint notice of representation for Tuolumne County and Curtis Creek was filed on January 7, 2019. Tuolumne County and Curtis Creek filed a joint response to Student's due process complaint on January 11, 2019. During the due process hearing there was joint presentation of evidence. Tuolumne County and Curtis Creek filed a joint closing brief as well. Tuolumne County and Curtis Creek did not present evidence specifying which public entity was the local education agency responsible for providing Student FAPE. Accordingly, for purposes of this decision, Tuolumne County and Curtis Creek are deemed jointly responsible for offering and providing Student a FAPE.

3. Student had emotional and behavioral struggles from an early age. His parents moved to Tuolumne County in 2015. Parents enrolled Student in Tuolumne County Superintendent of Schools and Curtis Creek School District in the first grade. He was home schooled for the remainder of his first grade year. At the start of Student's

second grade year, he was enrolled at a comprehensive elementary school within the district. At the end of the first school day, Mother came to pick up Student who refused to get into her car, Student eloped from the school site with Mother and the principal in pursuit. Student attacked the principal with a stick and bit him. Following the attack, the family was informed Student's behavior was not suitable for a comprehensive elementary school and Student was placed at the Nexus program.

4. The Nexus program is a structured behavioral support program intended to help students with behaviors that interfere in their learning to develop appropriate behaviors. The program provides students behavior and social emotional supports in a specialized classroom on a general education campus.

5. Student also exhibited significant behavioral issues at home. Parents took Student to see various mental health professionals. Prior to the 2016-2017 school year starting, Student ran away from Mother who contacted law enforcement, who took him into custody in restraints and to the hospital for a psychiatric evaluation. He was hospitalized for one week.

6. Student had a behavior incident on the school bus on December 2, 2016, where he required numerous prompts for redirection, spit at another student, and was banging the seat belts together. Parents received a warning letter from the transportation coordinator. Student was also suspended on December 15, 2016, for jumping on another student, knocking the student over, throwing a rock at staff, and running away.

7. An IEP team meeting was held on December 2, 2016. Student qualified for mental health services and the team offered 180 minutes monthly of individual counseling to support positive peer interactions and emotional regulation. Mother consented to the offer on December 12, 2016.

## SPRING 2017 SEMESTER

January 31, 2017 IEP

8. Student's annual IEP team meeting was convened on January 4, 2017; the IEP team continued the meeting on January 31, 2017. Mother attended, as well as Amanda Drayton, program specialist; Jordan Reiser, mental health clinician; Shannon Casey, school psychologist; Shea Morgan, Nexus teacher; Aimee Johnson, occupational therapist. The team reviewed assessment data from Student's psycho-educational assessment. Student's verbal comprehension and visual spatial were in the average range, Student's fluid reasoning was below average, and he had deficits in his working memory and processing speed. Student was identified as clinically significant in all areas of executive functioning. Student's academic assessment also revealed math deficits in calculation. Both raters on his Behavior Assessment System for Children-3rd Edition identified him as clinically significant in hyperactivity, aggression, conduct problems, depression, typicality, and withdrawal. Mother provided private assessment results ruling out Autism as a diagnosis for Student.

9. The IEP team identified writing, math, fine-motor skills, bilateral coordination, and social skills as areas of need. Student's executive function deficits were an unaddressed area of need. Tuolumne County and Curtis Creek knew of Student's need for redirection, aggressive outbursts, and frequent prompting by the classroom aide to complete his work, but failed to provide any goals in this area. The IEP team developed an executive function goal of keeping his work space orderly, but did not develop goals to address his other areas of executive functioning need.

10. The occupational therapist reviewed his three occupational therapy goals. Student met both fine motor goals, but did not meet his bilateral coordination goal of being able to shoot a basketball through a standard height hoop 50 percent of the time. The school district team recommended discontinuing occupational therapy. Student



continued to have fine and gross motor needs.

11. The team also determined Student did not need assistive technology services. However, on February 24, 2017, the IEP team agreed Student needed the assistance of an educational tablet that Parents' were required to provide. Despite this, no assistive technology assessment was recommended for Student.

12. Student's previous IEP contained a total of seven goals. By the January 31, 2017 IEP, Student met only three goals: the two fine motor goals and a goal in respecting personal space. The IEP team agreed that Student's behavior impeded his learning and that of others. Mother raised a concern about Student being restrained on the bus due to his behavior. The team determined Student's behavior could be managed through classroom reinforcement systems and mental health support. The IEP team developed two new behavior goals to address positive peer interactions and managing anger, stress and frustration. Both goals were set in a counseling setting, not the classroom, and would be addressed by the mental health clinician.

13. Student's school-based mental health needs and goals were serviced by his clinician Jordan Reiser. Ms. Reiser, who testified at hearing, obtained her master's degree in psychology with an emphasis in marriage and family therapy in 2009. Ms. Reiser completed the requisite 3000 practicum hours to obtain a license as a marriage and family therapist in 2011. As of the hearing, she still had not obtained licensure. Ms. Reiser referred to herself as a mental health associate. Ms. Reiser was familiar with Student. She was aware of Student's behavior challenges and his active imaginary world. She wrote Student's behavior goals without any assistance from other staff or team members. She was familiar with Student and his needs and her testimony was given significant weight.

14. The IEP team developed 12 goals for Student to work on over the next 12 months. One behavior goal addressed positive peer interaction where Student was

asked to learn and demonstrate positive peer interactions such as introductions, sharing, and starting a conversation with a 70 percent success rate in two out of three trials in a counseling setting. He also had goals that addressed number sense requiring him to add and subtract double digit numbers up to 50 with 80 percent accuracy along with a spelling goal of 80 percent accuracy from a fourth grade sight list. For example, goal two addressed behavior. It stated: in a counseling setting, when given scenarios Student will learn and demonstrate positive peer interactions (introducing self, sharing, starting a conversation, etc.) in order to increase interactions with peers 70 percent of the time in two out of three trials. Another goal addressed his need to regulate his emotions. This goal requested Student, in a counseling setting, identify five strategies for managing his own anger, stress, frustration, and anxiety 70 percent of the time in two out of three trials as measured by the mental health clinician.

15. The IEP team offered Student placement in the Nexus program. As part of his services, Student was offered 120 minutes monthly of individual mental health counseling; a 60 minute per month reduction from the services he was offered in December 2016. Student also received 204 minutes daily of specialized academic instruction.

16. Tuolumne County and Curtis Creek also offered Student supplementary aids, accommodations, and supports in the classroom. These consisted of collaboration between staff and parents, a daily behavior chart to track behaviors, chunking of assignments, comprehension checks, pairing verbal instruction with visual cues or schedules, providing Student with breaks, limiting distractions in Student's work area, the use of a token reward system, speaking to Student away from peers in a calm voice, escorting Student to the bathroom and checking facility prior to and after use, staff maintaining line of site control over Student when on the track, and staying within arm's reach when Student was on the blacktop area.

17. Mother did not object to the IEP offer or request different or additional goals, placement, services, or supports. Mother consented to Tuolumne County and Curtis Creek's January 31, 2017 IEP offer.

18. Within days after the January 31, 2017 IEP, Student had two behavioral incidents that resulted in him being suspended from school. The first incident occurred when Student hit two other students and the bus driver while riding the bus. He also hit his teacher and broke the classroom window on the same day. This resulted in a one-day suspension. The second one occurred when he returned from his first suspension. Student was playing tag with other students when he hit three students and ran away from the playground. He threw a rock at staff and ran away from staff while he continued to throw rocks. As staff attempted to escort him off the playground, he attempted to bite staff and throw rocks at them. Staff was able to get Student back into the classroom where he was contained in a sitting wall restraint until he calmed down. Student was suspended for one day for this incident.

19. An IEP team meeting was held on February 24, 2017, where the behavior incidents were reviewed. The IEP team agreed Student would use Leapfrog, an educational tablet provided by Parents, as a behavior support on his bus rides. No assistive technology assessment was proposed. The team presented an assessment plan to conduct a functional behavior assessment on Student. Specifically, the team wanted to explore the function of his aggressive behaviors, review school and bus behavior, and explore additional aide support. Student had previously shown improvement when a bus behavior plan was implemented. Mother consented to the functional behavior assessment.

20. Victoria Murphy, who testified at hearing, is a board certified behavior analyst. She conducted the functional behavior assessment in March and April 2017. Ms. Murphy's primary area of expertise was Autism. Prior to Student she had never

conducted a functional behavioral assessment for a student with an emotional disturbance. A functional behavior assessment is a formal assessment conducted by a behaviorist. The behaviorist collects data during multiple observations at different times concerning maladaptive behaviors. The purpose of the assessment is to determine what events or circumstances trigger maladaptive behaviors and determine the true purpose behind each behavior. A plan is then developed to decrease the frequency of the targeted behavior, determine one or more appropriate replacement behaviors, and develop reinforcement strategies to encourage replacement behaviors. The referring behaviors for Student's plan were: 1) negative interactions with peers, defined as making threats and negative comments towards peers and 2) aggression towards adults and peers, defined as hitting, kicking, and pushing.

21. Ms. Murphy interviewed Mother and learned there were concerning behaviors occurring in the home. Ms. Murphy visited Student's Nexus classroom, his mainstream class, the honor room, and the art room; she also observed Student's transitions between classrooms. She made five observation visits during the assessment period. During Student's observation period, there were no documented instances of maladaptive behaviors. Ms. Murphy identified positive behavior strategies employed by Student's Nexus classroom teacher, Shea Morgan. Ms. Murphy recommended behavior strategies that were inputted into a behavior intervention plan generated for Student.

22. Because none of the targeted behaviors occurred during the assessment period, the behavior plan developed by Ms. Murphy did not address when Student's maladaptive behaviors were more likely to occur. The behavior plan contained preventative strategies to address Student's reported, but not observed, behaviors. These strategies consisted of speaking in a neutral and emotionally flat manner, stating directions in a clear and concise matter and then walking away to avoid power struggles, and focusing on Student's effort rather than accuracy or grade. The teacher

was also directed to listen to Student and validate his feelings and when possible and appropriate, to ignore Student's disruptive behavior.

23. The IEP team met on May 30, 2017, to review Ms. Murphy's behavior assessment. The IEP team developed four new behavior goals for Student. The behavior goals included two goals where Student would engage in positive peer interactions and identify five strategies for self-management of stress, anger, and frustration. Both goals called for Student to be measured in a counseling setting by the mental health clinician. The remaining two goals involved working with Student to utilize a self-management tool to identify stress triggers and learn to choose an appropriate behavior prior to engaging in maladaptive behaviors. Student would also use a graphic organizer to help select better behavior choices.

24. The IEP team generated a checklist of behaviors and interventions to be addressed: 1) Student's oppositional behavior and defiance towards teachers, adults, and authority figures; 2) Student's tendency to argue and bicker with adults and other students; 3) Student's failure to admit responsibility, frequently blaming others for their failure, behaviors, or shortcomings; 4) Student's failure to follow through with directives and; 5) Student's tendency to not comply with school and class rules, routines, and procedures.

25. Mother signed as present on the IEP team meeting amendment page on May 30, 2017. She did not initial that she consented to the IEP.

#### FALL 2017 SEMESTER

October 18, 2017 IEP Amendment

26. The IEP team met again on October 18, 2017, to review a behavior intervention plan generated since the conclusion of the functional behavior assessment in May 2017 and the beginning of the 2017-2018 school year. Mother; program

specialist, Amanda Drayton; Student's Nexus teacher and case manager, Shea Morgan; and school psychologist, Megan Farnsworth attended. Ms. Reiser was not present at this meeting.

27. The IEP team presented a new behavior intervention plan that differed from the behavior intervention checklist the team introduced in May 2017. This plan identified two behaviors the plan intended to address: negative interactions and aggression towards adults. The plan left a blank for the frequency of the behaviors. The team indicated Student's maladaptive behaviors occurred to express frustration with difficult tasks; to protest, postpone, or avoid non-preferred tasks; and to express anger toward an unwanted peer or adult in an effort to remove that unwanted peer or adult.

28. The IEP team included strategies to prevent problematic behavior in the behavior intervention plan. These included having Student meet with his teachers and have an opportunity to ask questions and receive clarification on the plan's expectations; having Student meet with Ms. Reiser to review the plan and establish skills needed to comply with the plan; providing Student with the opportunity to review the visual tools and understand the uses and procedures to access the supports; reinforcement by teachers of preferred activities he could earn; and reinforcement of his schedule.

29. The IEP team also included replacement behaviors in the behavior intervention plan for Student. To encourage these replacement behaviors, the plan included verbal praise for an on-task behavior, participation in a token economy to allow him to access preferred activities, and a preferred staff member or food as part of his reinforcement. Once Student completed ten continuous school days of the ten-piece reinforcement chart he would transition to the reinforcement chart used for the entire class.

30. Four additional goals were developed for Student. Student's self-soothing

goal asked him to independently move to a safe area away from conflict in four out of five situations. Student's emotional control goal required him to not engage in threats and negative comments towards other students, and avoid aggression towards adults as defined by making physical contact with them through hitting, kicking, and pushing, 85 percent of the school days he attended. A second goal addressed Student independently seeking help when engaged in a difficult or non-preferred task. Another goal asked Student to calmly and effectively communicate his emotions and needs in four out of five trials.

#### Student's Behavioral Emergencies

31. After the October 18, 2017 IEP team meeting, and before the end of the 2017-2018 school year, Student engaged in eight maladaptive incidents that resulted in him being suspended from school. The behaviors included punching other students, yelling obscenities at a teacher, throwing rocks at other students and staff, bringing a pocket knife to school, and striking a teacher with a fire extinguisher.

32. Three of the maladaptive incidents occurred between October 18, 2017, and January 29, 2018. These incidents included eloping from campus, striking Mr. Morgan with the fire extinguisher, and striking staff with rocks. His teachers and support staff tried to navigate Student's changing behaviors. Mr. Morgan, who testified at this hearing, developed home-communication logs to share news of Student's behavior with Parents. He developed a points system that would evaluate Student daily on his behaviors. If Student behaved appropriately he could earn snacks, spicy food was a favorite of Student's, or a video at the end of the day. Mr. Morgan's behavior emphasis was to encourage Student to end the day well. Thus, if Student engaged in maladaptive behaviors at some point in the day, but recovered his behavior, Mr. Morgan sought to encourage the recovery. Mr. Morgan utilized suspensions to support appropriate behaviors for Student. He also utilized in-house suspensions in an effort to determine

which consequence Student least preferred in an effort to support positive behavior outcomes. Mr. Morgan and his aide staff were frequently the adults who remained within arm's length of Student during the day to best redirect his maladaptive behaviors. He and his aide staff were also frequently the target of Student's anger and dislike of authority figures. Student threw rocks at Mr. Morgan, and struck him with a fire extinguisher, and sticks. Mr. Morgan was familiar with Student and his needs and his testimony given significant weight.

33. Student was also privately seeing therapist Susan Swaffer, a licensed marriage and family therapist who also testified at this hearing. Ms. Swaffer provided Mother with a referral to a psychiatrist, Dr. Randall Roxas, in 2015. Ms. Swaffer saw Student after school and spent much of their counseling sessions working on getting Student to be emotionally regulated so he could go home from school. She found Nexus to be a great program for Student at first. She did not believe Student initially required residential treatment. Her opinion was consistent with Parent's desires as well, as keeping Student in the family unit was a preferred outcome. Ms. Swaffer identified Student's tendency to cycle through his maladaptive behaviors. She called this tendency "slippery," for it was exceptionally difficult for his caregivers and teachers to predict when it would return. Student often returned to similar themes in his therapy sessions: being a spy, his need for a weapons cache, and his anger with people who didn't understand he was a spy. Ms. Swaffer and Dr. Roxas communicated after her initial referral regarding Student's treatment plan, but she had not communicated with him in more than two years. Ms. Swaffer's testimony and knowledge of Student was persuasive and given great weight.

34. The family also hired a private behavior modification practitioner, Susan Knopf, who testified at this hearing. Ms. Knopf retired out of Tuolumne County Behavior Health service in 2018. She holds a master's degree in social and behavioral sciences.



She has developed a program she calls cognitive behavior skills to help parents work through maladaptive behavior of their children. Part of this program requires the use of non-verbal communication to allow the child to communicate their feelings with adults without having to verbalize them. Ms. Knopf was familiar with the Nexus program from other clients who participated in the program prior to Student's case. Ms. Knopf provided extensive assistance to the family outside the school setting. At first, Mother contacted her almost daily, and sometimes multiple times a day. As Student became familiar with the program the frequency decreased; however, as his maladaptive behaviors resurged, Mother's frequency increased. As part of her on-boarding experience with clients, Ms. Knopf worked with Parents for three-to-four weeks implementing skills. She observed one instance of Student's maladaptive behavior and how it was influenced by his sibling; referring to them as "coyotes."

35. Ms. Knopf became a member of Student's emergency phone tree when his behaviors became unsuitable to remain at school. Ms. Knopf would pick Student up from school if Mother was unable. She would also meet the family at the emergency room when necessary. Ms. Knopf is a trusted member of Student's private support team. Ms. Knopf expressed her belief Student was intellectually disabled during testimony. She did this without any evidence to support her claim. Ms. Knopf's credibility was impacted by this unsupported statement.

#### SPRING 2018 SEMESTER

January 29, 2018 IEP

36. Student's annual IEP team meeting convened on January 29, 2018. Present were both Parents; general education teacher, Greg Haney; Nexus teacher, Mr. Morgan; administrator, Terri Bell; mental health clinician, Ms. Reiser; school psychologist, Megan Farnsworth; parent advocate, Kellie Learn; and parent's behavior practitioner Ms. Knopf.

The IEP team offered Student placement at the Nexus program, specialized academic instruction for 1080 minutes per week; individual counseling for 120 minutes monthly. Student had twelve goals to review; he met four of them. Student met two of his behavior goals. He did not meet any of the behavior goals introduced to him from the October 17, 2017 IEP amendment that added his behavior intervention plan. Mother provided the team a letter from, Dr. Roxas identifying his current psychiatric diagnoses and any conditions still under consideration. Dr. Roxas' letter informed the team that he had diagnosed Student with bi-polar disorder and attention deficit hyperactivity disorder.

37. Student's IEP team identified his area of needs as English language arts, math, social skills, counseling, and behaviors. Student continued to display the need for occupational therapy services, executive functioning, and assistive technology. No goals or services were offered addressing the latter.

38. The team introduced new goals in multiplication, subtraction, and reading fluency, along with a counseling setting-behavior scenario goal, and two new behavior goals to address negative peer interactions and aggression. Goals from his 2017 IEP that he did not meet were continued. Student's aggressive behavior goal called for Student to refrain from pushing, kicking, or hitting staff 100 percent of the school days he was present. His previous goal had called for him to avoid the target behavior 85 percent of the time. He had four instances of physical contact since the previous October incident, for a 93 percent success rate on avoiding those behaviors.

39. Student also received a bus behavior plan. The plan was devised in an effort to maintain Student's safety on the bus. Ms. Swaffer provided a letter in support of the bus behavior plan. Student had made progress in therapy and needed some assistance to be successful in riding the bus. Ms. Swaffer identified the triggers that made Student reactive. As part of his bus behavior plan, Student would be given an iPad

and headphones to use while riding the bus. He would be provided an aide to ride with him. Once Student could to ride the bus without issue for one week, the team would increase his ridership to afternoons with aide and technology support. No assistive technology assessment was offered. Mother consented to the IEP on January 29, 2018.

40. Following the January 29, 2018 IEP meeting Student's behavior deteriorated. Between February 20, 2018, until July 5, 2018, he was suspended for eight days total. This was a substantial increase in Student's maladaptive behavior. He punched a kindergartner, hit his teacher in the head with rocks and chased him with a stick, brought a pocket knife to school, and spouted obscenities at his aide on the bus.

41. On May 10, 2018, the team meet for an IEP team meeting to add searches of Student's pockets and socks in the morning and afternoon to prevent Student from hiding contraband to be used as a weapon. By this meeting Student had been suspended nine days. Mother raised concern about his suspensions. Student's behavior necessitated he be transported in an individual vehicle. The team also agreed to reintroduce Student to the bus the last week of school. During this week Student would take the bus in the morning with an aide. Starting with the extended school year, Student would take the bus in the morning and the afternoon. Mother consented to the IEP amendment.

42. The team met again on June 25, 2018, to discuss Student's transportation. His treating psychiatrist provided a medical update of his current diagnoses, his medical protocols, and an opinion on the level of care Student needed. The team agreed Student required an aide to ride the bus. An aide in the afternoon was currently available and they were searching for a morning aide.

43. In August 2018, Student was suspended for one day from using school computers for accessing inappropriate sites including pornography. On September 6, 2018, Student threatened two staff members on his bus ride home. He also kicked and

spit on his aide and threatened additional violence if his behavior was reported. Student had a fantasy life as a spy. His fantasy life became more disturbing, his drawings became more violent, and his desire to create escape routes and weapons caches more immediate.

#### Manifestation determination review

44. Kylee Luchetti, who also testified at this hearing, and was the special education coordinator for Tuolumne County, informed Parents of Student's suspension the evening of September 6, 2018. Ms. Luchetti's testimony was persuasive.

45. Ms. Luchetti joined the Tuolumne County Superintendent of Schools in July 2018 as the special education coordinator. Tuolumne County supports 11 school districts within the county with regionalized special education program. The superintendent of schools provides all service clinicians to area schools; Ms. Luchetti supports special education providers with training, supervision, and scheduling. Ms. Luchetti met Student on the first day of school in August 2018 as part of her welcome back to school tour of programs. Ms. Luchetti handles special education discipline that rises to suspension levels.

46. A manifestation determination review meeting was held on September 11, 2018. Ms. Luchetti attended, along with all required personnel. Student did not attend the meeting. Ms. Baez, who did not testify at the hearing, prepared the manifestation determination report.

47. Elijah Elder-Rosen, Student's Nexus teacher at the time, who also testified at the hearing, reported to the manifestation review team that Student was one of his best. Mr. Elder-Rosen taught on a provisional internship permit. Mr. Elder-Rosen had no specialized training in special education, yet was in charge of a specialized behavior classroom servicing students with emotional disturbance. Mr. Elder-Rosen was surly, evasive, and at times non-responsive during testimony and his testimony was given no

weight.

48. The manifestation determination review team concluded Student's behavior was a manifestation of his disability. The team recommended a functional behavior assessment be conducted and a behavior intervention plan developed. Parents signed in agreement with the team's determination that Student's behavior was a manifestation of his disability. Parents contended Tuolumne County and Curtis Creek failed to implement Student's IEP.

#### 2018 functional behavior assessment

49. Judy Simon, a board certified behavior analyst for Tuolumne County recommended a new functional behavior assessment be conducted. At the time of the manifestation determination review, Ms. Simon had 18 years' experience as a behavior specialist in a school setting. She was working for Tuolumne County as an independent contractor during school year 2018-2019. She reviewed Ms. Murphy's original FBA and recommended it be redone. Ms. Simon noted there were issues with getting the staff to record behavior data correctly and lacked confidence the staff had correctly identified the behavior function. Ms. Simon expressed a need for the behavior assessment to identify precursor information in order to interrupt behaviors before they escalated. Ms. Simon's knowledge of the case and thoughtful presentation was given significant weight.

50. Jeanine Wilkinson, a board certified behavior analyst with her own company, Building Connections Behavioral Health, testified at this hearing. She reviewed Ms. Murphy's FBA and also recommended a new assessment be conducted. Student's first behavior plan was, in her opinion, "cookie cutter". At the Parents' request, Ms. Wilkinson reviewed Student's 2017 functional behavior assessment and behavior plan. Ms. Wilkinson found it lacking in several areas. Consistent with Ms. Simon, Ms. Wilkinson recommended precursor behaviors be identified to allow lower level interventions. Ms.

Wilkinson's opinions on the quality of the assessment and behavior plan were impacted by straying from her area of expertise in behavior. Ms. Wilkinson consistently testified about Student's psychosis issues. Student has a diagnosis of Bi-Polar disorder; no medical provider was called to testify to any "psychosis." Further, Ms. Wilkinson's credibility was impacted by her refusal to answer the questions she was asked and instead insisted on providing the answers she wanted to give.

51. Student's behaviors deteriorated significantly following his 2017 Functional Behavior Assessment. Student displayed no maladaptive behaviors during his 2017 assessment period, thus his behavior intervention plan did not sufficiently identify precursor behaviors in order to interrupt them before escalation. Further, Student's aggressive and maladaptive behavior escalated to where Student faced a manifestation determination review.

52. Parents were given a proposed assessment plan on February 6, 2019. The plan described the proposed assessment as a functional behavior assessment, written in English; it stated no special education services would be provided to Parents without Parent's written consent. The plan also identified the title of who would perform this assessment, in this instance, a board certified behavior analyst. Parents did not consent.

#### Placement in Residential treatment

53. During the manifestation determination review, Parents indicated they wanted to pursue residential treatment for Student. To support her position, Mother produced a letter from Ms. Swaffer outlining Student's counseling care and documenting Ms. Swaffer's belief that Student required a higher level of care.

54. Shortly after the manifestation determination review, Ms. Luchetti provided parental consent forms for Parents to sign on September 17, 2018, for two residential treatment programs under consideration: Change Academy at the Lake of Ozarks and Devereux Advanced Behavioral Health. The same day, Ms. Luchetti reached

out to Devereux via telephone. Since she did not have a signed parental consent she was only able to inquire in generalities of Devereux's availability.

55. Student was taken to the emergency room on September 29, 2018, for suicidal behavior. During Student's manic incident he tried to harm himself with a knife, including attempting to stab his testicles. He was restrained by his Parents and later law enforcement. As Student was unable to re-regulate himself, he remained on a psychiatric hold until September 30, 2018.

56. Mother returned the signed consent for Devereux on October 1, 2018. The same day, Ms. Luchetti learned from Mother that Student's application was rejected by the Change Academy because his behavior was too acute. Ms. Luchetti provided Devereux documents it required to determine if Student could be admitted to Devereux on October 16, 2018. Two days later, Ms. Luchetti learned from Devereux that Student had already been conditionally accepted from the documents Mother provided.

57. At this point, Mother was almost exclusively focused on finding a residential placement for Student. Tuolumne County and Curtis Creek were aware Parents were considering Devereux as a possible placement for Student between October and December 2018. Mother revoked consent for Tuolumne County and Curtis Creek to speak to any third parties about Student on December 28, 2018.

58. Following Mother's revocation of consent, Tuolumne County and Curtis Creek were unable to communicate with any prospective residential placements regarding Student. Tuolumne County and Curtis Creek were also denied updated information about Student's on-going mental health issues and hospitalizations.

59. Student was rejected from several other facilities. Michael Clumeck, the director of admissions for Edgewood Center for Children and Families, testified at the hearing. The family provided records to Edgewood to make its determination. After reviewing Student's records Edgewood Center could not meet Student's needs. Among

the factors Edgewood identified as areas they would be unable to meet were Student's self-harm, aggression, and tendency to make weapons. Mr. Clumeck notified the family of Edgewood Center's determination on November 14, 2018.

60. On November 28, 2018, Mother provided a signed release for Tuolumne County to communicate with Perimeter Health, also known as Madison Oaks Behavioral Acute and Residential Services in Tennessee. This program was Mother's preferred program. Barbara Radebaugh testified telephonically in this hearing. Ms. Radebaugh was the assistant administrator and director of clinical services at Madison Oaks. Ms. Radebaugh first spoke with Mother in November 2018. The Madison Oaks team reviewed Student's file and made a decision on November 26, 2018, to admit Student. Ms. Radebaugh believed Madison Oaks could meet Student's therapeutic and educational needs.

61. The Madison Oaks Behavioral Program is co-located with an acute care facility in Jackson, Tennessee. The facility has a child-adolescent and a geriatric unit. It received certification by the California Department of Education in December 2018. The program focuses on children who have behavioral or psychiatric issues that have made them a threat to themselves or their community. It could meet Student's educational and therapeutic needs. Student would receive academic, behavioral, psychiatric, and emotional support through this program. The daily rate for the program is \$495 which covers room and board, therapeutic services, and education.

62. Mother then hired Shayna Abraham, a therapeutic educational consultant with her own company, Prepare to Bloom. Ms. Abraham has a master's degree in counseling psychology. She has no special education teaching experience. As a consultant, she specializes in locating residential treatment facilities for children. At Mother's request and without any knowledge of Tuolumne County and Curtis Creek, Ms. Abraham visited both Devereux and Madison Oaks prior to the hearing. Ms. Abraham described both facilities as residential treatment facilities. Ms. Abraham reviewed all of



Student's record and spoke with Parents, but no one from Tuolumne County and Curtis Creek. Ms. Abraham visited Devereux for approximately two and one-half hours and spent half a day at Madison Oaks. Madison Oaks offered a trauma-infused therapy program and had an on-site psychiatrist and staff therapists to serve Student's therapeutic needs. Mother expected Ms. Abraham to render an unfavorable opinion of Devereux at the time she engaged Ms. Abraham. Ms. Abraham billed Parents \$3923.63 for reviewing Student's case, testimony, and travel to the two facilities.

#### December 18, 2018 IEP TEAM MEETING

63. On December 14, 2018, Ms. Luchetti, believing there was a consensus on both the need for residential treatment and location, drafted an IEP amendment document offering Student placement at Devereux. Ms. Luchetti presented Parents with the IEP amendment document. Parents refused to consent to placement because Devereux was no longer their preferred program for Student. Ms. Luchetti was surprised by Parent's refusal. No IEP team meeting was scheduled immediately following Parent's refusal to consent to the amendment. Student's next IEP team meeting was not held until February 1, 2019.

#### Dr. Solomon's Assessment

64. In early February 2019, Parents contracted with Dr. Paula Solomon, who testified at this hearing, for an evaluation of Student. Dr. Solomon had a doctorate in psychology. She worked as a clinical director for TLC learning centers for 23 years. Starting in 1996, she also simultaneously maintained a private practice where she specialized in psychological assessments of Students, and throughout her career has performed more than 300 assessments. She was a lecturer at the Institute of Imaginal Studies, where she taught psychology graduate students in assessment techniques and neuropsychological screenings.

65. For her assessment, Dr. Solomon reviewed Student's records including Tuolumne County's assessments, IEP team meeting documents, suspension reports, and school-home communication. She received information from Parents through interviews. Dr. Solomon also had access to records relating to Student's mental health and hospitalizations that was not shared with Tuolumne County.

66. Dr. Solomon attended Student's February 1, 2019 IEP team meeting. She then assessed Student over three days in February and March. Her assessment consisted of a review of Student's records; observations of Student at school; and interviews with Parents, Student, Ms. Reiser, Ms. Luchetti, Ms. Swaffer, and Dr. Roxas' nurse.

67. Dr. Solomon administered the Wechsler Intelligence Scale for Children, Fifth Edition. This standardized test measured cognitive ability and problem-solving processes in children. Student's full scale intelligence quotient was in the low average range. His working memory and processing speeds are areas of specific weakness. Student performed strongly on the verbal comprehension.

68. Dr. Solomon also observed Student in his classroom on February 12, 2019. During the observation, Student was easily frustrated and off-task. He was given credit for work he partially completed. Student was described as doing as little as possible. Student engaged in maladaptive behaviors like attempting to access inappropriate material on the computer.

69. On the same day she observed Student, Dr. Solomon met with Ms. Luchetti and Ms. Reiser. Student tended to struggle between 11:30 and 1:00, which was the result of Student's morning medication time being adjusted.

70. Dr. Solomon received input from Mother and Mr. Elder-Rosen through interviews with them and their completion of the rating scales for the Behavior Assessment Scales for Children, Third Edition. Mother's index scores were in the clinically significant range for externalizing problems, internalizing problems, and on the behavior

systems index. Mother's content scores noted concerns in the areas of anger control, bullying, developmental social disorders, emotional self-control, executive functioning, and resiliency.

71. None of Mr. Elder-Rosen's scores identified Student in the clinically significant area. His scores rated Student at-risk in externalizing and behavioral symptoms; with aggression, atypicality, and withdrawal being his highest scores. Mr. Elder-Rosen's content scores showed Student as clinically significant in bullying and at risk for developmental social disorders.

72. To assess Student's adaptive skills, Dr. Solomon administered the Adaptive Behavior Assessment—Second Edition. The test consists of rating scales which Dr. Solomon asked Parents and Mr. Elder-Rosen to complete. Parents rated Student in the first through third percentile for youth his age. He was rated highest by Parents in community use and lowest in self-care, but all scores were significantly below average. Mr. Elder-Rosen's ratings were also below average, with Student's highest score in the 13th percentile in conceptual domain; though all Mr. Elder-Rosen's scores were also significantly below average.

73. To assess Student in the area of emotional disturbance, Dr. Solomon administered the Emotional Disturbance Decision Tree. The test measures a child's inability to build or maintain relationships; inappropriate behaviors or feelings; pervasive mood or depression; and physical symptoms and fears. Dr. Solomon also received input from Parents and Mr. Elder-Rosen in completing the Emotional Disturbance Decision Tree. Parents rated Student to be very high clinical in all categories. Mr. Elder-Rosen's rating sheets rated Student moderate clinical in inability to build or maintain relationships, physical symptoms or fears; high clinical in inappropriate behaviors or feelings and pervasive mood/depression.

74. Dr. Solomon received input from Student and Parents on the Children's

Depression Inventory-2. The Children's Depression Inventory-2 is a multi-rater assessment to aid in the identification of depressive symptoms, and diagnoses of depression and related disorders. Student described himself as significant in negative mood, negative self-esteem, and interpersonal problems. Parent's responses also placed him at elevated levels for aspects of depression and total depression.

75. Dr. Solomon also received input from Student and Father on the Multidimensional Anxiety Scale for Children. This measurement estimates the likelihood of experiencing anxiety disorders. Father rated Student very elevated in physical symptoms, tense and restless; slightly elevated in social anxiety, performance fears; and high average on humiliation and rejection, panic, and obsessions and compulsions; and low on harm avoidance. Student self-reported slight elevation in social anxiety, humiliation and rejection, performance and fears, and panic; high average on physical symptoms and harm avoidance; average on obsessions and compulsions and tense and restless.

76. Dr. Solomon also asked Student to participate in the Roberts Apperception Test for Children. In this assessment, Student is asked to tell stories from a series of pencil sketches on children and families in normal situations. Each story will have an implied problem or emotional stress. Student's stories were concerning to Dr. Solomon. He was unable to accurately identify interpersonal dynamics and his problem solving gave bizarre and wishful outcomes.

77. Dr. Solomon also asked Student to perform the Draw-A-Person task where the individual is allowed to express their inner view of themselves. Student was given three opportunities to draw a person. His first effort was a non-descript person. The second effort was a very detailed lantern he had studied on-line, and third time, he drew a corpse. The corpse was in graphic detail including beard stubble and an empty eye socket.

78. The final test Dr. Solomon asked Student to complete was the Incomplete Sentence Test. Student was slow and thoughtful in his responses. Dr. Solomon followed up with some of Student's responses in her interview with him.

79. Dr. Solomon's assessment report recommended a residential program that specializes in children with serious mood disorders and significant learning disorders. Student was not accessing his education due his mental instability. Dr. Solomon also recommended required a one-to-one aide for Student. She believed the facility should also specialize in trauma-informed therapy. She also recommended Student receive daily therapy to allow him to work on his emotions and coping skills.

80. Dr. Solomon concluded Student required a residential treatment facility as of late 2015. Dr. Solomon first met Student in February 2019. This recommendation was unreliable as to when she concluded a residential placement was warranted. However, the totality of the evidence in this case established that Student required a more restrictive placement by May 10, 2018.

81. Dr. Solomon opined that a residential placement is currently required due to Student's past inappropriate placement. As part of her recommendation for remediation, Dr. Solomon recommended a residential treatment program be capable of providing family therapy on a weekly or bi-weekly schedule. Despite also only meeting Student's family in February 2019 and his younger brother for only 20 minutes, she also recommended the family receive two years of family therapy and individual therapy for each of the family members. Her recommendation was unpersuasive given the expansiveness of her recommendation versus the limited knowledge she had of the family's needs.

82. Dr. Solomon provided Parents with a bill for \$15,225 for her services. These services include 63.25 hours at the rate of \$175 per hour of performing a psychoeducational assessment. The balance was for travel and hearing testimony.

83. Student's needs outpaced Tuolumne County and Curtis Creek's ability to meet them starting in May 2018. Tuolumne County and Curtis Creek knew of Student's declining behaviors and more frequent outbursts. Once his decline was observed, Tuolumne County and Curtis Creek should have reassessed his functional behavior to determine what was causing the decline and how it could be appropriately addressed.

#### Educational Assessment

84. In March 2019, Parents contracted with Priya Tjendersen, who testified at this hearing, for an educational evaluation of Student. Ms. Tjendersen is an educational specialist consultant with the Morrissey-Compton Educational Center. In her role at Morrissey-Compton, she performs educational assessments to determine specific learning differences. Since 2016, she also serves as the lead education specialist with the North Bridge Academy. She holds a master's in special education.

85. In conducting her assessment, Ms. Tjenderson reviewed Student's work samples, report cards, and past IEPs. Ms. Tjenderson spoke with Mother. She did not speak with any of Student's teachers. Ms. Tjenderson administered standardized assessments including the Woodcock-Johnson; Berry-Buktenica Test of Visual Motor Integration; Test of Orthographic Competence, Ages 8-12; and the Kaufman Test of Academic Achievement, 3rd edition, form B.

86. On the Woodcock-Johnson test, Student obtained scores in the average range for letter word identification. He performed below average in sentence reading fluency, passage comprehension, broad reading, and oral reading. He performed below average in spelling, sentence writing fluency, writing samples, and broad language. His math scores indicated significant weakness in calculation, math facts fluency, applied problems, and broad mathematics.

87. On the Test of Orthographic Competence, Ages 8-12, Student scored in the first and second percentile for letter choice, word scramble, and sight spelling.

Student scored score in the 95th percentile in homophone choice. On the Berry-Buktenia Test of Visual Motor Integration, Student demonstrated below average deficits on his visual motor skills at both the perceptual and motoric planning levels. On the Kaufman Test of Academic Achievement, 3<sup>rd</sup> edition, Form B, phonological processing, Student scored a standard score of 71, putting him in the 3<sup>rd</sup> percentile, indicating Student had deficits in separating sounds of words.

88. Student worked diligently throughout the testing. He demonstrated distractibility and needed directions repeated and redirections to continue working. Near the end of his testing session, Student was restless and sang songs with violent or sexual connotations. Ms. Tjenderson believed, based on his performance, the testing results were an accurate reflection of his academic achievement.

89. Based upon her testing, discussions with Mother and Student, and record review, Ms. Tjenderson concluded Student meets the criteria for a Specific Learning Disability in Reading and a Specific Learning Disability in Written Expression, which she described as dysgraphia. She also concluded Student warranted a further diagnosis in Specific Learning Disorder in Mathematics, which she described as dyscalculia. Ms. Tjenderson's recommendation indicated Student's mental health issues impacted his learning abilities. She recommended a series of accommodations for Student, along with a program of educational therapy and assistive technology. Ms. Tjenderson's report was signed by her and Dr. John T. Brentar, a licensed psychologist at Morrissey-Compton.

90. Ms. Tjenderson found all of Student's IEP goals to be inadequate. Ms. Tjenderson's wholesale discounting of Student's goals was conclusory. Tjenderson never observed Student at school or spoke to his teachers. Ms. Tjenderson's testimony raised significant questions about her objectiveness.

## LEGAL ANALYSIS AND CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>3</sup>

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);<sup>4</sup> 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 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.) "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).)

3. In general, an IEP is a written statement for each child with a disability that

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<sup>3</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>4</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.



is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

4. 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 to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that, despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School District* (9th Cir. 2010) 592 F.3d 938, 950-951 (*Mercer Island*).) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. The Supreme Court recently clarified the *Rowley* standard in *Endrew F. v.*

*Douglas County Sch. District RE-1* (2017) 580 U.S. \_\_\_, 137 S.Ct. 988 [197 L.Ed.2d 335]. It explained in *Andrew 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 a student like *Andrew 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. (*Andrew F.*, *supra*, 137 S.Ct. at p. 1001; see *E.F. v. Newport Mesa Unified Sch. District* (9th Cir. 2018)) 726 Fed.Appx. 535 [nonpub. opn.] [in Ninth Circuit *Andrew F.* clarified but did not change *Rowley* standard], citing *M.C v. Antelope Valley Union High School District*, (9<sup>th</sup> Cir. 2017) 858 F.3d 1189,1200. The high court noted that "[a]ny review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." (*Andrew F.*, *supra*, 137 S.Ct.. at p. 999 [italics in original].)

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, Student had the burden of proof for all of his issues, and Tuolumne County and Curtis Creek had the burden of proof for their issue.

7. Whether an IEP offers a student a FAPE is assessed in light of information available at the time the IEP is developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) An IEP “is a snapshot, not a retrospective”; it must be assessed in terms of what was objectively reasonable when the IEP was developed. (*Ibid.* [quoting *Fuhrmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 (Mansmann, C.J., concurring)]; see also *L.J. v. Pittsburg Unified Sch. District* (9th Cir. 2017) 850 F.3d 996, 1004 [“the ‘snapshot’ rule . . . instructs the court to judge the appropriateness of the determination on the basis of the information reasonably available to the parties at the time of the IEP meeting.”]; *JG v. Douglas County Sch. District* (9th Cir. 2008) 552 F.3d 786, 801.)

8. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. “First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?” (*Rowley, supra*, 458 U.S. at pp. 206-207.) “If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.” (*Id.* at p. 207.) (*Mercer Island, supra*, 592 F.3d at p. 947.)

9. A procedural violation constitutes a denial of FAPE only if it impeded the child’s right to a FAPE, significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*)). The Ninth Circuit has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3

(*Park*); *Ford v. Long Beach Unified School District* (9th Cir. 2002) 291 F.3d 1086, 1089.)

The Ninth Circuit has also found that IDEA procedural error may be held harmless. (*M.L. v. Federal Way School District* (9th Cir. 2005) 394 F.3d 634, 652.)

10. Here Tuolumne County and Curtis Creek proceeded in a joint defense. They responded jointly, presented evidence jointly, and argued closing briefs jointly. At no time was there a differentiation of the local education agency responsible for providing Student FAPE. Thus, because the agencies proceeded jointly, and provided no argument or evidence regarding which entity was obligated to offer and provide Student a FAPE, it is a finding here that any of Student's substantiated FAPE denials will result in joint and several liabilities against Tuolumne County and Curtis Creek.<sup>5</sup>

ISSUES 3(A) AND 4 (B): FAILURE TO OFFER CLEAR AND MEASURABLE ANNUAL GOALS, REASONABLY CALCULATED TO MEET HIS UNIQUE NEEDS, WITH CLEAR, ACCURATE BASELINES.

11. Students argues his IEP goals contained in each IEP from January 4, 2017, through the end of the 2017-2018 school year were inadequate because the goals were not measurable, did not meet his needs, and did not have clear and accurate baselines. Tuolumne County and Curtis Creek contends Student's goals were sufficient enough for Tuolumne County and Curtis Creek's staff to understand the goals.

12. An IEP includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided with the projected initiation date and anticipated duration, the extent to which the student can

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<sup>5</sup> As a matter of law, these findings will have no impact on any interagency agreement Tuolumne County and Curtis Creek may have previously executed.

participate in regular educational programs, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i), (ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code § 56345, subds. (a)(2), (3).) Annual goals must meet “the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum” and “[meet] each of the child’s other educational needs that result from the child’s disability.” (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).)

13. The IEP shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

14. In developing an IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child’s education, the results of the most recent evaluations of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.324 (a).)

15. In the January 31, 2017 IEP, 12 goals were identified for Student to work on over the next 12 months. Four of Student’s goals were measurable. For example, Student’s numbers sense goal called for Student to add and subtract double digit numbers up to 50 with 80 percent accuracy. To measure progress toward this goal, staff could identify the number of times Student was asked to calculate double-digit numbers and his accuracy at each attempt. Student’s spelling goal is similarly measurable as it called for Student to spell at an 80 percent accuracy words from the fourth grade sight list.

16. The remaining goals of Student’s January 31, 2017 IEP were not

measurable. For example, Student had a behavior goal that asked him in a counseling setting to demonstrate positive peer interactions. The goal fails in its measurability and it is difficult to monitor or track. The goal is subjective to the mental health clinician evaluating Student in a counseling setting. Further, the goal requires Student to demonstrate appropriate interactions with peers, but is not evaluated in a classroom setting, but his individual counseling setting. Thus, this goal was never measurable.

17. Another unmeasurable goal was Student's behavior goal that asked him, in a counseling setting, to identify five strategies for managing his own anger, stress, frustration, and anxiety 70 percent of the time in two out of three trials as measured by the mental health clinician. The evidence in this case established Student was aware of positive and negative behaviors when not dysregulated. Simply asking Student to identify strategies without any further guidance renders the goal unmeasurable. Student could easily accomplish this goal by identifying five maladaptive strategies for his anger. Student could also by rote identify strategies and be successful in this goal. Thus, this goal is a memorization goal rather than a behavior goal because Student could identify strategies but not deploy them as a behavior modification. Thus, as a behavior goal it is not measurable.

18. In Student's October 18, 2017 IEP team amendment, four new behavior goals were presented. Two of Student's behavior goals were measurable. One goal asked Student to move to a safe area away from conflict four out of five situations. Student's emotional control goal required him not to engage in threats and negative comments towards other students, and avoid aggression towards adults as defined by making physical contact with them through hitting, kicking, and pushing on 85 percent of the school days he attended. However, the remaining two goals were not measurable. For example, one goal addressed seeking help, called for him to independently seek help when engaged in difficult or non-preferred tasks. This goal fails as it is unclear what

difficult or non-preferred tasks Student is expected to independently seek assistance on. His emotional control goal fails for similar reasons. It called for student to calmly and effectively communicate his emotions and needs in four out of five trials. The goal is not measurable as it is subjective to the causative behavior and the desired result.

19. When the team met again on January 29, 2018, the team introduced new goals in multiplication, subtraction, reading fluency, a counseling setting-behavior goal, and two new behavior goals to address negative peer interaction and aggression. Some of Student's goals from his 2017 IEP that he did not meet were continued without revision. None of the goals introduced at Student's October 18, 2017 IEP amendment meeting were met; however, Student's needs increased. Student's aggressive behavior goal was measurable as it required him to not engage in pushing, kicking or hitting staff 100 percent of the school days he was present.

20. Student failed to meet their burden that Student's baselines were incorrect. Student's expert's wholesale discounting of Student's goals was given little weight and Student provided no other evidence that the baselines were incorrect. While, Student did not meet their burden that the baselines were incorrect, Student did establish several goals from the January 31, 2017 IEP were unmeasurable and were never remediated in his January 29, 2018 IEP. That several goals were not measurable was a procedural flaw in the two IEP's.

21. As noted above, a procedural violation only results in a denial of FAPE if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *Target Range, supra*, 960 F.2d at pp. 1483-1484.)

22. That Student's goals remained unmeasurable and un-remediated over two annual IEPs resulted in a substantive denial of FAPE because the failure to develop clear

and measurable goals impeded Student's ability to access his education. Thus, Tuolumne County and Curtis Creek denied Student a FAPE.

23. Student prevailed on Issues 3(a) and 4(b).

#### ISSUES 3(B) AND 4 (C): EXECUTIVE FUNCTIONING GOAL

24. Student contends that, despite being on notice of Student's needs in executive functioning, Tuolumne County and Curtis Creek provided him only one goal and never addressed any other areas of need like redirection, distractibility or aggression. Tuolumne County and Curtis Creek argue executive functioning is not a skill, but a class of mental functions and Tuolumne County and Curtis Creek did provide goals for areas implicated by executive functioning deficits. They further contend Tuolumne County and Curtis Creek provided goals for areas implicated by executive functioning deficits, including self-regulation, impulse control, and reading fluency.

25. The evidence established that Student had a clear area of need in executive functioning. Student's psychoeducational assessment identified his executive functioning deficits to be clinically significant. The January 31, 2017 IEP did not offer Student any goals in executive functioning. Student continued to engage in aggressive behavior, required frequent redirection and prompting from his classroom aide to remain engaged in his school work, yet the IEP never identified executive functioning as an area of need. While the IEP provided support for areas implicated by his executive functioning it did not sufficiently address Student's significant executive functioning needs. Student's executive functioning deficits impacted his ability to access his education as he needed constant redirection from an aide to accomplish his daily tasks and his behavior remained at issue.

26. Student met his burden that Tuolumne County and Curtis Creek denied him a FAPE from January 31, 2017, through the date of filing by failing to address his needs in the area of executive functioning with appropriate goals. Thus, Student



prevailed on Issues 3(b) and 4(c).

#### ISSUE 3(C)(D), 4(D)(E) OCCUPATIONAL THERAPY GOALS AND SERVICES.

27. Student argued in Issues 3(c) and 3(d) and 4(d) and 4(e) that his deficits in writing required continued occupational therapy goals. Student also contends in issues 3(d) and 4(e) that he required ongoing occupational therapy services which Tuolumne County and Curtis Creek withdrew from his 2017 IEP and did not include on his 2018 IEP. Tuolumne County and Curtis Creek argued Student met two of his occupational therapy goals and the educational agency discontinued his third goal because Student preferred to play soccer and basketball with his peers during recess.

28. Under the "educational necessity" standard, occupational therapy and physical therapy shall be provided when required to help a student "benefit from special education." [34 C.F.R. Sec. 300.34(a).] Occupational therapy is defined by federal law as services provided by a qualified occupational therapist, and includes improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation; improving ability to perform tasks for independent functioning if functions are impaired or lost; and preventing, through early intervention, initial or further impairment or loss of function. [34 C.F.R. Sec. 300.34(c)(6).] Educational agencies have an obligation to assess a child in all areas of need. (20 U.S.C. § 1414 (b)(3)(B).)

29. Tuolumne County and Curtis Creek's argument is unpersuasive, for it conflates ordinary childhood playtime to a service provided by a trained professional. Student's January 2017 IEP identified Student's bilateral coordination as an area of need. Student met two of his three occupational goals at the time of this IEP. Tuolumne County and Curtis Creek discontinued Student's occupational therapy services despite evidence that occupational therapy an area of need with no explanation of justification. No assessment report supported Tuolumne County and Curtis Creek's withdrawal of Student's occupational therapy service or contained goals. Ongoing services for Student

in occupational therapy would have assisted him in further developing his fine motor and gross motor skills. The evidence established Tuolumne County and Curtis Creek should not have discontinued Student's occupational therapy goals or services when he continued to have occupational therapy needs.

30. Tuolumne County and Curtis Creek denied Student a FAPE from January 31, 2017, through the date of filing regarding occupational therapy. Accordingly, Student prevailed on Issues 3(c) and 3(d) and 4(d) and 4(e).

#### ISSUE 3(E) 4(F) MENTAL HEALTH COUNSELING SERVICES

31. Student argues he did not receive sufficient mental health related counseling. Tuolumne County and Curtis Creek argue the reduction of Student's individual mental health counseling in his January 31, 2017 IEP correlated with increased time in the Nexus classroom, thus providing him with education in a less restrictive environment. While neither side articulated a cogent and persuasive position on this issue, the facts are clear.

32. Student's mental health counseling offer at his January 31, 2017 IEP meeting was 120 minutes monthly. It is unclear from the offer if Student was to receive his services in one two-hour block per month or if Student received services on a weekly or daily basis.

33. Educationally related mental health services are a related service which is "required to assist a child with a disability to benefit from special education..." (34 C.F.R. § 300.34(a).)

34. The evidence established that from January 4, 2017, through the date of filing that Tuolumne County and Curtis Creek failed to provide Student appropriate mental health counseling. In spite of the abundance of information indicating Student had mental health and behavioral needs and the availability of educationally related intensive counseling services, Tuolumne County and Curtis Creek offered only 120

minutes monthly. Tuolumne County and Curtis Creek's offer was insufficient to meet Student's mental health needs as they impacted him in a school setting. Accordingly, Student established he was denied FAPE on this basis from January 4, 2017, through the time of hearing. Student prevailed on Issues 3(e) and 4(f).

#### ISSUE 3(F),3(G),4(G),4(H), 5(A) BEHAVIOR

35. Student contends Tuolumne County and Curtis Creek failed to timely conduct a functional behavior assessment or to offer Student an appropriate functional behavior assessment, behavior intervention plan, or a one-to-one aide across all settings, and failed to offer Student appropriate behavior intervention services that would allow him to access his education in the least restrictive environment. Tuolumne County and Curtis Creek contend that at all times at issue Student's behavior supports were per se adequate because Student made "strides in behavior."

36. Following Student's January 31, 2017 IEP team meeting, Student engaged in maladaptive behaviors that warranted Tuolumne County and Curtis Creek to assess his behavior. Mother consented to a functional behavior assessment on February 24, 2017.

37. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must also be conducted if the local educational agency "determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher request a reassessment." (20 U.S.C. §1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

38. The failure to conduct a timely assessment is a procedural violation of the

IDEA. (*Park, supra*, 464 F.3d, 1025, pp.1032- 1033; *Timothy O. v. Paso Robles Unified School District* (9<sup>th</sup> Cir. 2016) 822 F.3d,1105, pp.1120-22.) As noted above, it only results in a substantive FAPE denial 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; or (3) caused a deprivation of educational benefits.

39. As to Issues 3(f) and 3(g), the 60-day period for completing the functional behavior assessment began on February 24, 2017. Tuolumne County and Curtis Creek were obligated to complete the functional behavior assessment by April 25, 2017, and convene an IEP team meeting within the statutorily allotted time. Tuolumne County and Curtis Creek did not convene an IEP team meeting until May 30, 2017.

40. Tuolumne County and Curtis Creek's failure to timely complete Student's functional behavior assessment significantly impeded his Parents' ability to participate in his education. Student had on-going behavior issues that interfered with his ability to access his education. The procedural violation also impeded Student's right to a FAPE and deprived him of educational benefits. For example, Student's behavior intervention plan was not completed until October the following school year. Failure to timely conduct the assessment led to delays in developing Student's behavior intervention plan. This impeded Student's ability to receive a free appropriate public education from April 25, 2017, until October 18, 2017, when Student received his behavior intervention plan.

41. As to Student's Issues 4(g) and 4(h), Student's maladaptive behavior continued throughout the 2017-2018 school year, unabated by his behavior plan. On October 12, 2017, prior to Student's October 18, 2017 IEP team meeting, Student was suspended for striking a teacher with a fire extinguisher. He was suspended again for throwing rocks at staff on December 15, 2017. Student returned to school in 2018 and was suspended on February 16, 2018 for one day for hitting a teacher three times with

rocks and once with a large branch.

42. He was suspended two additional times for throwing rocks and punching a kindergartner before an IEP Team amendment meeting was convened on May 10, 2018. At this meeting, the team agreed to add visual searches in the morning and afternoon to Student; an excessively restrictive activity far beyond the usual modifications for a typical special education student.

43. As to Student's Issues 3(h) and 4(h), Student argued he required a one-to-one aide to access his education. Student did not prove he required a one-to-one aide, in fact, the evidence was contrary as Student's dislike of authority figures and even an aide at arm's length could trigger a behavior incident in Student.

44. Tuolumne County and Curtis Creek denied Student a FAPE regarding their obligation to timely conduct a functional behavior assessment from April 25, 2017, until February 6, 2019, when they provided an assessment plan to Parents. Student prevailed on Issue 3(f); Student prevailed on the subcomponents of Issue (g) that Student was not offered appropriate behavior intervention services and behavior intervention plan; however, Student did not meet its burden on Issue 3(g) to demonstrate Student needed a one-to-one aide. Student did not meet his burden on Issue 4(h), which contended Tuolumne County and Curtis Creek failed to provide a one-to-one aide in a timely manner. Student prevailed on Issue 5(a) Student met his burden of proof, Tuolumne County and Curtis Creek failed to provide appropriate behavior intervention services during the 2018-2019 school year to allow Student to access his education in the least restrictive environment.

#### ISSUE 4(A) ASSISTIVE TECHNOLOGY ASSESSMENT

45. Student contends that Tuolumne County and Curtis Creek denied him a FAPE by failing to assess his needs in the area of assistive technology. Tuolumne County and Curtis Creek argued Student did not meet his burden of proof that an assistive

technology assessment was necessary to provide Student a FAPE.

46. A school district is required to provide any assistive technology device that is necessary to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a)(12)(B)(i); 34 C.F.R. § 300.105; Ed. Code, § 56341.1, subd. (b)(5).) An IEP team must consider whether a child requires assistive technology devices or services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324 (a)(2)(v); Ed. Code, § 56341.1, subd. (b)(5).) An assistive technology device is any piece of equipment that is used to increase, maintain, or improve the functional capabilities of individuals with disabilities. An assistive technology service is any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.) Assessment is required to formulate the type, duration, and frequency of a related service. (20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(b)(2), (c)(4); Ed. Code, § 56320, subds. (e), (f).)

47. Student's needs rose to the level that Tuolumne County and Curtis Creek provided Student with electronic technology in an effort to contain his behaviors. Tuolumne County and Curtis Creek team members indicated at the January 31, 2017 IEP team meeting that they did not believe Student required any assistive technology. Yet, when the IEP team reconvened on February 24, 2017, the team agreed Parent would provide Student a leapfrog tablet for school use. Tuolumne County and Curtis Creek also agreed Student required an iPad and headphones to allow him to navigate his bus rides to and from school. The IEP team offered these services to address Student's behavior without the benefit of an assistive technology assessment to determine Student's unique needs in this area. Tuolumne County and Curtis Creek were on notice from at least February 24, 2017, of Student's needs in the area of assistive technology. Tuolumne County and Curtis Creek's failure to assess Student in that area of need denied him a FAPE from February 24, 2017. Student prevailed on Issue 4(a).

## ISSUE 5 (B) CHANGE OF PLACEMENT OUTSIDE THE IEP PROCESS;

48. Student argues Tuolumne County and Curtis Creek made a unilateral offer of placement by providing Student with a copy of an IEP amendment in December 2018 offering residential placement at Devereux. Tuolumne County and Curtis Creek argue the IEP was an amendment based on a belief of consensus.

49. If Parents and the public agency agree, changes to Student's IEP can be done without convening an IEP team meeting. A written document is developed and both parties must agree. If there is no agreement, the public agency must convene an IEP team meeting. (34 C.F.R. §§ 300.324(a)(4) and (6); Cal. Ed. Code Sec. 56380.1.)

50. Parents requested a residential placement for Student. Tuolumne County and Curtis Creek made discreet contacts with residential facilities prior to obtaining consent from Parents. Once consent was obtained, Tuolumne County and Curtis Creek provided the prospective facilities Student's educational records. After the consent was obtained and documents shared, Tuolumne County and Curtis Creek learned Student was admitted based on Parent's application. In an effort to facilitate Student's placement, Parents were given the opportunity to review an IEP amendment that would have provided Student placement at a residential facility that Tuolumne County and Curtis Creek believed Parents also concurred.

51. When Parents did not consent, however, Tuolumne County and Curtis Creek had an obligation to convene an IEP meeting to discuss and formally offer an appropriate placement. Tuolumne County and Curtis Creek failed to convene an IEP team meeting until February 2019, four months after the amendment was offered. Although it was appropriate for respondents to initially offer the amendment, when it failed to convene a meeting after parent declined to consent, this constituted an offer to change placement outside the IEP process. This deprived Student's IEP team of the opportunity to fully consider an appropriate placement which impacted Student's ability

to meaningfully participate in the IEP development process. This resulted in a denial of FAPE. Student prevailed on Issue 5(b).

### ISSUE 3(H) 4(I), 5(C) MORE RESTRICTIVE PLACEMENT

52. Student asserts that he required a more restrictive placement since at least January 4, 2017. Tuolumne County and Curtis Creek's Student's argue placement was reasonably calculated to ensure Student's progress in the least restrictive environment.

53. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (a)(2); Ed. Code, §§ 56031, 56033.5 OR 56040.1, subd. (b) 56342, subd. (b).) The IDEA also requires, to the maximum extent appropriate, that a child with a disability must be educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1, subd. (a).)

54. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: the educational benefits of full-time placement in a regular classroom; the non-academic benefits of fulltime placement in a regular classroom; the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and the cost of placing the child with a disability full-time in a regular classroom. (*Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

55. The Nexus program, while at first an appropriate program for Student, begun to no longer meet his needs. Following Student's October 18, 2017 IEP team meeting where the team implemented his behavior program, his behavior spiraled. He



was suspended for punching other students, striking a teacher with a fire extinguisher, and bringing a pocket knife to school. Student's on-going mental health was "slippery" as he would cycle through positive periods and extraordinarily dark periods. Student's behaviors, while difficult, were being managed by the behavior classroom at the Nexus program. Even Student's expert witnesses did not believe a more restrictive placement was necessary in the 2017-2018 school year. Ms. Knopf, Student's trusted behaviorist and key member of his outside of school support system never addressed residential treatment for Student until his manifestation determination review meeting on September 11, 2018. Ms. Swaffer, his counselor during the 2017-2018 school year also testified residential treatment was not a desired outcome as the family wanted to maintain the family unit.

56. Despite efforts to support Student's behaviors, they continued to decline. On May 10, 2018, the team agreed to an IEP amendment to initiate a twice daily pocket and sock check to ensure Student was not carrying any contraband he could turn into a weapon. Student was searched prior to coming to school and once he arrived at school out of fear he transported a weapon to harm himself or others. This intrusive form of behavior management, similar to what a criminal suspect endures rather than a fourth grade boy, was sufficient notice to Tuolumne County and Curtis Creek of Student's declining behaviors and increasing volatility. His active fantasy life took on a darker, more foreboding presence and was reflected in the violent and fantastical drawings he produced at school. Despite this knowledge, the adjustments the IEP team made to Student's IEP were insufficient to meet his needs. Tuolumne County and Curtis Creek's placement at the Nexus program was not sufficiently structured or restrictive to meet Student's behavior and learning needs beginning May 10, 2018. By May 10, 2018, the evidence showed that Student required a more restrictive placement than the Nexus program.

57. Further, Tuolumne County and Curtis Creek's December 18, 2018 IEP amendment that offered Student placement at Devereux outside the IEP process is a tacit admission that at least by that date, a more restrictive placement was also intended by Tuolumne County and Curtis Creek.

58. As to Issue 3(h), Student did not meet his burden of proof that he required a more restrictive placement during 2017-2018 school year. Student met his burden that he required a more restrictive placement from May 10, 2018, through the date of filing of Student's due process complaint, thus prevailing on Issues 4(i) and 5(c). The failure to offer a more restrictive placement severely impacted Student's ability to access his education. This failure denied Student a FAPE from May 10, 2018, through the time the case was filed.

#### CURTIS CREEK'S RIGHT TO CONDUCT A FUNCTIONAL BEHAVIOR ASSESSMENT

59. Tuolumne County and Curtis Creek argue a new functional behavior assessment is warranted due to Student's increasing maladaptive behaviors. Although both entities were identified as petitioners in this case, only Curtis Creek seeks an order finding it is entitled to conduct a functional behavior assessment. Student argues that a functional behavior assessment should be awarded by an independent assessor based on a FAPE denial, but that respondents should not be permitted to conduct an assessment.

60. The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and District agree otherwise, but at least once every three years unless the parent and District agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must also be conducted if the local educational agency "determines that the educational or related services needs, including improved

academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil's parents or teacher request a reassessment." (20 U.S.C. §1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

61. Reassessments generally require parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, §56381, subd. (f)(1).) If the parents do not consent to a proposed reassessment plan, the district may conduct the reassessment by showing at a due process hearing that it needs to reassess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(a)(3)(i), (c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) A district may also file for due process, "for example, if they wish to change an existing IEP but the parents do not consent, or if parents refuse to allow their child to be evaluated." (*Schaffer v. Weast, supra*, 546 U.S. 49, 53.) Parents who want their children to receive special education services must allow reassessment by the district. (*Gregory K. v. Longview Sch. District* (9th Cir. 1987) 811 F.2d 1307, 1315; *Dubois v. Conn. State Bd. of Ed.* (2d Cir.1984) 727 F.2d 44, 48.)

62. To obtain parental consent for a reassessment, the school district must provide proper notice to the student and his parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion state law. (20 U.S.C. §§ 1414(b)(1), 1415(c)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must: appear in a language easily understood by the public and the native language of the parent, explain the assessments that the district proposes to conduct, and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subd. (b)(1)-(4).) The district must give the parents 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

63. Reassessments must be conducted by persons competent to perform

them, as determined by the local educational agency. (20 U.S.C. § 1414(b)(3)(A)(iv); 34 C.F.R. § 300.304(c)(1)(iv); Ed. Code, § 56322.) Any tests of intellectual or emotional functioning of students shall be made in accordance with Education Code section 56320 and shall be conducted by a credentialed school psychologist who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, §§ 56322, 56324, subd. (a).)

64. Curtis Creek's request to assess Student is warranted. Student is currently eligible for special education and related services. Student's behavior has significantly changed since his 2017 functional behavior assessment was completed. Curtis Creek's members of Student's IEP team established that changes may be necessary to Student's IEP. The evidence further established that to propose changes, Student's IEP team requires current assessment information to determine his educational and related service needs.

65. Curtis Creek provided parents a copy of the proposed assessment plan on February 6, 2019. The proposed assessment plan outlined the areas to be evaluated and identified the titles of the examiner: a board certified behavior analyst. The plan described that the assessment proposed was a functional behavior assessment. The plan was written clearly in English and in terms understandable by the general public. The plan was clear in that it stated no special education services would be provided to Student without Parents' written consent. All statutory requirements of notice were met, and the assessment plan itself complied with the applicable statutes.

66. Curtis Creek proved they had qualified school personnel who met the state licensing, training and experiential requirements to assess Student. Specifically, Judy Simon is a BCBA with more than 18 years' experience; she was the designated assessor and qualified to assess Student.

67. Curtis Creek proved that the February 6, 2019, assessment plan complied

with all applicable statutory requirements regarding form, function, and notice. They met their burden of proof that they may assess Student without parental consent based upon the proposed assessment plan. Tuolumne County and Curtis Creek prevailed on Issue 2.

#### RELEASE OF STUDENT'S MEDICAL INFORMATION

68. Tuolumne County and Curtis Creek requested a release of information to communicate with Student's medical providers and with Devereux. Student argues Tuolumne County and Curtis Creek are not entitled to Student's medical information because Tuolumne County and Curtis Creek never sought medical information until after Parents hired counsel. While Student's argument is misplaced, Tuolumne County and Curtis Creek also failed to meet their burden.

69. As a preliminary matter, Tuolumne County and Curtis Creek are both petitioners in this request. Unlike the determination that they are jointly and severally responsible for offering and providing Student a FAPE, here, as the moving parties, each bears the burden of establishing that it is *independently* entitled to receive the requested information.

70. A recipient of federal funds that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap. (34 C.F.R. § 104.33.) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed. (34 C.F.R. § 104.33(b)(3).) Education Code section 56369 states that a local educational agency may contract with another public agency to provide special

education or related services to and individual with exceptional needs, not to transfer IEP responsibility. (Ed. Code, § 56369.) However, only one public entity is legally responsible for offering Student a FAPE. Neither Tuolumne County nor Curtis Creek put forth any evidence establishing which local education agency is required to ensure Student is offered a FAPE. Accordingly, this dual request is necessarily being made on behalf on one entity that lacks legal standing to make such a request. As Tuolumne County and Curtis creek bear the burden of proof on this issue, that alone is sufficient to deny the request. However, even had the request been made by the appropriate local education agency, it is further denied for the reasons stated below.<sup>6</sup>

71. The standards for privacy of individually identifiable health information promulgated by the passage of the Health Insurance Portability and Accountability Act of 1996 identity generally protects disclosure of information except by written consent. (45 C.F.R. § 164.502(a).) This includes information about an individual’s physical or mental health conditions. (45 C.F.R. § 160.103.)

72. California law recognizes a constitutional right to privacy in an individual’s medical history.<sup>7</sup> (See, *Pettus v. Cole*, (1996) 49 Cal. App. 4<sup>th</sup> 402, 440.[ “the ‘zones of privacy’ created by Article 1 , section 1 of the California Constitution extend to the details of one’s medical history”]; *Palay v. Superior Court*, (1993) 18 Cal. App. 4<sup>th</sup> 919,

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<sup>6</sup> The original and amended complaint only sought the exchange of information on Curtis Creek’s behalf; however, the order following prehearing conference specified the request was sought jointly by both. The order itself was not challenged prior to hearing. During the hearing the issues were reviewed on the record. At no time did either Tuolumne County nor Curtis Creek seek to limit the request to only one entity.

<sup>7</sup> State law governs an individual’s right to privacy in a civil matter. (Fed. Rule Evid. 501; *Freed v. Home Depot U.S.A.* (S.D. Cal. 2019) 2019 WL 183833.)

932, ["Fundamental to the privacy of medical information is the ability to control its circulation ..."] The constitutional right of privacy is not absolute, but is subject to invasion where a compelling public interest is involved. (*Freed v. Home Depot U.S.A, Inc.* (S.D. Cal 2019) 2019 W.L. 183833, p. 5; *Hill v. National Collegiate Athletic Association* (1994) 7 Cal. 4<sup>th</sup> 1, 37.))

73. Student has a right to privacy in his medical records. Tuolumne County and Curtis Creek seek Student's medical records because they imply that Student's medical history impacts the IEP team's development of his educational program. However, Tuolumne County and Curtis Creek failed to demonstrate, with specificity, exactly what records they required and for what purpose, such that Student's educational needs could be met while taking into consideration Student's right to privacy under the law. Student did not place his entire medical history at issue when Parents requested residential placement. He maintains his right to privacy as to medical matters not at issue in this case. (*Freed, supra*, at p. 5. ["The party seeking the constitutionally protected information bears the burden of establishing that the information is directly relevant to the claims at issue."].)

74. Tuolumne County and Curtis Creek's broad request for access to Student's medical providers would allow the local education agency, if granted as written, a release to communicate with all of Student's medical providers. The overbroad request could include his dentist, allergist, and orthopedist. There was no showing that such a broad disclosure was warranted.

75. However, Student also does not have an absolute right to block disclosure of any information related to his medical history where that information is necessary to design an appropriate offer of FAPE, particularly where parents requested a therapeutic placement that involved Student's medical history as it pertained to his social and emotional needs. An IEP is required to have a statement of a child's present levels of

academic achievement and functional performance. (20 U.S.C § 1414(d)(1)(A)(i)(I)) A right of privacy is not absolute. (*Hill, supra* at p. 38.) A court must construe any claim of waiver, due to placing medical matters at issue, narrowly and the competing compelling interest is found only where it is established that the material sought is directly relevant to the litigation. (*Freed, supra*, at p. 5 citing *Tylo v. Superior Court* (1993) 55 Cal. App 4<sup>th</sup> 1379, 1387.)

76. In this case, Tuolumne County and Curtis Creek's request for disclosure is overbroad. First, Tuolumne County and Curtis Creek failed to establish which entity would have the authority to communicate with Student's medical providers should that authority be granted. Further, they did not write a specific request identifying which medical providers they sought information from, what categories of information were needed, or for what purpose it would be used. Further, their request for a release to consult with Devereux is not appropriate because Tuolumne County and Curtis Creek are no longer proposing Devereux as an appropriate placement and Student did not place Devereux at issue. Student prevailed on Issue 1.

## REMEDIES

77. Tuolumne County and Curtis Creek did not meet their burden establish a right to Student's medical records or providers. Curtis Creek did establish it is entitled to conduct a functional behavior assessment.

78. On Issue 3 Student met his burden Tuolumne County and Curtis Creek denied him FAPE on the following subparts: 3(a) failing to develop measurable goals, 3(b) for failing to develop goals to meet Student's executive functioning needs, 3(c); failing to continue his occupational therapy goals, 3(d) discontinuing his occupational therapy goals, 3(e) reducing his educationally related mental health counseling services, 3(f) failing to timely conduct a functional behavior assessment, and part of 3(g) failing to offer appropriate behavioral intervention services and a functional behavior plan.



Student did not meet their burden on part of 3(g) as it relates to Student requiring a one-to-one aide. Student did not meet their burden on 3(h) not offering a more restrictive placement.

79. On Issue 4 Student met his burden Tuolumne County and Curtis Creek denied him FAPE on the following subparts: 4(a) failure to conduct an assistive technology assessment, 4(b) failure to develop measurable goals, 4(c) for failing to develop goals to meet Student's executive functioning needs, 4(d); for failing to offer occupational therapy goals, 4(e) for failing to offer occupational therapy services, 4(f) failing to offer sufficient educationally related mental health counseling services, 4(g) failing to offer appropriate behavioral intervention services and a functional behavior plan, and 4(i) failing to offer a more restrictive placement. Student did not meet their burden on part of 4(h) as it relates to Student requiring a one-to-one aide.

80. On Issue 5 Student met his burden Tuolumne County and Curtis Creek denied him FAPE on all subparts: 5(a) failing to offer appropriate behavior intervention services, 5(b) offering a change of placement outside the IEP process, and 5(c) not offering a more restrictive placement.

81. Student requested numerous remedies for his FAPE denials. Specifically, to award placement at Madison Oaks until Student is stabilized; fund a private educational specialist or therapist to write his academic, occupational therapy, and executive functioning IEP goals; fund a functional behavior assessment conducted by a doctorate level board certified behavior analyst; reimbursement of all out-of-pocket medical costs, assessment costs, and prospective private placement consulting fees. As discussed more fully below, careful consideration was given to each request.

82. Courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v.*

*Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School District v. T.A.* (2009) 557 U.S. 230, 244, n. 11.)

83. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Ibid*; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1496.) A school district also may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Ibid*.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.) 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." (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

84. Student demonstrated his most profound issue was Student's maladaptive behaviors. Student argued at length that Madison Oaks was a program capable of meeting all of Student's academic and psychiatric needs. Student put on testimony from Ms. Abraham who visited the program and cited its trauma-infused therapy program, locked facility, and on-site psychiatrist and staff therapists available to serve Student's therapeutic needs. Ms. Radebaugh's testimony demonstrated Student could have his educational needs met without having to leave the facility. Student was also denied a

FAPE by Tuolumne County and Curtis Creek's failure to assess him in assistive technology, failure to continue his occupational therapy goals, failure to develop appropriate and measurable goals, failure to provide appropriate educationally related mental health services, failure to timely provide an appropriate functional behavior assessment and behavioral intervention services, and failure to offer a more restrictive placement. All of these violations justify the following remedies.

85. A hearing officer may not render a decision which results in the placement of an individual with exceptional needs in a nonpublic, nonsectarian school if the school has not been certified pursuant to Education Code section 56366.1. (Ed. Code, § 56505.2, subd. (a).) However, the District Court for the Northern District of California upheld an ALJ's authority to reimburse, as compensatory education, a student's ongoing placement at a noncertified school. (*Ravenswood City School District v. J.S.*, (N.D. Cal. 2012) 2012 WL 2510844, p.7.)

86. Student required a more restrictive placement than what was offered from May 2018 through the time this case was filed. While the appropriateness of the subsequent offers is not reached in this decision, the evidence established that by October 2018, there was no dispute that Student required a residential placement to receive educational benefit. To remedy these denials, it is determined that Student is entitled to placement that addresses his mental health, behavior, and educational needs in order to receive an educational benefit. Student requires a program of residential treatment that provides mental health services by licensed clinicians experienced in treating individuals with emotional disturbance, specialized academic instruction by properly credentialed special education teachers, and delivered in a facility prepared to handle his elopement issues. Therefore, to compensate for Tuolumne County and Curtis Creek's failure to provide Student a FAPE including appropriate goals, executive functioning needs, occupational therapy needs, mental health counseling service, a

timely functional behavior assessment, appropriate behavior supports, for failing to provide a more restrictive placement, and as prospective relief based on Student's current needs, Student requires residential placement commencing no later than fifteen days following this decision, during the 2018-2019 regular and extended school year through the remainder of the 2019-2020 regular school year.

87. Student established that Madison Oaks is an appropriate program that is certified by the California Department of Education. It is being ordered prospectively to remedy the FAPE denials. Nothing in this decision alleviates Tuolumne County or County Creek from meeting its prospective obligation to offer Student a FAPE.

88. Student is also entitled to one round trip airfare to travel to and from Madison Oaks. Parents are entitled to accompany Student to Madison Oaks and to accompany Student home from Madison Oaks. Accordingly, Parents are each entitled to two round trips, including airfare and one-night hotel stay for each trip totaling two nights' hotel stay.

89. If Madison Oaks becomes unavailable or unwilling to serve Student, Student's IEP team must identify and offer a residential treatment center comparable to Madison Oaks with the components specified in this Decision. This award is the sole remedy for all of the violations and denial of FAPE addressed in this Decision.

90. Tuolumne County and Curtis Creek will reimburse Parents for Dr. Solomon's psychoeducational assessment of \$11,025 based on 63.25 hours at \$175 per hour.

91. In crafting a remedy, as part of the broad equitable powers provided to an ALJ to remedy a denial of FAPE, all remedy requests were examined. Student sought funding for placement at a residential treatment facility, specifically Madison Oaks. Student also requests that Tuolumne County and Curtis Creek be ordered to fund Ms. Tjenderson to draft all of Student's IEP goals and that Tuolumne County and Curtis

Creek be ordered to fund a functional behavior assessment by a doctorate level board certified behavior analyst. Student also requests Tuolumne County and Curtis Creek be ordered to pay Parent's out-of-pocket medical expenses for medical costs of Student's psychiatric hospitalizations and all invoices for non-testimonial services provided by Student's experts. This includes: the cost of Dr. Solomon's psychoeducational assessment, Ms. Swaffer's counseling services, Ms. Knopf's behavior services, Ms. Wilkinson's critique of Student's functional behavioral assessment, and Ms. Abraham's consultant services. Student further requests Ms. Abraham's consultant services be retained when Student is ready to exit residential placement.

92. In crafting a remedy, only educationally related expenses are available. Here Student sought out of pocket reimbursement for medical costs, assessments, and prospective private placement consulting fees. Student provided copies of invoices from Dr. Solomon, in addition to her psychoeducational assessment as discussed above, for her travel, hearing preparation, and testimony. Ms. Swaffer provided two invoices, one for her hearing preparation and testimony and one for all co-payments Parents have incurred since 2015. Student also provided an invoice from the private placement consultant Student engaged to find residential placement for Student.

93. Student presented no authority under which to order Tuolumne County and Curtis Creek to reimburse Parent's out-of-pocket medical expenses and private placement consultant fees. Further, at least two of the invoices for out-of-pocket medical expenses lack sufficient detail. Ms. Swaffer's is simply a list of years with dates listed. Ms. Knopf's invoice was handwritten, lacking an adequate explanation of the time duration of the services provided or even the year the services were provided. Parties were advised in the Order Following Prehearing Conference dated March 12, 2019, any party seeking reimbursement was to "present admissible evidence of these expenditures...as part of its case in chief." Thus, in the interest of justice, the nature of

the other remedies provided, and Student's lack of authority supporting such a remedy, Student's request for out-of-pocket medical expenses, assessments, and private placement consulting fees is denied.

94. Ms. Wilkinson's testimony was deemed less than credible. Reimbursement for her services would not be appropriate and is denied.

95. Curtis Creek established it is entitled to conduct Student's functional behavior assessment. Given the remedy ordered herein that assessment will be permitted to take place at Madison Oaks.

## ORDER

96. Tuolumne County and Curtis Creek, jointly and severally, are responsible for contracting with Madison Oaks to pay Student's daily fees of tuition, therapeutic services, and room and board to attend Madison Oaks until the end of 2019-2020 regular school year. Within 15 days of this Decision, Student will enroll and begin attending Madison Oaks.

97. Student needs safe transportation to Madison Oaks in the form of one round trip airline ticket. Tuolumne County and Curtis Creek will also pay for Parents two round trip airline tickets each to escort Student to and from Madison Oaks school, and for one night of hotel accommodations upon enrollment and return home for a total of two hotel nights.

98. If Madison Oaks is unavailable or unwilling to serve Student, Student's IEP team must identify and offer a residential treatment center comparable to Madison Oaks with the components specified in the remedy section of this Decision. (See paragraph 86.)

99. Within 45 calendar days of the date of this Order, Tuolumne County and Curtis Creek shall reimburse Parents \$11,025 for the cost of Dr. Solomon's assessment. The documentary evidence of payment provided at hearing is sufficient evidence of

costs incurred by Parents and no further documentation is required.

100. All other relief sought by Student is denied.

101. Curtis Creek is entitled to conduct a functional behavior assessment of Student. The assessment may be conducted while Student is attending Madison Oaks.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on issues 1, 3(a), 3(b), 3(c), 3(d), 3(e), and 3(f); 4(a), 4(b), 4(c), 4(d), 4(e), 4(f), 4(g), and 4(i); 5(a), 5(b), 5(c). Student prevailed on Issue 3(g) sub issue: behavior intervention services. Tuolumne County and Curtis Creek prevailed on Issues 2, 3(h), 4(h). Tuolumne County and Curtis Creek prevailed the sub issue one-to-one aide on issue 3(g).

## 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).)

DATE: May 10, 2019

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/s/  
TIFFANY GILMARTIN  
Administrative Law Judge  
Office of Administrative Hearings