

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

SPENCER VALLEY ELEMENTARY  
SCHOOL DISTRICT,

OAH Case No. 2014030842

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SPENCER VALLEY ELEMENTARY

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2014030046

AMENDED DECISION

On March 3, 2014, the Spencer Valley Elementary School District filed with the Office of Administrative Hearings a Request for Due Process Hearing (complaint) in OAH Case Number 2014030046, naming Parents on behalf of Student as respondent.

On March 21, 2014, Student filed a complaint in OAH Case Number 2014030842, naming Spencer Valley as respondent. OAH consolidated the two cases in an order issued on April 1, 2014.

OAH granted Student's unopposed motion to amend his complaint on April 30, 2014. On May 27, 2014, OAH granted Spencer Valley's unopposed motion to amend its complaint.

OAH Administrative Law Judge Darrell Lepkowsky heard this matter in San Diego, California on June 24, 25, and 30, 2014, and July 1 through 3, and 8 through 11, 2014.

Deborah Cesario and Karin Anderson, Attorneys at Law, represented Spencer Valley. Julie Weaver, Spencer Valley's Superintendent and the Principal of Spencer Valley Elementary School, was present throughout the hearing.

Tania Whiteleather, Attorney at Law, and Amy Langerman,<sup>1</sup> Special Education Consultant, represented Student. Student's parents attended each day of hearing. Student did not attend the hearing.

A continuance was granted for the parties to file written closing arguments and reply briefs. The date for receipt of initial closing briefs was continued twice, first based upon Student's request for an increase in the page limitation for the briefs, and second upon motion of Spencer Valley. Student filed his initial closing brief on July 30, 2014. Spencer Valley timely filed its initial closing brief on August 1, 2014. Student timely filed his reply brief on August 13, 2014, at which time the record was closed and the matter was submitted for decision.

On August 21, 2014, the ALJ filed the Decision in this matter. At that time, the ALJ was unaware that Spencer Valley had timely filed a reply to Student's closing argument. The ALJ subsequently became aware that Spencer Valley had filed its reply brief. The ALJ reviewed and considered Spencer Valley's arguments. Spencer Valley's reply brief does not alter the factual findings or legal conclusions reached in this matter.<sup>2</sup>

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<sup>1</sup> Ms. Langerman is licensed to practice law in Arizona but is not licensed in California.

<sup>2</sup> This Amended Decision corrects only the reference regarding the filing by Spencer Valley of its reply brief. There are no other changes to the previously issued Decision.

## ISSUES<sup>3</sup>

### SPENCER VALLEY'S ISSUES:

1. (a) Whether Spencer Valley's individualized education program dated October 25, 2013, provided Student a free appropriate public education in the least restrictive environment?

(b) If the IEP is not found to be a FAPE, may Spencer Valley implement Student's current program at a school in another district, such as Julian Union Elementary School District (Julian Union)?<sup>4</sup>

2. Whether Spencer Valley committed the following procedural violations and,

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

During the hearing, Student sought to introduce evidence that Spencer Valley had failed to implement his extended school year program and services for summer 2014. Student did not raise this issue in his complaint. A party who requests a due process hearing may not raise issues at the hearing that were not raised in the request, unless the opposing party agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.) Spencer Valley objected to the addition of this issue at hearing. The ALJ therefore excluded any evidence regarding extended school year 2014.

<sup>4</sup> Spencer Valley's issue as to whether it can implement its proposed IEP at a location other than Student's school of residence is already included in its issues 1(a) and 1(b). The ALJ has therefore deleted it as a separate issue.

if so, did the violations deny Student a FAPE:

- (a) Failing to timely complete Student's triennial assessment?
- (b) Failing to have an IEP in place as of April 2013, through the end of the 2012-2013 school year?
- (c) Failing to complete an IEP by May 28, 2013?
- (d) Failing to have an IEP in place on the first day of the 2013-2014 school year?
- (e) Implementing goals from the proposed October 25, 2013 IEP without the consent of Student's parents?
- (f) Refusing to schedule an IEP team meeting, pursuant to Parents' request for a meeting made in December 2013?

3. Did Spencer Valley deny Student a FAPE from April 2013 to the present by failing to:

- (a) Implement the behavior supports required by his IEP?
- (b) Implement adapted physical education services?

#### STUDENT'S ISSUES:

4. Whether Spencer Valley's IEP dated October 25, 2013, offered Student a FAPE in the least restrictive environment?

5. Whether Spencer Valley denied Student a FAPE by failing to implement Student's placement and services since October 25, 2013?

#### SUMMARY OF DECISION

There were many procedural issues raised by the parties in this case. However, the core issue is what constitutes the least restrictive environment in which Student can be educated that would enable him to make progress at school. Student contends that his least restrictive environment is placement full time in a general education classroom with appropriate supports, modifications, and accommodations. Student contends that Spencer

Valley's offer of a placement for half of his school day in a specialized academic instruction classroom, with the remainder of the day in general education, denied him a FAPE. Student also contends that Spencer Valley predetermined its placement offer. Spencer Valley contends that Student failed to make progress in general education and must have direct instruction from a special education teacher in order to make more than minimal academic progress. For the following reasons, this Decision finds that Spencer Valley did not offer Student placement in the least restrictive environment and predetermined its offer of placement.

With regard to the procedural issues Spencer Valley raised, Spencer Valley demonstrated that either its actions did not constitute procedural violations or that the violations had no substantive impact on Student's education or the rights of his parents to participate in the IEP process. With regard to Student's allegations that Spencer Valley failed to implement his IEP, Student has demonstrated that Spencer Valley failed to implement his IEP during the week in April 2013 when Spencer Valley prohibited Student from attending school. Student has also demonstrated that Spencer Valley did not provide the inclusion support and special education support required by Student's IEP to permit him to succeed in a general education classroom. In all other respects, Student has failed to demonstrate that Spencer Valley materially failed to implement his IEP.

## FACTUAL FINDINGS

### BACKGROUND INFORMATION

1. Student was 12 years old at the time of the hearing. He was and remains eligible for special education and related services due to an intellectual disability resulting from Down's syndrome. Student had an intelligence quotient of approximately 67, placing him in the mild range of intellectual disabilities. Student will be in fifth grade when the 2014-2015 school year begins.

2. During the applicable time frame, Student resided with his parents within Spencer Valley's boundaries. Spencer Valley consisted solely of one elementary school with two classrooms serving approximately 40 students in kindergarten through eighth grade. Spencer Valley was one of 10 school districts in the North Inland Special Education Local Plan Area (referred to herein as SELPA).

#### Student's Prior Educational Programs

3. Student previously lived in another part of San Diego County where he attended the Julian Charter School. Julian Union, another district belonging to the SELPA, chartered the school. The Julian Elementary School is located only a few miles from Spencer Valley. Student's program at the charter school consisted of enrollment in a general education classroom with a full-time aide, related services, and several accommodations and curriculum modifications to enable him to make progress in the general education classroom.

4. Student initially had significant behavior difficulties at his charter school. He was very aggressive, often hitting and biting staff and peers. He would not focus on lessons. Student's behavior resulted in his frequent removal from class, which affected his ability to make educational, behavioral, and social progress. Student had received applied behavioral analysis (ABA) interventions and instruction in his home. His teachers and aides at Julian Charter School also employed ABA strategies and principles to address Student's behaviors at school. However, the ABA strategies did not decrease Student's behaviors. By the summer of 2010, Student's family decided to try to implement another behavioral modification methodology with Student called Relationship Development Intervention (RDI). The San Diego Regional Center agreed to provide Student with RDI services in his home through a non-public agency called The Autism Group, Inc. (TAG). Soon after that, Student's charter school agreed to contract with TAG to oversee services to Student at school.

5. Brooke Wagner is the owner and director of TAG. Jennifer Palmiotto is the owner and director of the Family Guidance and Therapy Center of Southern California (FGTC), which was the only other non-public agency employing certified RDI staff in San Diego County. At the hearing in the instant case, Ms. Wagner and Ms. Palmiotto described the RDI methodology and how it differs from ABA. The primary difference is in the communication styles. In ABA, the clinician attempts to shape and prompt responses from the child by using repetition to develop skills. ABA generally uses the promise of extrinsic rewards, such as a favorite food, to obtain the required response or behavior from the child.

6. RDI, on the other hand, teaches the child to think through responses by focusing on the consequences of decisions and behaviors. It teaches the child to problem solve and act accordingly. The methodology is based on establishing a guide-apprentice relationship between the RDI aide and the child. The guide teaches the child to solve problems and make discoveries on their own rather than being told what to do by the guide. RDI uses several different tactics to accomplish this. The guide uses spotlighting to give feedback on what the child is doing so that the child can connect meaning to that moment. The concept of reflection gives the child an opportunity to think about what is important to the child and why it is important. The goal of the RDI approach is for the child to be able to take information and apply it to other situations. RDI emphasizes internal rather than extrinsic rewards.

7. Julian Charter School held an annual IEP team meeting for Student in April 2011. Parts of the IEP developed at that meeting still constituted Student's stay put placement and services as of the day of the instant hearing. The April 2011 IEP provided placement for Student in a general education classroom. The IEP also indicated that Student required extended school year instruction in order to prevent regression. The IEP

provided Student with 100 hours of one-on-one instruction for the extended school year.<sup>5</sup>

8. The April 2011 IEP also indicated that Student needed an instructional aide with more training in order for Student to progress with his behavioral supports. Student's parents and his IEP team at the charter school all agreed that RDI had benefited Student, that it was necessary in order for Student to access the general education classroom and make progress on his goals, and that his aide should be trained in RDI. However, neither Student's April 2011 IEP nor any of his subsequent IEP's ever specifically indicated that RDI was a required methodology or that TAG was required to provide the RDI behavior services. The term RDI was not mentioned on this or any of Student's subsequent IEP's. Nonetheless, after this IEP was implemented, the charter school decided to contract with TAG to provide an aide for Student rather than continuing to use its own staff, in addition to TAG providing behavior consultation and supervision.

9. The TAG aides used RDI methodology, together with some behavior strategies, including ABA, to support Student at school. This combination of RDI with other supports proved successful with Student. His aggressive behaviors were almost fully extinguished. Although Student had previously been unable to participate in class for any length of time, within a year or so of the introduction of RDI, Student was able to spend the majority of his school day in class.

10. In April 2012, Student and his family moved into Spencer Valley's boundaries, which are close to the city of Julian. Student's parents specifically moved to this location so that that their children could attend school at Spencer Valley. However, Spencer Valley did not believe that it could offer Student a program comparable to the one he had at Julian Charter School. It also believed that Student's IEP required him to have three hours a day of specialized academic instruction outside a general education

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<sup>5</sup> Extended school year is a summer school program for children with IEP's designed to prevent regression during the summer break.



class. It therefore offered Student a “hybrid” placement of half a day in general education with the remaining half of the day in a special education classroom, to be implemented at Julian Elementary School.

11. Student’s parents rejected Spencer Valley’s offer. They disagreed that Student’s April 2011 IEP called for him to be pulled out of a general education to receive special education instruction in a separate classroom. Rather than accept Spencer Valley’s offer, Parents elected to have Student continue to attend the charter school.

12. Julian Charter School held an annual IEP team meeting for Student in June and August, 2012. Based on Student’s considerable progress academically, socially, and behaviorally at school, Parents expected the Julian Charter School to again offer Student a full-inclusion general education placement. It did not. Rather, it offered Student placement at Julian Elementary School (since he was now living near there), in a special education classroom, with some mainstreaming. Basically, because Student was showing very good academic progress, Julian Charter School believed that Student might be able to learn to read, something that had not earlier appeared possible. It believed that Student required direct, small group instruction with peers who had similar goals and skills as his in order for Student to be able to make the progress needed for mastering reading skills.

13. Student’s parents strenuously disagreed with the decision to move Student from a general education placement to a predominantly special education placement. They therefore only consented to portions of the August 2012 IEP, including goals, the occupational therapy services offered, and some of the proposed modifications and accommodations. Parents indicated their consent to those portions of the August 2012 IEP through correspondence from either their attorney or from their special education advocate.

Due Process Hearing in OAH Case Number 2012100933

14. In October 2012, Student filed for due process in OAH case number

2012100933, alleging that Julian Charter School's failure to offer Student a full inclusion placement in a general education classroom denied him a FAPE. Student also alleged that Julian Charter School committed a procedural violation by failing to specify RDI and an RDI trained aide as necessary components of Student's IEP. Student did not include an issue contending that the failure to specify RDI substantively denied Student a FAPE because he required that behavioral methodology in order to make progress at school.

15. In January 2013, before the hearing started, Julian Charter School offered to amend Student's August 2012 IEP offer to include a full-inclusion placement in a general education setting, full-time support by a highly trained aide, 480 minutes a month of behavioral intervention support, and six hours total per month of inclusion support to Student, his teachers, and his aide. Student consented to the offer of a full-inclusion placement and to the offer of inclusion support. However, Student rejected the offer of the aide and the behavioral intervention support because the offer did not specify that the aide and behavioral support would be through TAG, and would be based on RDI methodology. Parents also consented to most of the assessments the charter school had proposed for Student's triennial assessment. Parents again indicated their consent to Julian Charter School's offer through correspondence from their representatives.

16. OAH held a due process hearing in January and February 2013 in Student's case 2012100933. OAH issued its decision in the case on March 26, 2013. The decision found that Student had made progress on his goals under his IEP's. Therefore, it was objectively reasonable that he would continue to make meaningful progress in a general education placement. The decision found that Julian Charter School's offer of placement for three hours a day in a special education classroom did not offer Student a FAPE in the least restrictive environment. The decision in OAH case number 2012100933 did not find that Student's currently implemented IEP should have included language specifying RDI methodology or an RDI-trained aide. Since Student had not raised a substantive issue as

to RDI, the decision did not address whether the lack of inclusion of RDI on the IEP substantively denied Student a FAPE.

#### STUDENT'S ENROLLMENT AT SPENCER VALLEY

17. Immediately after OAH issued its decision in case number 2012100933, Student, through counsel, indicated his intention to enroll again at Spencer Valley. Student's position was that the OAH decision required an RDI trained aide to support Student in his general education classroom. Student indicated to Spencer Valley that if it did not have employees on staff to implement his IEP, Spencer Valley was obligated to hire outside staff through a non-public agency to provide the support. Student also stated that his current IEP did not require any direct instruction by a special education teacher. Rather, his parents had agreed to a full inclusion placement with six hours a month of inclusion support.

18. Ultimately, through letters from its attorneys, Spencer Valley offered to implement Student's current IEP, which consisted of parts of his April 2011 IEP, and parts of his August 2012 IEP, as amended in January 2013. Although Student continued to insist that Spencer Valley was required to hire an RDI trained TAG aide and provide behavioral support through TAG, Spencer Valley disagreed. It only agreed to provide one-on-one aide support through an employee on its staff, but did agree that the aide would be trained in RDI, as well as other behavior methodologies, by another RDI-certified agency. Spencer Valley contracted with Ms. Palmiotto from FGTC to train the aide and provide the 480 minutes per month of behavior support services required under Student's IEP. The contract with Ms. Palmiotto indicated that she was qualified in and would use ABA strategies as well.

19. The letter from Spencer Valley outlining its agreement to implement Student's present IEP, which consisted of the stay-put provisions from Student's April 2011 IEP, and the August 2012 IEP as amended in January 2013, constituted Spencer Valley's

interim placement offer to Student. The letters from Student's legal representatives constituted Student's acceptance of the interim placement offer.

20. Spencer Valley did not provide a formal interim IEP document for Parents' signatures. However, Parents had authorized their legal representatives to consent to the interim offer, and to act on their behalf when responding to all IEP offers made by Spencer Valley. By the time of the hearing in OAH Case Number 2012100933, Student's parents, particularly his mother, were exhausted by the legal proceedings and conflicts with the two school districts over Student's educational programming. Parents therefore gave full authority to their attorney and to their special education consultant to make all educational decisions for Student on their behalf. Since Spencer Valley agreed to fully implement Student's IEP from Julian Charter School, it was not under an obligation to make a formal interim IEP offer. Its failure to provide Parents with an interim IEP document therefore was not a procedural violation.

21. Spencer Valley hired Holly Pawlicki as Student's aide. At the time Spencer Valley hired her, Ms. Pawlicki had already received her teaching credential and just needed to finalize the credentialing process. She had been working as an aide for about a year in a special education class at Julian Elementary School. Before that, she had been an instructional aide in a general education classroom. Ms. Pawlicki received RDI training from Jennifer Palmiotto after Student started school at Spencer Valley on April 22, 2013.

22. Spencer Valley was able to implement Student's IEP by contracting with an outside speech-language pathologist and by utilizing the services of an occupational therapist from Julian Union. Student's current IEP also required 30 minutes per week of consultation by a special education teacher to Student's aide. Spencer Valley obtained the services of a special education teacher from Julian Union named Tammy Dennis to come every week to provide the consultation services. Spencer Valley was also supposed to provide Student with six hours a month of inclusion support. However, it was not able to

contract with anyone until after Student's October 25, 2013 IEP team meeting. Between April 22, 2013, and October 25, 2013, no person identified as an inclusion support consultant met with either Ms. Pawlicki or Ms. Palmiotto as required by Student's IEP. Nor did any inclusion expert provide training or materials to either Ms. Pawlicki or Student's teachers.

23. Spencer Valley does not have an APE teacher on staff nor does Julian Union. Spencer Valley was not able to locate an APE provider. Parents agreed to defer APE until after Student's triennial/annual IEP team meeting. Spencer Valley, to date, has only been able to contract with an outside APE provider during the summer school break. The only provider found will not go to Spencer Valley or to Julian Union. He has only agreed to provide services at a location in the Ramona Unified School District, which is about a 40 minute drive from Spencer Valley.

24. Parents agreed to this arrangement for APE for the summers of 2013 and 2014. Parents agreed to the arrangement because they preferred to have Student remain enrolled at Spencer Valley and give up APE during the school year rather than have Student attend school in another school district. During her testimony, Student's mother agreed that she had fully agreed to the arrangement and that Student did not really lose anything by having the APE services during the summer. Since Parents were part of the decision to provide Student with APE during the summer and Student received all the APE to which he was entitled under his IEP, Spencer Valley has shown that no procedural violation occurred regarding Student's APE services.

#### THE EDUCATIONAL PROGRAM AT SPENCER VALLEY

25. Spencer Valley Elementary School District is unique in that it consists entirely of just one school. The school was built in the late 1800's. There are only two classrooms at Spencer Valley. The first class contains children in kindergarten, first, and second grades. During the time covered by this case, there were approximately 20 students in that class of

younger students.

26. The second class contains children in grades three through eight. When Student enrolled in April 2013, he was in third grade. Two of his siblings were in his class during Student's third and fourth grades. A fourth sibling was in the younger class.

27. There were two teachers in Student's classroom during third and fourth grade. Heidi Schlotfeldt taught English language arts, including reading, and social studies. She has a master's degree in social work and a general education teaching credential. Although Ms. Schlotfeldt previously had children with IEP's in her classes, none had disabilities as significant as Student's. She never had any special education training or preparation for teaching disabled students or how to include them in general education. Elizabeth Jacobson co-taught the class with Ms. Schlotfeldt. Ms. Jacobson taught the math and science curriculum. She likewise did not have any background or training in special education.

28. There were 17 children in Student's class when he promoted to fourth grade for the 2013-2014 school year, the year at issue in this case. There was no child in the eighth grade that year.

29. Due to the many different grade levels of the children in Student's class, the instructional model at Spencer Valley is unique. The teachers in Student's classroom alternated between providing whole group instruction in a few areas of the curriculum to the entire class, but devoted most of the instructional time to differentiating instruction to very small groups of students. There were never more than a few children in each grade level. The classroom had two teaching areas where Ms. Schlotfeldt and Ms. Jacobson gave direct instruction. The children went to each teacher when it was time for their group to receive direct instruction in a subject area. When one teacher was finished with one group, the group would leave and either went to the other teacher for instruction or would work independently on their assignments at their desks.

30. The students' desks were placed in the middle of the classroom. There was a loft in the corner of the classroom that housed the class library and was also used for group games. A small computer room was attached to the south side of the classroom.

31. Although there was not a rigid schedule in Student's classroom, the teachers did follow a general routine. The children would have physical education instruction for a few minutes right after school started. Then the class would meet together for morning announcements. After that, there was a block of instruction focused on science and reading, with the teachers rotating between the students in different grades. After this instruction the two classes would join in the school auditorium for a whole school circle time before both classes had a recess. After recess, Student's class had instructional blocks of social science, English language arts, and more reading. The entire school then had lunch, provided by the school from a small on-site kitchen. The children had a play-time after lunch as well when they were able to play games like basketball and kickball. After lunch, the children in Student's class wrote in personal journals, engaged in silent reading, gave presentations when they were working on them, and worked on math. On Thursdays, both classes worked on gardening projects. At the end of the day, the class would clean up, and review pending assignments. Student was easily able to learn this schedule.

32. Although Ms. Schlotfeldt described her classroom as somewhat akin to a "three-ring circus" due to the fact that the children were constantly rotating between her and Ms. Jacobson for differentiated instruction and constantly working on different projects, few of the people who observed the classroom in conjunction with this case found that to be the case. Rather, as Dr. Rienzi Haytasingh – the assessor who later conducted psycho-educational and functional behavior assessments of Student – found, the classroom, although a bit distracting to Student was very well orchestrated and not especially noisy. Ms. Wagner, who observed the classroom, said that it was fairly quiet when she was there, at times quieter than the traditional elementary school classes she

had observed. Kathleen Crouch, Student's inclusion expert, found the class quiet and organized. Lisa Elkins, the parent of some of Student's classmates, who sometimes assisted in class, did not think the classroom was particularly noisy. All observers gave strong endorsements of the quality of Ms. Schlotfeldt's and Ms. Jacobson's teaching and class management skills, and all had high praise for the unique and successful way in which they ran the multi-grade classroom.

### THE MAY 28, 2013 IEP TEAM MEETING

33. Student's triennial assessment was due in April 2013, as was his triennial and annual IEP's. At the time Student enrolled at Spencer Valley on April 22, 2013, Julian Charter School had begun the assessment process, but had not yet finished it. Since Julian Charter School's local educational agency is in the same SELPA as Spencer Valley, the two school districts decided that Julian Charter School would complete the assessments rather than have Spencer Valley start a new set of assessments when Student enrolled.

34. Spencer Valley convened an IEP team meeting for Student on May 28, 2013. The meeting lasted over eight hours. Although the resulting IEP is not being specifically contested in this case, it is significant for many reasons to the instant case. First, as discussed below, the entire IEP team agreed that Student was properly placed in a general education classroom. The team also agreed to several new goals that day, agreed that Student was making meaningful educational and social progress, and that further assessment, including independent educational evaluations, was warranted. In most respects, the team agreed to continue Student's then present program with a few changes, some of which Parents accepted, and a couple which Parents declined. Parents consented to much of the IEP at the meeting and during the summer of 2013. Finally, the May 2013 IEP is significant because the parties disagree whether Student's October 25, 2013 IEP, specifically at issue in this case, was a new annual IEP (according to Spencer Valley) or merely the continuation of the unfinished May 28, 2013 IEP (according to Student.)



35. The IEP team reviewed Student's triennial assessments. Parents requested an independent psycho-educational assessment at this time. They questioned the validity of the district assessment because it did not consider the behavioral scales completed by Student's RDI aide or Student's mother in arriving at conclusions about Student's behavioral or academic progress. Parents were also concerned because the assessor addressed Student's weaknesses but none of his strengths, and had never interviewed Ms. Wagner, who supervised Student's behavioral program. Spencer Valley agreed to fund the independent psycho-educational assessment.

36. The IEP team reviewed Student's present levels of performance and progress on his goals. Student had partially met one of his behavior goals, had substantially met the second, and had fully met the third. By the time of this IEP team meeting, Student was able to participate in class by taking turns, sharing school materials, follow instructions, and participate in preferred and non-preferred class jobs, such as passing out class assignments. Student behaved appropriately and participated in class much of the time. His aide assisted him when needed. During recess, Student was able to line up for a snack and play games with his classmates without aide assistance. Student was generally in good spirits at school, acted independently at times, interacted with his peers, participated to some extent with the class, and took directions from Ms. Pawlicki, who did not overdo her supports to him. Student's teacher, Ms. Schlotfeldt, agreed that Student did not have a problem at school regarding his interactions with his classmates.

37. Student did have other behavioral issues at school. He sometimes touched other children inappropriately when he was lined up behind them. Student's IEP team had no explanation for the behavior. Student also had a habit of slipping his hand into his pants fairly frequently. Many of the IEP team members surmised that Student did so because of sensory needs. The occupational therapist participating in the meeting suggested several items that might address sensory issues, such as putting Velcro on

Student's desk, and giving him fidgets, which are items that could occupy his hands. Ms. Palmiotto, who continued to be responsible for providing behavior intervention support to Student, had already implemented the use of fidgets, with only partial success.

38. Ms. Langerman, represented Student at this IEP meeting. She had prepared a proposed behavior support plan for him. The IEP team agreed that Ms. Palmiotto would update the behavior plan with input from Student's IEP team at Spencer Valley. Additionally, the team determined that Spencer Valley would conduct a functional behavior assessment (FBA) of Student in order to determine the causes and antecedents of his behavior.

39. Student's August 2012 IEP contained 19 goals in addition to the three behavior goals discussed above. Student was only erratically able to accomplish his goals in the following areas: understanding "who, what, where, when" questions; answering "why" questions; answering why pairs of objects or words were similar; and writing three-word sentences using what is known as "CVC" words, that is words containing a vowel between two consonants. Student was able to write all upper case letters independently from memory but could not write the lower case letters.

40. Student was near to meeting his goals in the following areas: writing numbers one to 15 in random order from memory; retelling four details of a story read to him; producing words with consonant clusters during sentence imitation activities; rounding up numbers when pretending to buy things; and copying three, five-word sentences from a far point model.

41. However, Student had met or exceeded his goals in the following areas: improving his social pragmatic skills by using conversational turn taking; using appropriate verbal statement to decline engaging in conversations with no more than one indirect prompt or cue; copying two to three sentences of four to five words from a near point model; taking turns with peers; reading the first 20 sight words out of context with 90

percent accuracy;<sup>6</sup> identifying the first 20 sight words in a written passage or book and reading them aloud correctly 80 percent of the time; correctly identifying letters of the alphabet on cards without prompts or cue 90 percent of the time; correctly identifying letters of the alphabet in written documents without prompts or cues with 80 percent accuracy; and verbally stating the sound of consonants displayed on cards without prompts or cues with 70 percent accuracy.

42. The IEP was not able to finalize Student's goals. The team agreed that the respective team members would formulate the goals subsequent to the IEP team meeting and submit them to Parents for their review. The entire IEP team agreed that Student was doing a great job meeting, or nearly meeting, his academic goals. Student had surpassed his math goals. Ms. Pawlicki was therefore beginning to work on single digit addition with him.

43. Based upon Student's clear progress on his goals, Student's full IEP team agreed that full inclusion in a general education classroom with supports, accommodations, and modifications to the curriculum, continued to be the appropriate placement for Student. Ms. Dennis, the special education teacher providing consultation to support Student's general education placement, suggested increasing the special education consultation time from 30 minutes a week to 60 minutes a week. She did not believe more than an hour a week was necessary to address Student's needs.

44. The only two main areas of disagreement between Parents and Spencer Valley's IEP team members was the amount of speech therapy Student needed and what type of extended school year program would be appropriate. The IEP team did not reach

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<sup>6</sup> Sight words are known as "Dolch" words. It is a list of words that children are taught to identify by sight, rather than having to sound them out. The ability to identify and understand this list of words is considered a prerequisite to learning to read.

agreement on these two issues by the end of meeting on May 28, 2013.

45. The IEP did not specify that Student required RDI in order to make progress on his academic goals or on his behavior. The IEP did not specify that Student's full-time one-on-one aide had to be trained in RDI, or that the behavior intervention services provided to support Student's IEP had to be provided by someone trained in RDI. At the IEP team meeting on May 28, 2013, neither Student's parents nor his special education consultant insisted that RDI be included as a required methodology on the IEP. Nor did the behavior support plan developed by Ms. Langerman and Ms. Palmiotto, and later revised by Spencer Valley, specifically mention RDI as necessary to implement the behavior support plan. Ms. Langerman never raised the lack of specific mention of RDI in the IEP as a reason for Parents' failure to sign consent to it.

46. During her testimony at hearing, Ms. Langerman acknowledged that she did not insist on including RDI as a required behavioral methodology because she was aware that Spencer Valley would never agree to identify a specific methodology on Student's IEP's. Therefore, she focused on listing RDI strategies – such as spotlighting – as tactics to overcome Student's resistance behaviors. Ms. Langerman likened her decision to concentrate on listing the strategies needed to address Student's behavior to decisions where ABA strategies, such as giving a child tangible rewards for correct responses, are listed on an IEP rather than a specific reference to ABA as a required behavior methodology. Therefore, although Student contended that RDI constituted Student's stay put placement, the evidence failed to support this contention.

### EVENTS DURING SUMMER 2013

47. On June 23, 2013, Spencer Valley, through its attorneys, provided Parents, through Ms. Langerman, with a complete copy of the proposed May 28, 2013 IEP, along with a revised behavior support plan. In the letter, as further indicated on the IEP document, Spencer Valley agreed that it was proposing to continue all supplementary aids

and services provided to Student in his previous IEP's. Spencer Valley further agreed that it was appropriate to continue the 60 minutes per month of collaboration between Student's special education service providers even though Ms. Dennis could only meet with the teachers and Ms. Pawlicki after school hours due to her other teaching obligations. The IEP document contained the six hours per month of inclusion consultation support and the provision for full-time aide support for Student in a general education classroom, as the IEP team had discussed at the IEP team meeting.

48. Spencer Valley did not indicate at the IEP team meeting on May 28, 2013, in its letter of June 19, 2013, or in the IEP document, that a general education classroom with supports was no longer appropriate for Student.

49. Parents, through Ms. Lanagerman, did not reply to Spencer Valley's June 19 letter until August 24, 2013, a few days following the start of the 2013-2014 school year. Instead of having Parents sign the IEP document sent by Spencer Valley, Ms. Langerman replied by letter to Spencer Valley, agreeing to the amount of time indicated in the May 28, 2013 IEP for consultation by the inclusion specialist and for behavior support services. She also specified the goals to which Parents agreed and those to which they disagreed. She proposed changes to the latter goals. Many of the suggested changes were merely language revisions rather than substantive changes. The goals were adequate as originally written. Parents decided that issues regarding supports, modifications, and accommodations for Student would have to be reviewed again by Student's IEP team once his behavior assessment and pending independent educational evaluations were completed.

50. The IEP document contained a page where Student's Parents could have signed partial consent to the IEP, identifying those portions to which they disagreed. Parents chose to have their consultant identify through her letter Parents' consent and lack of consent to each part of the IEP rather than signing the proposed IEP document

provided by Spencer Valley. Although Student contended that Spencer Valley was required to re-write the May 28, 2013 IEP to incorporate Student's proposed changes, there is nothing that required it to do so.

51. When Student started fourth grade in late August 2013, Spencer Valley implemented those portions of the May 28, 2013 IEP to which Parents, through Ms. Langerman, had agreed.

52. While Student contended that Spencer Valley failed to have an IEP in place for him on the first day of the 2013-2014 school year, the evidence demonstrated that Spencer Valley offered a full IEP to Student shortly after the May 28, 2013 IEP team meeting. Student's parents did not fully consent to it. Spencer Valley implemented those portions to which Parents had agreed, and continued to implement those portions of Student's previous IEP's that were still in effect. Student had a full IEP in place as of the start of the 2013-2014 school year and therefore no procedural violation occurred.

#### DR. RIENZI HAYTASINGH'S ASSESSMENTS

##### Independent Psycho-educational Assessment

53. The parties selected Dr. Rienzi Haytasingh to conduct the independent psycho-educational assessment Spencer Valley had agreed to fund. Dr. Haytasingh was formerly a school psychologist with another school district. He recently opened a private practice. Dr. Haytasingh conducted his assessments after Student returned to school for the 2013-2014 school year. Neither Student nor Spencer Valley called Dr. Haytasingh to testify at the hearing.

54. Dr. Haytasingh was charged with determining Student's strengths and limitations and suggesting interventions that could support Student in the classroom. Dr. Haytasingh's assessment consisted of his review of Student's records, including assessments conducted in 2013; information supplied by Student's mother through an

interview and her preparation of a written history; a review of the May 28, 2013 IEP, which Dr. Haytasingh originally had believed was proposed rather than partially consented to and implemented; and observations of Student at school and during the assessment. Dr. Haytasingh also administered three standardized assessments. Spencer Valley did not provide Dr. Haytasingh with copies of Student's school work or Ms. Pawlicki's logs of Student's progress. The school work and the logs demonstrated that Student was continuing to learn more sight words and had started to learn to read, something for which he did not yet even have a goal. The school work and logs also indicated that Student was starting to do addition and subtraction, skills that were beyond those required by his math goals.

55. At the time of Dr. Haytasingh's assessment, Student's strengths at school were his ability to work well with his classmates, give them positive feedback, and play games and sports with them. Student was very social, liked to be with other people, and could be very sweet and kind. He had learned to apologize when he was wrong. Student enjoyed completing jobs and chores he was asked to do.

56. Student's weaknesses at school were his resistance to and difficulty transitioning to non-preferred activities. Student also had difficulty understanding things, either because he did not understand what was being said, or because he did not properly read pragmatic cues. He also had difficulty controlling his behavior and would sometimes create distractions in group settings. However, Ms. Pawlicki was generally able to quietly redirect Student to the task at hand.

57. At the time of the assessment, Student had begun to read basic sight words. Reading, if only by remembering sight words rather than being able to decode the words by sound, was a new skill for Student that had emerged since his enrollment at Spencer Valley. In past years, his instructors had not believed that he would ever learn to read. Student had a poor inherent ability to remember phonetic sounds, which impaired his

ability to learn sound symbol relationships. Therefore, Student's instructors worked with his ability to remember sight words. Student had slowly but steadily increased the quantity of sight words he knew.

58. Student also demonstrated emerging math skills as of fall 2013. He understood the concept of size and shapes. In class, Student had started being able to use a ruler to measure items and use manipulatives to do simple addition. Student had developed the latter skills since enrolling at Spencer Valley in April 2013.

59. Student's written language skill had also improved somewhat since enrolling at Spencer Valley. Student was able to write upper case letters and write his own name using a pencil. He could write out numbers one to 10, and was able to identify numbers from a field of three. Student also was able to locate letters on a keyboard and type words from a visual model.

60. Student's adaptive and social/emotional functioning was lower than that of his same-aged typical peers. This was expected given Student's intellectual disability. However, Student demonstrated the following positive adaptive behaviors at school: listening to stories; listening to and following instructions; using simple words to describe and classify things; asking questions beginning with "when"; using regular past tense words; writing his full name from memory; printing at least 10 words from memory; following school rules; cleaning up after activities; staying on task without specifically seeking approval; working around others without becoming distracted; and doing homework.

61. Student was able to relate to others in the following ways: making or trying to make social contact; verbalizing relationships of familiar people to himself; seeking friendship with peers; using words to express his emotions; acting when someone needed a helping hand; cooperating with others; playing with others with minimal supervision; sharing; taking turns; cooperating with requests; saying "please" and "thank you" when



appropriate; accepting suggestions or solutions from others; and talking with others without being rude.

62. Student's emotional and social development, though delayed, was his strongest asset. Student was genuinely loving and sensitive to others, loved to play and to interact with other people. He sought out approval and loved to receive positive praise. Although Dr. Haytasingh did not see Student interacting with other children at recess, many others who observed him at school, including Ms. Langerman, Ms. Wagner, Ms. Schlotfeldt, and Student's expert Kathleen Crouch, all noted that Student would play with others during unstructured play time.

63. Student did lack the developmental skills to always act appropriately with his peers. He would become frustrated and his behavior would deregulate when he did not find a task meaningful or if he thought it was too difficult. However, Student's motivation and attention span increased with simple techniques such as the use of visuals, primary reinforcers, and chunking (breaking down into smaller parts) of activities.

64. Dr. Haytasingh did not administer any cognitive testing to Student. Based on his review of Student's records and the assessment tools he did use, Dr. Haytasingh concluded that Student was operating at the functional and intellectual level of a four to five year old child.

65. At the time of Dr. Haytasingh's psycho-educational assessment, Student was making educational progress in his current placement in spite of his tendency to avoid tasks and in spite of his other behavioral issues. He was benefiting from the model of inclusion upon which Student's IEP was based. However, Student needed the following supports in that environment to address Student's interest level and his cognitive and adaptive skills: teaching and learning activities that were appropriate for Student's level of interest; hands on activities; reduced visual distractions; one on one instruction for teaching of explicit skills; visual and verbal systems for conveying expectations; positive

feedback and reassurance; support and instruction in self-regulation skills; meaningful social interaction from adult and peers; and social facilitation. Student also continued to need a special education teacher to support his placement in a general education classroom.

66. Dr. Haytasingh's assessment report recommended that a special education teacher provide assistance to the other members of Student's IEP team in order to support Student's current program of full time inclusion in general education. However, Dr. Haytasingh did not recommend a particular educational program or educational setting for Student. He also declined to make any such recommendations during Student's October 25, 2013 IEP team meeting.

#### Functional Behavior Assessment

67. The purpose of an FBA is to determine why a child is engaging in behaviors interfering with his or her learning, how the function of the behavior can be met more appropriately, and how the child's environment can be altered to better support general positive behaviors. Spencer Valley contracted with Dr. Haytasingh to conduct the FBA of Student. Ms. Weaver, Ms. Schlotfeldt, Ms. Jacobson, Ms. Pawlicki, and Student's mother assisted Dr. Haytasingh by compiling the necessary data on Student's behaviors.

68. The purpose of the FBA was to address the three behaviors affecting Student's ability to access his education: being off task by ignoring the task, looking around the room, talking to others, or making comments unrelated to the task at hand; Student touching himself by putting his hands down his pants; and Student's touching of others without permission.

69. The school staff collected data on Student during September and October 2013. Being off task was the predominant behavior that interfered with Student's learning. However, when Student was on task, he loved to learn and would get excited about his accomplishments. Student's behaviors of being off task were the result of inconsistency in

his school day and being asked to do lessons that were not meaningful to him. Student also was distracted by the other lessons going on in the classroom. The off-task behaviors could be addressed by teaching Student to ask for a break and by giving him assistance and direction in making choices, either by speaking or using a visual aide.

70. Student's behavior of putting his hands down his pants occurred during instruction and during non-structured times of the day. The behavior generally occurred when Student did not have anything in his hands. Student stopped the behavior when redirected to do so. The data showed that Student's self-touching seemed to be decreasing. Student's self-touching behaviors were for sensory and comfort reasons and not for seeking attention. The behaviors could be addressed by giving Student toys or other devices that he could handle to address his sensory needs, along with providing positive redirection when Student did touch himself.

71. Student touched other people most often when listening to group lectures or during physical education class. When asked to stop, he would comply. Student also was able to apologize to others when he realized he had done something wrong. Student touched others as a way to interact with them. Student had delayed speech but had high social interests. Student did what he could to share his emotional and social needs, and touching his classmates was a way of doing that. Student did not realize his actions were bad. The touching could be addressed by teaching Student alternative ways of socially and emotionally engaging with others.

72. The data indicated that Student no longer was hitting or kicking people; had stopped swinging objects around, such as shovels; and was no longer pushing staff. Thus, all of Student's aggressive behaviors had extinguished by the time of Dr. Haytasingh's FBA.

73. Dr. Haytasingh did not conclude that placement in a general education classroom was the cause of Student's behaviors or that Student needed to be removed from a general education environment in order to extinguish them.

## EVENTS PRECEDING THE OCTOBER 25, 2013 IEP TEAM MEETING

### Contracts with Gayle Patterson and Jennifer Brown

74. After the start of the 2013-2014 school year, Julie Weaver, Spencer Valley's Superintendent and the Principal of the school, began feeling more pressured about her district's ability to support Student's IEP. Spencer Valley had no special education teacher or related service providers on staff. The only related service provided at Spencer Valley was speech therapy, through a private therapist contracted by Spencer Valley on an hourly basis. Ms. Weaver had not been able to find an APE teacher willing to go to Spencer Valley. She also was concerned that most of the consultation support for Student's IEP was provided after school hours because of conflicts in the schedules of the providers. Additionally, Dr. Berryman, who was the case manager for Student, was laid off in approximately June 2013. Although a program specialist had replaced Dr. Berryman, that person did not have experience in elementary schools.

75. Ms. Weaver contacted the SELPA for assistance. SELPA Director Angela McNeece eventually connected Ms. Weaver with Gayle Patterson, a program specialist employed by another SELPA in San Diego County. After Student's October 25, 2013 IEP team meeting, Ms. Patterson became the person responsible for providing inclusion support for Student's IEP.

76. About a week before the IEP meeting scheduled for October 25, 2013, the Director of Pupil Services at Ramona Unified School District, another district which is a member of the North Inland SELPA, contacted a program specialist named Jennifer Brown who worked for Ramona Unified to seek Ms. Brown's assistance with Student's program. Ms. Brown is a credentialed special education teacher (sometimes called a specialized academic instructor) with many years of experience working with and teaching special needs children. Until August 2013, Ms. Brown had been a full-time specialized academic instructor. Among the classes she had taught was one for children with behavior and

emotional issues. She has received training in behavior modification and managing disruptive classroom behaviors, but does not have any specific certifications in behavior management. Ms. Brown began working with Student after his October 25, 2013 IEP team meeting, through a contract between Ramona Unified and Spencer Valley.

#### October Parent/Teacher Conference

77. Student's parents and Spencer Valley anticipated that Student's IEP team would meet after all of his new assessments were completed. Spencer Valley noticed the meeting for October 25, 2013. Instead of having the meeting at Spencer Valley, the meeting was scheduled to convene at the SELPA's offices in Ramona, California. Parents agreed to attend.

78. Spencer Valley's parent/teacher conferences were scheduled a few days before Student's IEP team meeting. Parents met with Student's teachers to discuss Student's progress. His teachers, occupational therapist, and speech-language pathologist also provided Parents with a written progress report. The only academic goals reported by the teachers were related to Student's sight words and math goals.

79. Student continued to enjoy interacting with classmates, playing games, and coloring in his sketchbook. Student had started greeting teachers and classmates by saying "good morning." He also enjoyed participating in the class journaling activity. Although Student could not write a sentence independently, he would stand in front of the class and read something with assistance. Student's academic materials were differentiated for his pre-kindergarten level, with lessons modified when possible to access grade level vocabulary and concepts.

80. By the time of the parent/teacher conference, Student was able to read 25 sight words. Because Student was progressing well in learning the sight words, Ms. Pawlicki had begun using a reading program called Project Read with him. The program consisted of short stories that utilized common sight words. Once the student successfully

read a story, the next story would be introduced. Each time a new story was introduced, the instructor would have the student first read all previous stories to reinforce the words learned in the stories. By the latter half of October, when the parent/teacher conference took place, Student was already reading the eighth story in Project Read.<sup>7</sup>

81. Student had regressed a bit in his ability to recognize numbers and count. However, he had begun to learn how to add, a skill he did not previously have. Using dots as manipulatives, Student could add sums up to the number 12. This was a significant leap in his math abilities. Student also was able to type two words a minute on his keyboard. This was a new skill he had learned since the start of the 2013-2014 school year.

82. Student had learned to say his parents' first and last names with 100 percent accuracy, also a new skill. He was beginning to recognize how his behavior affected other people.

83. Student had made good progress on his speech and language goals. He was improving in his ability to produce words with consonant clusters. He was also improving in his social pragmatic skills. The speech-language pathologist spent time with Student on the playground and during snack and lunch time to help Student work on his social skills with classmates. Student was able to make two conversational turns with a classmate when discussing what they were both building, but still needed prompting to continue the conversations for a longer time.

84. Student had also begun initiating conversation during his speech therapy sessions concerning things that interested him. The speech-language pathologist was hopeful that Student would be able to generalize this skill into initiating conversations with classmates since he was not yet doing so.

85. Student also made progress on his occupational therapy goals. He had

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<sup>7</sup> By winter break, Student was reading the 15th Project Read story.

completed six lessons of a formal typing program, meeting the benchmark for the goal. Student also had made excellent progress on his second occupational therapy goal of copying letters, words, and sentences on lined paper.

86. Student's teachers did not raise any issues regarding Student's behavior at school at the parent-teacher conference. The teachers gave no indication that they believed that Student was not making progress, or that his progress was insufficient. They gave no indication that they felt that the May 28, 2013 IEP, which continued Student's placement in general education, was inappropriate or needed to be modified. They gave no indication that an IEP team meeting was warranted solely to address Student's lack of progress. Finally, they gave no indication that they felt overwhelmed by having to educate Student, felt that they were not able to meet his needs, or that they were receiving inadequate support to help them meet those needs. To the contrary, all the evidence indicates that Student was making meaningful progress academically as of the time of the parent/teacher conference.

87. Additionally, the evidence showed that Student benefited from mainstreaming in his class at Spencer Valley because of the emphasis the school placed on performing arts. The children did a number of presentations throughout the school year to which family and friends were invited. The children sang songs, some of which they wrote on their own, read poetry, acted in plays, and danced. Video recordings of some these performances indicated Student enjoyed his part in the programs, and that he participated in them, at least when he chose to join the presentation. Student interacted with the other children, and was accepted by them even if he, like some of the other children, was not able to give a "perfect" performance. Student's teachers gave no indication at the October parent/teacher conference that Student was not benefiting socially from his placement in a general education classroom.

### The Pre-IEP Meeting on October 24, 2013

88. The day before the October 25, 2013 IEP team meeting, several people who were either presently involved with Student's IEP or would become involved in supporting his IEP, met to discuss Dr. Haytasingh's reports, which Parents still did not have. They also met to prepare a draft IEP for the meeting the following day. The meeting took place at Spencer Valley over eight hours. The following people attended the meeting: Ms. Schlotfeldt, Ms. Jacobson, the program manager who had replaced Dr. Berryman, SELPA Director Ms. McNeece, Ms. Patterson, Ms. Brown, Ms. Weaver, and Spencer Valley's two attorneys. Although Ms. Patterson was there the entire time, it is unclear how much time each other participant spent at the meeting. Most people participated for a short time and then left. It is unclear if Ms. Dennis, who was then providing specialized academic consultation support for Student's IEP, participated. While Ms. Weaver came and went from the meeting, she did not participate much. Since the meeting was intended as a way for Spencer Valley IEP team members to review Student's education before the IEP team meeting the next day, Parents were not invited to attend.

89. Spencer Valley did not invite Ms. Palmiotto or Ms. Pawlicki to attend the meeting. None of the Spencer Valley IEP team members consulted with them or asked them for any input prior to the pre-IEP meeting or the IEP team meeting the following day.

90. At the pre-IEP meeting, in addition to reviewing Dr. Haytasingh's reports, the people present discussed Student's progress on goals and the fact that they thought he was making little progress. They also had a discussion regarding different available placements for Student in the general area where he lived. The discussion centered on possible placements at Mt. Woodson Elementary school, which is in Ramona Unified, and on Julian Elementary School, in the Julian Union Elementary School District. Both schools had specialized academic instruction programs on campus, as well as special education teachers and related service providers on staff.



91. By the end of the meeting on October 24, 2013, the people present had prepared a draft IEP document with proposed goals. The proposed goals incorporated the goals to which Parents had consented in August 2013, as well as the re-written goals for those Parents had not yet given consent. The draft also included a service page with a draft proposal of services for Student. This page included a different offer of placement for Student. The placement described on that page was a hybrid program at a different school district that would have Student spending three hours a day in a specialized academic instruction classroom, with the remainder of the school day in a general education setting. Although Spencer Valley gave Parents and Ms. Langerman a copy of the majority of the draft IEP at the beginning of the October 25, 2013 IEP team, no one gave them a copy of the service page.

#### THE OCTOBER 25, 2013 IEP TEAM MEETING

92. Student's IEP team met starting the morning of October 25, 2013. The meeting lasted the entire day.<sup>8</sup> All required IEP team participants were present. However, Spencer Valley did not invite Ms. Palmiotto to the meeting even though she had been present at the May 28, 2013 meeting and was still providing behavior intervention services to Student and consultation to his aide. Ms. Dennis was not able to be present. Ms. Brown was present in her place, although Ms. Brown had not yet worked with Student by the time of this meeting. Ms. Patterson, who had attended the entire pre-IEP meeting the day before and whose opinions had help formulate Spencer Valley's draft IEP, was not present at the meeting. Dr. Haytasingh was present to review his two assessments. He stayed for

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<sup>8</sup> A certified transcript of part of the IEP team meeting is in evidence as Student's Exhibit 35. However, the transcript often misidentifies the speakers. The audio recording of the full meeting, in evidence as Student's Exhibit 67, is the best evidence of what occurred at the meeting.

the entire meeting.

93. Ms. McNeece was not available to facilitate the IEP team meeting as she had in May 2013. Instead, retired SELPA Director Penny Valentine was present as the facilitator. However, unlike Ms. McNeece at the May 2013 IEP team meeting, Ms. Valentine often interjected herself into the IEP discussion by taking sides and voicing opinions, rather than being a neutral facilitator of the discussion. For example, Ms. Valentine opened the meeting by making a statement that Spencer Valley was a unique school and that it was difficult to implement certain kinds of services because of the setting. During the course of the meeting, she also gave opinions regarding Student's placement, although she had never been involved in Student's education.

94. Much to Parents' and Ms. Langerman's surprise, Spencer Valley presented the draft IEP – and the IEP team meeting in general – as a new annual IEP for Student, intending to disregard the May 28, 2013 IEP to which Parents had already given partial consent. Based on this unilateral decision to change the annual due date of Student's IEP, Spencer Valley had written draft goals for Student with beginning implementation dates of October 2013, and completion dates for October 2014. Parents did not agree to the change in annual IEP date. Spencer Valley provided Parents and Ms. Langerman with a copy of the draft IEP but did not give them a copy of the service page which contained, among other items, a proposed placement for Student. At least one Spencer Valley IEP team member – Ms. Brown – had a copy of the page throughout the IEP team meeting.

95. The IEP team reviewed the draft proposed goals, many of which had already been implemented based on Parents' consent in August 2013. The team modified some of the goals based on the discussion, and agreed that there would be more revisions after the IEP team meeting.

96. Dr. Haytasingh reviewed his functional analysis assessment. He concluded that addressing Student's behaviors at school was not "rocket science" and that it was just

a question of developing functional equivalent replacement behaviors for Student. Dr. Haytasingh did not recommend changing Student's placement as a means of addressing Student's off task behavior, his self-touching, or touching of others.

97. After the team finished discussing Student's goals, Ms. Langerman asked to discuss the special factors page of the IEP, which included placement. Rather than start discussion on the special factors, the Spencer Valley IEP team members took a break. By this time, the IEP team had been meeting for over five hours. Just before the Spencer Valley team members returned, Ms. McNeece joined the IEP team meeting. Ms. Valentine welcomed her by announcing that Ms. McNeece had a unique knowledge of all the services the SELPA could offer and that it was now time to discuss where Student's goals could be implemented.

98. Ms. Valentine directed Dr. Haytasingh to the recommendations in his psycho- educational assessment report and asked him where he thought the recommendations should be implemented. When Dr. Haytasingh responded that the decision was for Spencer Valley to decide, not he, Ms. Valentine and other Spencer Valley IEP team members pressed him to make a recommendation for placement. However, no matter how much they pressured for a recommendation, Dr. Haytasingh declined to give one. At one point in the discussion, Ms. Brown misinterpreted Dr. Haytasingh's assessment report as stating that Student needed direct instruction by a special education teacher. She was corrected because the report did not make that recommendation.

99. Ms. Brown stressed her opinion that Student required direct instruction by a teacher with a special education credential because she felt he was not making sufficient academic progress. However, her opinion that Student was not making progress was contradicted by his school work, Ms. Pawlicki's logs, and the progress report prepared by Student's teachers for the October parent/teacher conference.

100. Dr. Haytasingh opined that no one could really say whether Student would

make more academic progress with direct instruction. However, even if he could make more progress, Student would be giving up many important things, such as the socialization he received in a general education classroom. Student was included at least half of his school day, was part of the general education classroom learning environment, and was on task half the day. The fact that Student was going to school every day, that he was integrated into the general education classroom, that he was participating in lessons, school activities and in outside activities, were factors as important as, if not more important than, making more progress academically.

101. The team also discussed the fact that Ms. Weaver, in spite of her efforts, had been unable to maintain consistent staffing to support Student's IEP. Ms. Weaver was genuinely concerned about her inability to support Student. She felt that she had done everything she could, and yet Student was still not really part of the general education classroom or achieving his potential. However, the appropriate analysis must start with what is a child's least restrictive environment. Only once that is determined should an IEP team discuss where and how the child's program will be implemented.

102. Ms. Schlotfeldt's concern was her inability to address Student's goals. She had not been given enough training in addressing the needs of child with Student's academic deficiencies or in how to include him in the general education curriculum, although she was doing her best to do so. She was not taught how to modify Student's curriculum and was not provided with modified lessons to use with him. Ms. Schlotfeldt attempted on her own to find lessons, but due to her lack of training, felt overwhelmed by the task. She was overwhelmed and exhausted by having Student in the class. Unfortunately, she was simply not given the support she needed. As a general education teacher, Ms. Schlotfeldt should never have been given the responsibility of modifying Student's curriculum. Rather, the specialized academic instructor assigned to consult with her should have done so, and then should have instructed Ms. Schlotfeldt and Student's

aide how to present the curriculum to him.

103. The Spencer Valley IEP team members felt that Student's progress on goals was illusory because he was not achieving results independently. For example, although they acknowledged that Student had started adding by using dots as manipulatives, he was doing so only under guidance of his aide. However, none of Student's goals required that he be able to accomplish the goals without support. All evidence from Student's work samples and the logs kept by Ms. Pawlicki indicated that Student was beginning to read, even if only by memorization, a skill that only the year before had been felt impossible for him to achieve. And Student had started doing simple addition and subtraction, math skills more advanced than his present math goals. This was significant evidence that Student was making meaningful progress, particularly for a child who functioned at the developmental level of a four or five year old. Neither party presented any concrete evidence that Student would progress more rapidly if given direct instruction by a special education teacher. Nor is there any evidence of how far Student could be expected to advance in light of his disabilities.

104. The Spencer Valley team members were very much focused on what they believed to be Student's need for direct specialized academic instruction, in spite of their inability to obtain Dr. Haytasingh's support for that recommendation. Because the discussion was basically going around in circles, Ms. Langerman finally just asked Spencer Valley to tell her and Student's mother what they intended to offer Student as a placement.

105. Ms. McNeece, who had not been present at the first five or so hours of the IEP team meeting, had not been present to hear Dr. Haytasingh's review of his assessments, or to hear the discussion of the assessment or Student's progress on goals, then made Spencer Valley's offer of placement. She stated that Student needed direct instruction from a credentialed specialized academic instructor. She stated that there were

two choices: Julian Elementary School and Mt. Woodson Elementary School in Ramona Unified. She said that she was recommending Mt. Woodson because of its strong support of inclusion. Ms. McNeece said that the program would consist of specialized academic instruction, constituting 40 percent of Student's school day, with 60 percent of his day in a mainstream placement.

106. Ms. McNeece did not review the continuum of placements that might be available for Student. She did not open the discussion to the team as to whether other placements existed that might be appropriate for Student. She did not offer placement at Julian Elementary, although that school was located only a few minutes from Spencer Valley rather than the some 40 minutes that it took to get to Mt. Woodson. Neither Ms. McNeece nor any other member of the Spencer Valley IEP team explained to Student's mother why a program in Ramona was offered rather than one in Julian. At hearing, none of Spencer Valley's witnesses addressed why Julian Union was not offered as a placement.

107. At hearing, Ms. Brown testified that a Julian placement was discussed by the IEP team but ultimately not offered because Student's parents had rejected placement at Julian Elementary. Ms. Brown was incorrect. Julian Elementary was not discussed at the IEP team meeting on October 25, 2013, and had not been rejected by parents at the meeting. Parents had only rejected Julian the *previous year* when Student's former school district wanted to place Student full time in a special day class. What Ms. Brown thought was discussion of Julian as a placement during the IEP team meeting actually took place the day before at the pre-IEP team meeting.

108. At hearing and in its closing brief, Spencer Valley spent considerable time focusing on Student's behavior challenges at school. At hearing and in its brief, Spencer Valley argued that Student's behaviors was another reason it felt Student should not be placed full time in a general education classroom. However, at the October 25, 2013 IEP team meeting, Spencer Valley team made its offer of placement based solely on its

incorrect belief that Student had not made any progress on his academic goals. There was no discussion at the IEP team meeting concerning whether Student's lack of progress was due to his behaviors or concerning any impact the district IEP team members felt the behaviors were having on Student's ability to learn or on the ability of his classmates to access their education. This discussion never occurred even though Dr. Haytasingh was present and would have been fully qualified to address those issues.

109. The team agreed that Student required extended school year instruction and services to avoid significant regression during the summer break. Neither Ramona Unified nor any of the other districts in the SELPA offered general education summer school classes. They only offered four hours a day of instruction in special education classroom for moderately to severely disabled children. Ms. Brown acknowledged that full-time placement in a special education classroom was not appropriate for Student. She stated that she was going to have to spend some time figuring out what to do for Student's summer program.

110. The IEP team agreed that Dr. Haytasingh would finalize his functional behavior assessment and develop a behavior intervention plan for Student in consultation with Ms. Brown and Ms. Palmiotto. The team agreed that Spencer Valley would update the goals based on the discussion at the meeting, would follow up on a proposal for extended school year, and would provide Student's parents with a more detailed description of the program offered to Student at Mt. Woodson.

111. Student's mother and Ms. Wagner eventually visited Mt. Woodson in February 2014. The general education classroom proposed for Student was a traditional fourth grade class of approximately 30 children. The classroom was fairly small and contained many desks. There was a lot of environmental stimulation in the classroom. Student would also have to transition a long distance between the general education classroom and the room used for specialized academic instruction. There was also no

consistent amount of children who would be in the specialized academic instruction room since they were assigned on an individual basis pursuant to their IEP's. Therefore, during the three hours Student would be in the room there would be a constant flow of other children arriving and leaving.

## STUDENT'S LEAST RESTRICTIVE ENVIRONMENT

### Testimony of Dr. Carol Bartz

112. Dr. Carol Bartz testified as an expert on behalf of Spencer Valley.<sup>9</sup> She planned and developed the inclusion program for special needs children now in place at Ramona Unified. She was particularly instrumental in developing the inclusion program at Mt. Woodson Elementary School. The goal of that program was to overhaul the approach to educating special needs children by no longer having traditional separate special day classes where children were placed full time. Rather, the program at Mt. Woodson only has

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<sup>9</sup> Dr. Bartz has a doctorate in education in educational supervision, a master's degree in special education and supervision, and a bachelor's degree in speech correction. She worked for Ramona Unified School District, first as the Director of the special education program and then as a school principal. In 1997, Dr. Bartz became the Senior Director of the North Inland SELPA, a post she held until 2010, when she retired. Since retirement, Dr. Bartz has worked as a consultant providing support to school districts and SELPA's. In the past, Dr. Bartz was also a part-time instructor at the university level. She has taught courses on inclusion practices to general education teachers and has also collaborated with Dr. Jacque Thousand, the well-known inclusion expert with whom Ms. Patterson and Student's expert Kathleen Crouch have also collaborated. Dr. Bartz had given many presentations on a variety of issues concerning special education practices and the education of special needs children.



specialized academic instruction classrooms, which children attend solely based on their individual needs. Therefore, while one child might attend the class for many hours a day, another might only go for an hour, if that is all that was needed in order to meet the child's needs. Mt. Woodson's inclusion program is nationally known and respected.

113. Dr. Bartz first heard about Student in the summer of 2013. However, she did not actually do an analysis of Student's program until June, 2014, right before the hearing started in this case.

114. Dr. Bartz did not do a formal observation of Student at school. She did do an informal observation. Her impressions were that Student was somewhat disruptive since he went off-task and began playing around with a younger child in the class. She also did not believe that Student was involved in or participated in any of the class lessons.

115. In Dr. Bartz's opinion, Student could not be successfully included in a general education classroom. She based her opinion on several factors. First, she found that there was a significant discrepancy between what is required of a fourth grade student under the new California's Common Core State Standards and Student's IEP goals which indicated that Student was functioning at a level much lower than fourth grade. This discrepancy required 100 percent of Student's curriculum to be modified, and the general education teachers did not have the expertise to do so. However, including a child with disabilities in a general education classroom is not dependent on whether the child can meet state educational standards. It is up to a special education instructor to assist the general education teacher in the modification of materials. If all decisions regarding inclusion of intellectually disabled children in general education classrooms was made based upon whether the child's curriculum had to be completely modified, few intellectually disabled children would be educated in general education.

116. Dr. Bartz also reviewed Dr. Haytasingh's functional behavior assessment of Student. She used the findings in the report that Student had been off-task, engaged in

self-touching, and in touching of others, as a basis that Student's behaviors mediated against his inclusion in general education. Dr. Bartz hypothesized that Student's behaviors were caused by his placement in the Spencer Valley general education classroom. Dr. Bartz's focus on Student's behaviors as a reason for removing Student from a general education classroom was not persuasive for several reasons. First, Dr. Bartz is not a psychologist or a behavior specialist. Second, Dr. Haytasingh, who is a psychologist and a behavior specialist, did not recommend removing Student from the general education classroom based on Student's behaviors. Rather, Dr. Haytasingh believed that the behaviors could be easily addressed by implementation of a behavior intervention plan. Third, the Spencer Valley IEP team did not discuss Student's behaviors as a reason for recommending the partial placement in a specialized academic instruction classroom. Finally, because behavior was not a motivating issue for Spencer Valley's decision on placement, at least at the October 25, 2013 IEP team meeting, there was no discussion as to how Student's behaviors were going to be addressed in the proposed classrooms. Certainly, the same behaviors would be no different in the general education classroom in which Spencer Valley proposed Student would spend half his school day at Mt. Woodson than they were at Spencer Valley. It seems incongruous that it would be appropriate for Student to spend that half day in a general education classroom if his behaviors were so distracting to him and to other children. Nor did Dr. Bartz give any indication of how the behaviors would be addressed differently in the specialized academic instruction classroom, where different children were entering and leaving all day long.

117. Dr. Bartz also analyzed Student's behaviors subsequent to his October 25, 2013 IEP team meeting, finding that the data indicated that Student's behaviors were increasing in spite of the implementation of his behavior intervention plan. However, she did not analyze whether Student's behavior intervention plan was being implemented with fidelity. As discussed below, Student has not demonstrated that the plan was not being

implemented. Likewise, Spencer Valley did not show that it was. Since Student's education subsequent to October 25, 2013, is not at issue in this case and therefore was not fully litigated, it is impossible to determine what factors contributed to Student's increase in maladaptive behaviors. In any case, the IEP team made its decision based on what it had in front of it at the time, and Student's possible failure to respond to the behavior intervention plan was not discussed and therefore was not the reason for Spencer Valley to offer a change of placement.

118. Dr. Bartz reviewed Student's academic progress over a three year period. She found that Student had not made academic progress over those three years. Her opinion with regard to Student's prior progress, however, was not persuasive in light of the fact that OAH had specifically determined in its prior decision that Student had made progress during the time he was at his charter school, up to approximately January 2013, when the hearing was held. Additionally, Dr. Bartz did not give suitable weight to the progress Student did make on his goals and the progress he made in learning to memorize sight words and learning to add. As of October 2013, Student had begun to read, even if only by memorizing sight words, and had begun to add. Both skills went beyond the objectives of his then current goals. Both skills are significant indications of progress.

119. Finally, Dr. Bartz's opinion that the progress Student made was minimal rather than meaningful was not supported by any reference to what type of progress Student is actually capable of making. Dr. Bartz did not address what she felt were Student's capabilities. No psychologist testified at the hearing, and there was no competent testimony on this issue. There is thus no point of reference for what type of progress should be expected of Student other than the fact that he had begun demonstrating skills that had not yet even been expected of him as of the October 25, 2013 IEP team meeting. MS. Patterson also testified as an expert on behalf of Spencer

Valley.<sup>10</sup> As stated above, Ms. Patterson began providing inclusion support for Student in early October 2013, through a contract between her SELPA and Spencer Valley.

#### TESTIMONY OF GAYLE PATTERSON

120. Ms. Patterson did not believe that Student was being fully included in the general education classroom at Spencer Valley. During her observations of him, Student would not engage in the lessons despite the efforts of his aide and the general education teacher. Ms. Patterson opined that the teacher and aide lacked the skills and strategies necessary to include Student in the lessons that a credentialed special education teacher would have.

121. Ms. Patterson also opined that she did not see sufficient efforts to modify Student's curriculum so that he could work on lessons that were in the general area of what his classmates were doing in fourth grade. She found that even when there was a significant effort to include Student in the curriculum, he became resistive. For example, at one point in the school year Student's class was rehearsing a play about Julius Cesar. Student simply left the room because he did not want to participate.

122. Ms. Patterson is very knowledgeable about inclusion. However, her testimony was directed more on the fact that the general education teachers were not capable of modifying the lessons for Student. However, the general education teachers

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<sup>10</sup> Ms. Patterson has a master's degree in education, with an emphasis on special education. She is a credentialed special education teacher with almost 40 years of experience. Ms. Patterson received training in inclusion practices and how to modify curricula for special education students from well-known inclusion specialists such as Jacque Thousand and Richard Villa, who, among other things, teach inclusion concepts at California State University San Marcos. Ms. Patterson has collaborated with Drs. Villa and Thousand. She has also received awards for her inclusion efforts.

should not have been charged with those duties. They of course were not trained to do so. Modified curriculum should have been provided to the teachers and the aide for use with the classroom lessons. The entire point of inclusion for children with intellectual disabilities is that the lessons be modified either to their level or to include something that would make the lesson meaningful to the child. The point of inclusion is not to train general education teachers to take the place of special education professionals.

123. Ms. Patterson believed that the one hour of specialized academic consultation a week required by Student's IEP was insufficient to meet his needs, and was insufficient to provide the necessary support to Student's general education teachers and aides. However, the fact that Ms. Patterson believed that the one hour, which had been increased from the 30 minutes a week required by Student's prior IEP and which had been recommended by special education teacher Tammy Dennis, was insufficient, is not the focus of the issue here. The need to increase special education consultation time does not mean that a child should not or cannot be fully included in a general education classroom.

124. Kathleen Crouch testified as an expert on behalf of Student.<sup>11</sup> She oversees the inclusion programs for 26 children with disabilities at 13 different public school campuses for the school district where she works. Ms. Crouch trains the instructional aides

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<sup>11</sup> Ms. Crouch is a credentialed special education teacher with a master's degree in education. Although she taught a special education class for a year or two, from 2001 until the present, Ms. Crouch has held the title of Inclusion Specialist at a school district in California. She originally was trained in inclusion practices through her special education teacher credential program. She has also attended eight summer workshop programs on inclusion given by Drs. Thousand and Villas. Like Ms. Patterson and Dr. Bartz, Ms. Crouch has also co-taught with Dr. Thousand and Dr. Villa at California State University, San Marcos.

assigned to the children as well as supplies support for the general education teachers to whose classrooms the children with IEP's are assigned.

#### Testimony of Kathleen Crouch

125. Many of the school sites do not have experience with the inclusion of disabled children. Often, the general education teachers believe they are not competent to have the children in their classrooms. Ms. Crouch addresses this lack of familiarity by providing the teachers, aides, and other school staff with information concerning the child, the child's disability, and how to include the child, before the child begins attending the school. She lets the teacher know that she or he is not alone, and that there is support for them from the inclusion staff. Additionally, she will do peer-training with the child's classmates before the child begins attending the class. Peers can be the strongest support for the disabled child as well as a beneficial role model.

126. Ms. Crouch will often do an ecological assessment of the classroom. She observes the class and notes the class environment. She then reviews the child's IEP to determine how it can be implemented in the actual classroom to which the child is assigned.

127. Often, as in Student's situation, the child's curriculum needs to be modified. Ms. Crouch helps provide the modifications and also trains the aides how to do on-the-stop modifications as the need arises.

128. Ms. Crouch emphasized that a child who is fully included in a general education classroom does not have to be at the same grade level as the other children in the class. The included child can be several grades behind, be non-verbal, and perhaps not know how to read. The most important tenet was to instill a sense of belonging in the classroom for the child by adapting lessons so that the child could participate in whatever the class was studying. Ms. Crouch has successfully trained instructional aides on modifying core grade level standards. It is a job requirement for aides in her district to be

able to do so.

129. Ms. Crouch opined that all of Student's goals could be implemented in a general education classroom. She also indicated that the 54 or so hours a year of inclusion support provided in Student's IEP was greater than she usually recommends for children on her caseload. Generally, she recommends 30 hours a year of support. She further opined that the children will not necessarily learn better or faster if they are placed in special education classes rather than in general education.

130. Ms. Crouch reviewed Student's records in preparation for her testimony. She opined that the records and data indicated he was making progress. She found that Student's behaviors were not significantly impacting his ability to make that progress. Even though he was off-task for a portion of his school day, Student had been able to learn new reading and math skills, which substantiated his ability to progress in the classroom.

131. Ms. Crouch also observed Student at school in the spring of 2014. Student was at lunch and recess for part of her observation. Student independently went to lunch, chose what he wanted to eat from what was offered in the school kitchen, and sat down with classmates to eat his food. After lunch, Student cleaned up and then went down to a play area to join some other children for a game of kickball. On the way, he saw a little child sitting by his or herself. He kneeled down to ask if the child was alright. Student then joined the kickball game. The other children encouraged him while he was playing. When Student missed when he tried to kick the ball, another child spontaneously changed places with him and became Student's "pinch kicker." Student then ran to home after the other child kicked for him. No aide was necessary to facilitate Student's participation in this game.

132. Based upon her observation of Student's classroom, Ms. Crouch opined that the multi-grade model was a benefit for him. There were many resources available in the classroom itself. All the children in class were receiving differentiated instruction because

of the multiple grade levels, which meant that Student did not stand out as unique because of his own need for a different program. The classroom only had 17 pupils who were taught by two teachers, a model that provided a much higher adult to pupil ratio than most classrooms, where one teacher was generally assigned to a classroom of about 30 children. The school campus was small and easily navigated both positive aspects for a child with Student's disabilities. An additional benefit was the fact that Student might have the same teacher until grade eight. That meant not having to train a new teacher each year in Student's needs and how to meet them. The classroom did not appear distracting to Student. It was well-organized and not especially noisy. The teachers had excellent teaching styles. It was a classroom ripe for inclusive practices.

133. Ms. Crouch has been trained in RDI. During her observation of Student, she did not see Student's aide employ any RDI strategies during lessons or to address his behaviors. However, Ms. Crouch is neither a behavior expert nor, specifically, an expert in RDI. Therefore, her opinions regarding the implementation of RDI with Student were not given much weight.

135. Dr. Bartz, Ms. Patterson, and Ms. Crouch each have significant education and experience in teaching disabled children and with inclusion practices. All three have taught inclusion programs at the university level. All three were credible witnesses. However, ultimately, Ms. Crouch's testimony was the more persuasive for several reasons. First, for the last 12 or 13 years, her only job has been to successfully include disabled children in general education classrooms. She has trained the aides who will support the children, as well as the general education teachers in whose classes the children are placed. She had modified the curriculum for the children, trained aides how to do so, and provided modified curricula for the general education teachers. Ms. Crouch does not make the decision as to whether a child will be fully included or to what extent the child will be included. She leaves that to the IEP team. However, once the decision is made, it becomes



her responsibility for ensuring the success of the inclusion model. The difference in her testimony from that of Dr. Bartz was that of looking at the class half full, rather than half empty: how can I make this work rather than why it would not succeed.

136. Importantly, Ms. Crouch understood that children could be fully included in a general education classroom no matter their level of intellect, how far behind academically they were, whether they could read, or even whether they could speak, as long as the child was able to make progress. The emphasis Dr. Bartz and Ms. Patterson placed on the fact that Student was so far behind his classmates academically detracted from the persuasiveness of their opinions. As discussed in the Legal Conclusions below, the fact that a child is many grades behind his or her classmates is not a factor in determining whether the child should or should not be fully included in a general education classroom.

#### ALLEGED PROCEDURAL VIOLATIONS SUBSEQUENT TO THE OCTOBER 25, 2013 IEP TEAM MEETING

137. On November 22, 2013, Spencer Valley provided Parents a copy of the finalized October 25, 2013 IEP. Spencer Valley clarified some points of its offer. With regard to extended school year, although Ms. Brown had acknowledged that full-time special education instruction during summer was not appropriate for Student, Spencer Valley's offer of extended school year instruction for summer 2014 consisted solely of a special education placement. Spencer Valley did not state that the reason why it was only offering a special education placement was that it was not obligated under California education law to offer Student a general education placement. Nor did it state that the reason for the offer of full time placement in a special education class for extended school year was the only way to prevent Student from regressing during the summer break. Spencer Valley did not give parents an opportunity to discuss the extended school year program before it made the offer.

138. Spencer Valley began having even more difficulty providing the supports required in Student's stay put IEP after Student's October 25, 2013 IEP team meeting. First, the speech-language pathologist became unavailable. Then, Ms. Pawlicki tendered her resignation, effective when the winter break began, because she had been offered a full-time teaching position. Spencer Valley had not been able to find a replacement speech-language pathologist, had not ever been able to contract with an APE teacher, and was concerned that it would have difficulty hiring an aide for Student. Spencer Valley therefore suggested holding an IEP team meeting to consider having Student move to Julian Elementary School under his stay put IEP, where all services were available for him, other than APE. Parents declined the proposal for an IEP team meeting to discuss moving Student from Spencer Valley.

139. On December 30, 2013, Parents responded to Spencer Valley's November 22 letter. Parents confirmed what constituted Student's stay put placement. They also reiterated that they had agreed to change the content of some of Student's goals during the October 25, 2013 IEP team meeting. These latter goals were those first proposed during the May 28, 2013 IEP team meeting but not finalized until the October 25, 2013 meeting. While Parents did not agree to the latter goals being labeled at "October 25, 2013" goals, because they disagreed that the October 25, 2013 IEP team meeting was a new meeting with a new annual IEP date for Student, Parents did agree to the content of the goals, irrespective of how the commencement date of the goals was defined.

140. Parents also agreed to implement Dr. Haytasingh's behavior intervention plan. The plan incorporated RDI strategies such as spotlighting Student's successes, as well as provided for the use of common behavior strategies such as giving Student verbal praise, and providing him with breaks. Ms. Brown oversaw implementation of the plan by Student's teachers and aides. Ms. Wagner, Student's former behavior support provider from TAG, observed Student at school in April 2014. Student was not disruptive. He tried

to participate in the lessons, although the lessons Ms. Wagner observed were not modified for Student. Mr. Moles, Student's aide, employed the RDI based strategies from Student's behavior intervention plan as part of the instruction process and to redirect Student when his behavior was inappropriate.

141. Through their December 30, 2013 letter, Parents also requested Spencer Valley to convene an IEP team meeting for Student in May 2014 to review both the May 28, 2013 IEP and Student's behavior support plan. Spencer Valley responded that although it did not agree that May remained the state for Student's annual IEP, it agreed to hold an IEP team meeting in May 2014 to address any of Parent's concerns. Spencer Valley indicated it would contact Parents closer to May 2014 in order to suggest possible meeting dates. In later correspondence, Parents indicated that they did not want to meet while the due process hearing in this matter was convening. The dates for the hearing changed several times, ultimately beginning on June 24, 2014. The evidence established that Spencer Valley attempted to accommodate Parents' request for a meeting but Parents never provided concrete dates on which they wished to meet prior to the start of the hearing. No procedural violation occurred based on any contention that Spencer Valley failed to hold an IEP team meeting at Parents' request.

142. Student's IEP required Spencer Valley to provide him with two hours per week of speech-language therapy. Student believes he was shorted some eight hours of services. However, Student's calculation fails to account for his own absences and late arrivals to school where he missed some of his sessions even though the therapist was present to provide the service. Spencer Valley therefore only failed to provide Student with less than five hours of the services required under his IEP. Any failures to provide speech and language services to Student were not a material failure to implement his IEP.

143. Spencer Valley terminated its contract with FGTC and Jennifer Palmiotto in January 2014. Thereafter, Jennifer Brown provided behavior intervention services to

Student. While Student believes that Spencer Valley materially failed to implement the behavior support services, his belief is based on information gleaned from summaries of service provider hours created by Ms. Weaver, rather than the hours actually provided by Ms. Brown testified that she materially provided the services as required by Student's IEP. Reports addressing Student's progress on his behavioral goals also demonstrate that the service was being provided. At hearing, Student chose not to question Ms. Brown as to the services hours she provided after January 2014, and there is no evidence that contradicts her testimony. The weight of the evidence therefore supports Spencer Valley's contention that it did not materially fail to implement the behavior intervention services required by Student's IEP.

144. After Ms. Pawlicki resigned, Spencer Valley had difficulty finding a permanent replacement aide for Student. Ms. Weaver interviewed several candidates, but did not find anyone who she felt appropriate. Eventually, she was able to hire former Spencer Valley teacher Lanson Moles as Student's aide.<sup>12</sup> He was able to work a few days a week with Student. The other days, another substitute teacher acted as Student's aide. Although Mr. Moles did not receive any specific training in RDI, he had been provided a copy of Student's behavior intervention plan and was implementing it. Ms. Wagner observed Student in class in late February 2014 and agreed that Mr. Moles was implementing RDI strategies.

145. Mr. Moles was not able to substitute as Student's aide after March 2014 because of other obligations. Spencer Valley continued to have difficulty finding an aide. When no one else was available, Ms. Weaver herself would substitute. However, she had numerous other duties and could not always be available. The week after spring break

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<sup>12</sup> Mr. Moles has a master's degree in education, with an emphasis on reading and language arts.

ended in April 2014, Ms. Weaver was unable to find a substitute aide for Student and her other duties prevented her from assisting Student that week. Ms. Weaver did not consider contacting a non-public agency in order to contract a substitute aide for the week although she was aware that both TAG and FGTC had people trained on staff as behavioral aides. Because it had no substitute aide, Spencer Valley informed Parents that Student could not attend school. Student missed an entire week of academic instruction as well as social interaction with his peers until Spencer Valley found an aide for him.<sup>13</sup> Depriving Student of a week of school when other children were permitted to attend, constituted a material failure to implement Student's IEP.

146. Ms. Weaver has continued to have difficulty securing and keeping staff to support Student's IEP. The speech-language pathologist originally used is no longer available. Ms. Patterson had retired and will not be available to provide inclusion services for the 2014-2015 school year. Ms. Brown, who had been providing specialized academic consultation and behavior support under Student's IEP, has been promoted and therefore also is not available for the 2014-2015 school year. Ms. Weaver has never been able to locate an APE instructor.

147. However, while Ms. Weaver testified to the efforts she has made to find staff and providers, Spencer Valley failed to put on any evidence of several things. It did not put on any evidence of whether the SELPA had tried, but failed, to secure staff for Spencer Valley. It did not put on any evidence of whom, if anyone, was replacing Ms. Patterson and Ms. Brown, and why those professionals would not be able to provide the services of the people they were replacing. Spencer Valley did not put on any evidence as to why service providers from other school districts in the SELPA, such as from Ramona Unified or Julian

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<sup>13</sup> Neither the substitute aide who worked the days Mr. Moles was unavailable nor the aide Spencer Valley hired in April 2014, testified at the hearing.

Union (which is just a few miles from Spencer Valley) could not provide services to Student during the school day on an itinerant basis. Finally, it is unclear why Spencer Valley did not simply contract with a non-public agency for those providers who were unavailable through the SELPA. While Spencer Valley contends that it cannot implement Student's IEP at Spencer Valley, it has failed to meet its burden of persuasion that it cannot do so.

148. Ms. Patterson began acting as the inclusion specialist for Student's program after October 25, 2013. However, while she provided the hours required by Student's IEP, neither she nor Ms. Brown provided Student's aides or teachers with sufficient support to ensure his participation in the fourth grade curriculum. Ms. Patterson did not offer any inclusion training to Ms. Schlotfeldt. While Ms. Schlotfeldt had been provided with some materials that were supposed to be modifications to the curriculum, Ms. Schlotfeldt did not believe they were helpful. Rather than providing Ms. Schlotfeldt with modified lessons for Student, Spencer Valley continued to require her to somehow develop the modifications on her own. Neither Ms. Brown nor Ms. Patterson met regularly with Ms. Schlotfeldt to review her lessons and either provide her with modifications or instruct her how to do them herself. Ms. Schlotfeldt continued to feel overwhelmed by having to provide the modifications to Student's lessons without the necessary knowledge or training to do so.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>14</sup>

1. This hearing was held under the Individuals with Disabilities Education Act

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<sup>14</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below. All references to the Code of Federal Regulations are to the 2006 version, unless otherwise noted.

(IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 et seq. (2006); Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley (Rowley)* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690], the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the pupil's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 – 207.)

4. In *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, supra*, 458 U.S. at p. 201.) *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met

when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Ibid.*)

5. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 – 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.)

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) Further, a court or tribunal must judge an IEP at the time of its development, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*); *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801 (*Douglas County*); *Tracy N. v. Department of Educ., Hawaii* (D.Hawaii 2010) 715 F.Supp.2d 1093, 1112.) Here, under this "snapshot rule," evidence of events that occurred after the October 25, 2013 IEP meeting are largely irrelevant in evaluating the appropriateness of the IEP which is the subject of this case.

7. In a special education administrative proceeding, the party seeking relief has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 38; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Here, Spencer Valley has the burden of proof in this proceeding with respect to the issues raised in its due process hearing request and Student has the burden of proof with respect to the issue raised in his due process hearing



request.

## DETERMINATION OF ISSUES

### DID SPENCER VALLEY'S OCTOBER 25, 2013 IEP OFFER STUDENT A FAPE IN THE LRE? (SPENCER VALLEY'S ISSUE 1 (A) AND STUDENT'S ISSUE 4)

#### Procedural Validity of the Offer – Predetermination of Student's Placement

8. Student contends, and Spencer Valley denies, that Spencer Valley decided prior to the October 25, 2013 IEP team meeting that it was not going to offer to continue Student's placement in the general education classroom at Spencer Valley. Student contends that Spencer Valley decided to not only change Student's placement to a hybrid program of three hours a day in a specialized academic instruction classroom, with the remainder of the day in general education, but that Spencer Valley also predetermined the location where that placement would be. Student further contends that Spencer Valley predetermined his extended school year placement as well. Spencer Valley contends that it came to the IEP meeting with an open mind and only determined its offer of placement after discussing Student's assessment results and hearing from all IEP team members.

9. An IEP must be both procedurally and substantively valid. 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 the child a deprivation of educational benefits. (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 Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*))

10. Special education law places a premium on parental participation in the IEP process. School districts must guarantee that parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of

the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1).) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Parental participation in the IEP process is also considered "(A)mong the most important procedural safeguards." (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.)

11. An educational agency must therefore permit a child's parents "meaningful participation" in the IEP process. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131-1132 (*Vashon Island*).) The standard for "meaningful participation" is an adequate opportunity to participate in the development of the IEP. Although a student's parents have a right to meaningful participation in the development of an IEP, a district "has no obligation to grant [a parent] a veto power over any individual IEP provision." (*Ibid.*) Merely because the IEP team does not adopt the placement, services, or goals advanced by parents, does not mean that the parents have not had an adequate opportunity to participate in the IEP process. (*B.B. v. Hawaii Dept. of Educ.* (D.Hawaii 2006) 483 F.Supp.2d 1042, 1051.)

12. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840 (*Deal*); *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 2007 WL 1989594 [107 LRP 37880, 48 IDELR 31]; see also, *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115,

1131 ["A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification." (citing *Target Range, supra*, 960 F.2d at p.1484)].)

13. Here, Spencer Valley has failed to prove that it did not commit a procedural violation by predetermining Student's placement. Likewise, Student has demonstrated that Spencer Valley, through the SELPA, predetermined that it would offer Student a combined special academic instruction and general education placement specifically at Mt. Woodson Elementary School in the Ramona Unified School District.

14. Student's parents met with his teachers for a parent/teacher conference just days before the October 25, 2013 IEP team meeting. The teachers did not give any indication that they believed Student was not making progress in class or that his full time placement in general education was not appropriate. Instead, they gave Parents a progress report that demonstrated Student was making progress in his goals in four areas: reading, math, speech and language, and occupational therapy. As of that date of that meeting, there was apparently no reason for changing Student's placement.

15. A day or two after the parent/teacher conference, Spencer Valley held an eight-hour "pre-IEP" meeting to discuss Student's progress and possible placements for him. In addition to Student's teachers, Ms. McNeece attended the meeting as did Ms. Patterson and Ms. Brown, the latter of whom were not yet service providers for Student at that time. Although the purpose of the meeting was to discuss Student's progress, neither Student's aide, Ms. Pawlicki, nor his behavioral supervisor, Ms. Palmiotto, were invited to the meeting or consulted prior to the meeting about Student's progress or lack of it. Ms. Weaver, Spencer Valley's Superintendent and the Principal of the school, barely participated as she had other duties that day that needed her attention. Therefore, a discussion about Student's progress, his needs, and where those needs could be met, occurred without many of the people who had worked directly with Student, and occurred

based on the input from many people who had never worked with Student at all.

16. Ms. Brown testified that Spencer Valley's IEP team offered Student placement at Mt. Woodson only after Parents rejected consideration of a placement at Julian Elementary School. However, Ms. Brown's recollection was faulty. The recording of the October 25, 2013 IEP meeting indicates that placement in Julian was not discussed at all, other than Ms. McNeece stating that there was a placement available in Julian but that the Spencer Valley team was offering Mt. Woodson Elementary in Ramona Unified instead. It is clear that Ms. Brown's recollection was from the pre-IEP team meeting that took place on October 24, 2013, where the Spencer Valley team, outside of the presence of Parents, discussed possible placements and arrived at the conclusion, for reasons *never discussed with Parents at the IEP team meeting on October 25, 2013*, that Mt. Woodson would be offered rather than Julian, a location which was just a handful of miles from where Parents live, rather than a 40 minute drive away, in the case of Mt. Woodson.

17. There is nothing wrong with a school district holding a meeting with its staff prior to a child's scheduled IEP team meeting, in order to discuss the child's progress and needs, and to discuss possible placements. (see, 34 C.F.R. 300.501 (b)(3) (stating that an individualized educational program meeting "does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting") and *Mercer Island, supra*, 592 F.3d at p. 952). However, although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized. (Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).) In this case, the weight of the evidence is that people present at the pre-meeting on October 24, 2013, discussed and predetermined Student's placement and then did not open the discussion to Parents at

the IEP team meeting the next day with an open mind.

18. The recording of the October 25, 2013 IEP team meeting supports that finding. Although retired SELPA Director Penny Valentine was supposed to be present as a neutral facilitator, instead of merely moving the meeting along, she often interjected herself into the discussion with opinions and critiques, even though she had never provided services to Student. For example, Ms. Valentine opened the meeting by making a statement that Spencer Valley was a unique school and that it was difficult to implement certain kinds of services because of the setting. During the course of the meeting, she also gave opinions regarding Student's placement, although she had never been involved in Student's education.

19. Another indication of predetermination is the fact that several members of the Spencer Valley IEP team kept pressing Dr. Haytasingh to make a placement recommendation or at least agree that Student required direct specialized academic instruction by a special education teacher. In spite of Dr. Haytasingh's refusal to do so, the Spencer Valley team members kept pressing for his agreement that Student should not be fully included in a general education classroom. Ms. Brown, at one point, misquoted from Dr. Haytasingh's assessment report, stating that she agreed with his finding that Student required direct instruction rather than just special education consultation. Dr. Haytasingh's report does not make any such recommendation.

20. Another indication that Spencer Valley had predetermined Student's placement was the fact that although Spencer Valley announced at the beginning of the October 25, 2013 IEP team meeting that it had unilaterally decided to start Student's annual IEP meeting over again, disregarding the fact that Student's IEP team had met for over eight hours the previous May, had agreed to Student's placement, many of his services, and many of his goals. The fact that Spencer Valley decided to disregard an IEP to which Parents had consented in great part, is another indication of predetermination.

21. Additionally, although Spencer Valley provided a draft IEP to Mother and her educational consultant at the beginning of October 25, 2013 IEP team meeting that contained proposed goals, etc., Spencer Valley did not give them the special factors page. This page contained the offer of placement in the hybrid program, specifically identifying Mt. Woodson as the location for the placement. Ms. Brown read from this page toward the end of the meeting as she discussed why Spencer Valley believed Student required three hours a day of direct specialized academic instruction. The evidence supports a finding that Spencer Valley had predetermined what was on that page and did not want Mother or her consultant to be aware of what they had determined until the point Spencer Valley was ready to disclose it.

22. Finally, the fact that it was Ms. McNeece who made the offer of placement is another indication that the decision was predetermined. Ms. McNeece had been present at the pre-IEP team meeting on October 24. However, she did not join the October 25, 2013 IEP team meeting until more than five hours after it started. She was not present for any of the discussions regarding Dr. Haytasingh's assessments, Student's present levels, any of his progress, or the proposed goals. Yet, in spite of not having been present, Ms. McNeece was not only able to make a specific offer of three hours of specialized academic instruction, but also specified a school in another district where the placement would be implemented. Unless that placement had been previously discussed and determined, it would have been improbable for Ms. McNeece to be so specific. This is especially true since the Spencer Valley team never mentioned either partially or wholly implementing its proposed placement at Julian Elementary School.

23. The totality of the evidence, when examining the entire series of events prior to the meeting, and how the meeting was conducted, including comments and actions of Spencer Valley team members, supports a finding that Spencer Valley, through the SELPA, predetermined the placement rather than making a decision after consultation with

Student's parents. The preponderance of the evidence demonstrates that Spencer Valley's decision to place Student in a specialized academic instruction classroom for over 50 percent of his school day was predetermined prior to the October 25, 2013 IEP team meeting. Spencer Valley has failed to meet its burden of proof that it did not predetermine the placement. Student correspondingly has met his burden of proof that Spencer Valley did predetermine the placement, thereby denying Student's parents the right to participate in the IEP process for their son.

24. Additionally, the evidence supports a finding that Spencer Valley predetermined Student's extended school year placement. At the end of the meeting on October 25, the IEP team discussed and all agreed that Student's needed extended school year instruction to prevent regression. The Spencer Valley team members explained that none of the school districts in the SELPA had general education classes during the summer. However, both Ramona Unified and Julian had extended school year programs for specialized academic instruction classes for four hours a day. However, Ms. Brown specifically stated that a full-time placement during the summer in a special education classroom was inappropriate for Student. She stated that she would need to consider other possibilities after the meeting. There was no further discussion at the IEP team meeting addressing possible extended school year options. Spencer Valley agreed that it would provide specifics for extended school year at a later date.

25. In its November 22, 2013 letter, Spencer Valley offered Student the full-time special education classroom that Ms. Brown had specifically stated was inappropriate. It did not give specific reasons why it no longer believed that Student required a summer program that at least partially provided interaction with typical peers. The decision was unilateral, made without input from Parents, and directly contradicted Ms. Brown's statement at the October 25, 2013 IEP team meeting.

26. California law relieves a school district of the obligation to place an inclusion

student in a general education program if the district offers no regular summer school programs:

If during the regular academic year an individual's [IEP] specifies integration in the regular classroom, a public education agency is not required to meet that component of the [IEP] if no regular summer school programs are being offered by that agency.

(5 C.C.R. § 3043, subd. (h).)

27. In this case, however, Spencer Valley never raised either the lack of general education extended school year placements or the fact that it was not legally required under California law to provide Student with a general education placement during the summer as rationales for its decision to only offer a full-time special education program.<sup>15</sup> The preponderance of the evidence therefore demonstrates that Spencer Valley predetermined its offer of extended school year instruction.

28. In all other respects, Spencer Valley has demonstrated that it complied with all mandated procedural requirements in developing Student's October 25, 2013 IEP. All required IEP team members were present. Spencer Valley informed Student's mother of her procedural rights. The full IEP team discussed Student's present levels and discussed proposed goals for Student. Spencer Valley agreed to rewrite goals based on input from

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<sup>15</sup> Student cites to the recent case of *T.M. v. Cornwall Central Sch. Dist.* (2nd Cir. 2014) 752 F.3d 145 (*Cornwall*), for the proposition that a school district must consider a child's least restrictive environment when determining the child's extended school year program. However, since this decision finds that Spencer Valley's offer for extended school year was predetermined, it is unnecessary to determine the applicability of *Cornwall*.



Student's educational consult. Dr. Haytasingh developed Student's behavior intervention plan based on consultation from Student's advocate, his behavior consultant, and members of the Spencer Valley IEP team. The IEP document offered by Spencer Valley on November 22, 2013, as a result of the IEP team meeting contained all requisite elements, including a description of Student's unique needs, his present levels of performance, proposed annual goals and educational placement, related services, and modifications and accommodations necessary to provide Student a FAPE. Spencer Valley has therefore met its burden of proof that, other than having predetermined its offer of placement to Student, the IEP of October 25, 2013, met all other necessary procedural requirements.

#### Least Restrictive Environment

29. The primary focus of this hearing was what the least restrictive educational environment was for Student. Student contends that at the time of the October 25, 2013 IEP team meeting, a general education classroom was the least restrictive environment for him, as his full IEP team had determined at the end of the previous school year. He contends that the social skills and modeling he learns from typical children in a general education placement far outweigh any possible increase in academic abilities he might acquire if directly taught by a special education teacher. Student believes that he made some benefit in a general education classroom and should be permitted to remain in that placement. Spencer Valley contends that based on the information it had regarding Student's unique needs and his abilities at the time of the IEP meeting, a hybrid program of specialized academic instruction for three hours a day with the remainder of the school day in general education, was the least restrictive environment for him. Spencer Valley contends that Student requires direct instruction from a special education teacher in order to make academic progress.

30. Generally, where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not

need to include consideration of whether the student ultimately received a FAPE. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award]; *Target Range, supra*, 960 F.2d at pp. 1485-1487 [when parent participation was limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held].) However, given the importance of the issue of what constituted Student's least restrictive environment at the time of his October 25, 2013 IEP team meeting, a discussion of the merits of Spencer Valley's offer is fitting in this case.

31. One of the key policy motivations behind the enactment of special education laws was to move special needs children out of segregated programs. In *Rowley*, the Supreme Court noted the intent of the Education of the Handicapped Act (the predecessor to IDEA) was "to open the door of public education to handicapped children on appropriate term . . . ." (*Rowley, supra*, 458 U.S. at p. 192.) California special education laws also emphasize the importance of keeping special education pupils with their typically developing peers. For example, California Education Code section 56000, subdivision (b), provides that:

The Legislature further finds and declares that special education is an integral part of the total public education system and provides education in a manner that promotes *maximum interaction* between children or youth with disabilities and children or youth who are not disabled, in a manner that is appropriate to the needs of both. (Emphasis added.)

32. For this reason, special education law mandates that disabled children remain in the general education setting *whenever appropriate*. Under title 20 United States Code section 1412(a)(5)(A), a state must ensure that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(See also Ed. Code, § 56040.1; 34 C.F.R. § 300.114.)

33. The seminal Ninth Circuit case addressing the issue of least restrictive environment is *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398 (*Rachel H.*). The *Rachel H.* court noted the preference by Congress for educating children with disabilities in regular classrooms with their peers. The court then considered four factors to examine in determining the appropriate least restrictive environment for the child: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the child would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the child. (*Rachel H., supra*, 14 F.3d at p. 1404.)

34. However, the Ninth Circuit has also found that a general education placement is not the least restrictive environment for every special needs child. In *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830 (*Poolaw*), the Ninth Circuit considered the *Rachel H.*

factors and determined that a general education classroom was not the least restrictive environment for the child in question. The Court acknowledged that there was a tension within the IDEA between the requirement that a district provide children with a FAPE to meet their unique needs and the preference for mainstreaming. The Court stated:

In some cases, such as where the child's handicap is particularly severe, it will be impossible to provide any meaningful education to the student in a mainstream environment. In these situations continued mainstreaming would be inappropriate and educators may recommend placing the child in a special education environment. This allows educators to comply with the Act's main requirement—that the child receive a free appropriate public education. Thus, "the Act's mandate for a free appropriate public education qualifies and limits its mandate for education in the regular classroom."

(*Poolaw, supra*, 67 F.3d at p. 834, citing *Daniel R.R. v. State Bd. Of Educ.* (5th Cir. 1989) 874 F.2d 1036, 1044.)

35. Applying the *Rachel H.* factors to the instant situation results in the conclusion that Spencer Valley has failed to prove by a preponderance of the evidence that Student was making such minimal progress as of October 25, 2013, that he required being removed from his general education classroom. It is significant to note that as of May 28, 2013, at Student's previous IEP team meeting, his full IEP team agreed that Student was making excellent progress and that he should remain a general education student. The IEP team meeting on October 25, 2013, took place barely eight weeks after Student returned to school from his summer break. It is difficult to understand why Spencer Valley would have made such a decision based solely on some two months' of

data, even had Student actually made no progress whatsoever as of that time.

36. However, to the contrary, the evidence available to the IEP team on October 25, 2013, demonstrates that Student was making progress on all the goals on which Spencer Valley had reported as of that date. Student had progressed on his speech and language goals and had progressed on his occupational therapy goals. Most significant was the fact that Student was progressing in math to such an extent that his aide, Ms. Pawlicki, had increased the difficulty of her lessons by including addition and subtraction, neither of which had been addressed in Student's then-present goals. Student had made so much progress on meeting his goal of memorizing sight words, that Ms. Pawlicki had begun using the Project Read program to teach Student to read stories. Reading is a skill that Student's former school district had believed he might never accomplish. By October 25, 2013, Student had acquired the ability to do a skill above and beyond that which his goals addressed.

37. Certainly, in comparison to the fourth grade reading and math goals, Student was far behind his classmates. However, there is no requirement that a student be on par with his peers or even be capable of someday catching up to them. It bears emphasizing that the child in *Rachel H.* had an intelligence quotient of only 44, significantly below that of Student, whose I.Q. was 67. The facts in *Rachel H.* are remarkable similar to the facts here. The school district in *Rachel H.* believed that the child could not make progress because of the extent of her intellectual disability. However, the Ninth Circuit found that, like Student, *Rachel H.* was learning the alphabet and learning number correspondence. She was also improving her communication skills. Here, as of October 25, 2013, Student had shown meaningful academic progress on his goals.

38. Although Dr. Bartz and Ms. Patterson did not believe that Student's goals could be addressed without direct instruction from a special education teacher, their opinion flies in the face of the purpose of the IDEA, which is to include children with

disabilities to the greatest extent possible. Following their logic, no child who was academically many years behind his or her peers could be fully included in general education. As stated above, that was not the intent of Congress in passing the IDEA. In any case, the studies to which Dr. Bartz referred in her report and her testimony found only that an intellectually disabled child might read a few words faster per minute after a few years if placed in special education classrooms. However, the fact that such a placement might optimize a child's learning is not a basis for removing the child from general education.

39. Student's expert Kathleen Crouch effectively refuted the opinions of Dr. Bartz and Ms. Patterson that it was too difficult to modify curriculum for an intellectually disabled child so that the child could participate in the curriculum. Ms. Crouch, who has worked specifically as an inclusion expert for about 14 years, gave persuasive testimony as to how Student's curriculum could be modified so that his goals could be implemented in the general education classroom to an extent that Student would be able to continue to gain educational benefit. It is exactly what Ms. Crouch was doing for children in the school district where she worked.

40. Just a few months before the October 25, 2013 IEP team meeting, Student's IEP team had agreed that Student was making progress on his goals, that his behaviors had improved, and that all he needed was a behavior support plan to address the behaviors that remained. What then changed between May 28, 2013, and October 25, 2013, after only two additional months of school, that caused Spencer Valley to do an about-face on its offer of placement? The preponderance of the evidence indicates that rather than Student's actual lack of progress, it was a combination of the difficulty Spencer Valley had in finding and retaining staff to support Student's IEP, and lack of support to general education teacher Heidi Schlotfeldt, which was draining her of energy, that was the impetus behind Spencer Valley's decision. However, neither reason is a suitable basis

for making a decision on what constitutes a child's least restrictive environment. (See, *Letter to Trigg* (OSEP Nov. 30, 2007) 50 IDELR 48, 108 LRP 16391.) The United States Department of Education has long found that the lack of adequate personnel or resources cannot be used as an excuse by a school district to relieve it of its obligation to make a FAPE available to disabled children in their least restrictive environments. All districts and SELPA's are charged with ensuring the supply of a sufficient number of teachers and service providers who are qualified, with the needed aids and supports to provide such services in the general education environment. (See, *Memorandum 95-9* (OSEP, November 23, 1994) 21 IDELR 1152, 21 LRP 2967.) Here, Spencer Valley should have first determined Student's least restrictive environment, then discussed and determined how to implement Student's IEP in that environment. Here, the preponderance of the evidence indicates that it was the lack of resources that drove the decision to remove Student from a full general education placement.

41. Certainly, Student might make more progress with direct instruction from a special education teacher. But the goal of the IDEA is not to maximize or optimize a child's progress. It is to give the child a "floor of opportunity" so that he or she can make "some progress" on his or her goals. From the information available to the IEP team at the October 25, 2013 IEP team meeting, it was apparent that Student was capable of making some academic progress. Therefore, the first *Rachel H.* factor, whether Student would gain academic benefit from a general education placement, weighs heavily in favor of a general education placement for Student as of the time of the October meeting.

42. There is no question that Student gained substantial non-academic benefit from placement in a general education classroom. He was able to learn socially from his peers. He was able to try to model his language and his behavior on that of his peers as well. Student interacted with typical children all day long at school. He knew how to request food in the school kitchen at lunch, how to eat with other children, and where to

put his dirty dishes. Student played games with this peers at recess and lunch without prompting from adults. He was learning to demonstrate manners by taking turns and apologizing when he said or did something wrong. He was learning compassion and had begun asking classmates if something was wrong if he saw that the other child was upset. Student participated in class by doing jobs which all children were expected to do, like making copies. Student *wanted* to be a member of the class.

43. Student participated in many extra-curricular activities as well. Student was not disruptive, tried to model what the other children were doing, and genuinely appeared to enjoy being part of the group endeavor. The video recordings in evidence demonstrate that not only did Student participate without needing an adult to stand with him, but that he was encouraged and congratulated by his peers.

44. The evidence therefore supports a finding that the second *Rachel H.* factor, whether Student would gain non-academic benefit from a general education placement, weighs heavily in favor of a general education placement being the least restrictive environment for Student as of the October 13, 2013 IEP team meeting.

45. Spencer Valley contends that Student's behaviors were disruptive to his learning, created a distraction for his classmates, and negatively impacted his teachers' ability to teach the other students.

46. There are several reasons why Spencer Valley's arguments in this regard are not persuasive. First and foremost is the fact that Spencer Valley IEP team members never raised the issue of Student's behaviors as being a reason for his partial removal from general education during the discussion at the IEP team meeting on October 25, 2013. To the contrary, Ms. McNeece acknowledged at the IEP meeting that Student had received social and behavioral benefit from placement in general education that was noticeable. Nor did Spencer Valley raise Student's behaviors as a basis for its offer in its letter of November 22, 2013, which clarified the offer of placement and services. The only factor



voiced by Spencer Valley's IEP team for the decision to change Student's placement was the fact that Spencer Valley did not believe Student was making academic progress. Therefore, Student's behaviors were not the reason behind Spencer Valley's decision to offer a different placement to Student.

47. In any case, Student's behaviors had improved since the previous spring. In his assessment report, Dr. Haytasingh found that Student was not engaging in aggressive behaviors such as hitting, kicking, biting, or swinging a shovel, as Student had been noted doing in the past. Dr. Haytasingh, who conducted the functional behavior assessment and independent psycho-educational assessment of Student, specifically said that addressing Student's behaviors was not "rocket science." Dr. Haytasingh believed that Student could progress in general education if given adequate support. He also believed that Student's behaviors could be addressed in the general education environment. Overall, Student had made meaningful progress academically.

48. Focusing on Student's behaviors toward other children as a reason for proposing his partial removal from general education is also not supported by the record. Student would sometimes touch other children. He did it to get their attention or for contact with them. However, the incidents of touching had decreased. There is also no evidence that changing Student's environment would decrease the touching. Rather, Dr. Haytasingh's behavior intervention plan would address the issue, and could be implemented in a general education classroom.

49. Finally, Spencer Valley points to the fact that Student's habit of putting his hands into his pants was distracting and worrisome for the other children at school. Like Student's other behaviors, the behavior intervention plan was developed to address this behavior and could be implemented equally in a general education environment.

50. The preponderance of the evidence therefore fails to support Spencer Valley's contention that Student's behaviors were so disruptive that either his educational

progress or that of his classmates was significantly impacted by Student's behaviors, or that those behaviors could not be adequately addressed through implementation of Student's behavior intervention plan in a general education classroom.

51. Spencer Valley presented no evidence that the cost of providing Student the supports he needed to remain in general education were a factor in its decision on where he should be placed.

52. In applying the four factor analysis of the *Rachel H.* case, Spencer Valley has not met its burden of proof that Student required three hours a day of direct specialized academic instruction in order to make progress on his goals. Spencer Valley has also not met its burden of proof that Student's least restrictive environment was a partial special day classroom as of the time of his October 25, 2013 IEP team meeting. Because the placement did not comport with Student's least restrictive environment, the IEP Spencer Valley developed on October 25, 2013, did not offer Student a FAPE, and thus cannot be implemented over the objections of Student's parents. Likewise, Student has met his burden of proof that as of October 25, 2013, general education was his least restrictive environment. *May Spencer Valley Implement Student's Present IEP at Another School District? (Spencer Valley's Issue 1(b))?*

53. Spencer Valley contends that it has not been able to hire and retain the staff necessary to implement Student's IEP at Spencer Valley. Spencer Valley therefore asks if this decision finds, as it has, that the October 25, 2013 IEP did not offer Student a FAPE in the least restrictive environment, may it implement Student's stay put general education placement at another school district, such as Ramona Unified or Julian Union Elementary School District? Student contends that his IEP can be implemented at Spencer Valley through contracts with suitable certified non-public agencies.

54. Spencer Valley has not met its burden of proof on this issue for several reasons. First and foremost, Spencer Valley has never offered Student placement full-time

in a general education classroom at any other school district. Spencer Valley's issue 1(b) is therefore a hypothetical question that asks OAH to give Spencer Valley an advisory opinion.

55. Special education due process hearings expressly do not include declaratory decisions about how the IDEA would apply hypothetically. (Gov. Code, § 11465.10-11465.60; Cal. Code Regs, tit. 5, § 3089; see also *Princeton University v. Schmid* (1982) 455 U.S. 100, 102 [102 S.Ct. 867, 70 L. Ed. 2d 855] ["courts do not sit to decide hypothetical issues or to give advisory opinions"]; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539-542 [court deemed the matter not ripe for adjudication because it was asked to speculate on hypothetical situations and there was no showing of imminent and significant hardship].) Spencer Valley did not meet its burden of showing that its October 25, 201 IEP offered Student a FAPE. Nor did Spencer Valley present any evidence that it had made an IEP offer to implement Student's IEP in another district. Issue 1(b) therefore amounts to a request for an advisory opinion, which OAH declines to issue. (See, e.g. *Bellflower Unified Sch. Dist. v. Student, et al.* (2013) Cal.Offc.Admin.Hrngs., Case No. 2012060009, et al.) The proper procedure for requesting an advisory opinion is to make a request to the Office of the Attorney General, pursuant to Government Code, section 12519, through an appropriate public official, or to request an opinion from the Office of Special Education Programs of the United States Department of Education.

56. Even if OAH were inclined to give an advisory opinion, Spencer Valley has failed to demonstrate that it is not able to implement Student's present IEP at Spencer Valley. Ms. Weaver gave sincere testimony expressing her frustration and anguish at not being able to meet Student's staffing needs. However, all Ms. Weaver could address was the fact that the speech language pathologist was no longer available, Ms. Patterson was retiring, and Ms. Brown had been promoted. She did not address whether they were being replaced. Neither did Ms. Weaver address any efforts she or the SELPA had made to

replace the staff that had left. No one from the SELPA testified; therefore, the extent to which staff might be available through the SELPA is also unknown. Furthermore, Spencer Valley failed to present any evidence as to what the placement at Julian Union would be and if it is comparable to Student's placement at Spencer Valley or whether a full-time general education placement at Mt. Woodson in Ramona Unified would be a comparable placement.

57. Finally, Spencer Valley failed to address the issue of whether an inability to support a child's IEP through providers on staff at the district means that the school district may place the child at other than his home school or, as in this case, at another school district altogether. Spencer Valley has therefore failed to meet its burden of proof as to its Issue 1(b).

#### PROCEDURAL VIOLATIONS THAT MAY HAVE DENIED STUDENT A FAPE

##### Timely Completing Student's Triennial Assessment (Spencer Valley's Issue 2(A))

58. Spencer Valley contends that it did not fail to timely complete Student's triennial assessment, which was due by approximately mid-April 2013. Student contends that the triennial was not completed until just prior to the IEP team meeting on May 28, 2013, and therefore it was approximately six weeks overdue.

59. An IEP required as a result of an assessment of a student must be developed within a total time not to exceed 60 calendar days from the date the school district received the parent's written consent to assessment, not counting school vacations in excess of five schooldays, unless the parent agrees to extend these timeframes in writing. (Ed. Code, § 56043, subd. (f)(1).)

60. Student was enrolled at his charter school at the beginning of 2013. The charter school began the triennial assessment process while Student was still enrolled there. It had not completed the process when Student transferred to Spencer Valley. The

parties agreed that the charter school would finish the assessments so that there would be no further delay. Spencer Valley's obligation to assess Student did not arise until Student enrolled there on April 22, 2013. Spencer Valley's assessments would therefore not have been due until 60 days after April 22, 2013. The charter school completed the assessments by May 28, 2013, well before Spencer Valley's 60 days had elapsed. Spencer Valley therefore did not fail to timely complete Student's 2013 triennial assessments.

Failing to Have an IEP in Place as of April 2013, Through the End of the 2012-2013 School Year (Spencer Valley's Issue 2(b))

61. Spencer Valley contends that it did have an IEP in place for Student from the time Student enrolled on April 22, 2013, through the end of that school year. It contends that it implemented all portions of Student's prior IEP's to which Student's parents had consented, either by signing the IEP document, or by consenting through correspondence between Student's representatives and Spencer Valley's representatives. Student contends that Spencer Valley was obligated to create an interim IEP document for him that specified all components of the IEP Spencer Valley was implementing, and which his parents could indicate consent by their signatures on the document.

62. Under the IDEA, when a child transfers to a new school district during a school year, his new school must provide the child with a FAPE, including services comparable to what was included in the IEP developed by the child's former school district. The new district must either adopt the previous district's IEP or develop and implement a new IEP. (20 U.S.C. § 1414(d)(2)(C)(i)(I).) In California, if the child transfers to a new district in the same SELPA, the new district must implement the prior IEP unless the parent and the new district agree to develop, adopt, and implement a new IEP. (Ed. Code, § 56325, subd. (a)(2).)

63. In this case, Student informed Spencer Valley of his impending transfer. After a flurry of correspondence, Spencer Valley agreed in writing to fully implement in its

entirety the program and services that had been provided to Student by his charter school. That program consisted of parts of Student's April 2011 IEP that had not been superseded, parts of his August 2012 IEP to which Student's parents had given consent, and the January 2013 amendments agreed to by the charter school, to which Parents had also given consent. Parents had given partial consent to the August 2012 IEP through correspondence from their legal and educational representatives. They did the same with their consent to the January 2013 amendments to the August 2012 IEP.

64. Student contends that he and his parents have been harmed by the failure to have an interim IEP offer that was reduced to one document because Student's teachers and service providers, as well as the parties themselves, have had a difficult time recalling just which goals are supposed to be implemented, and, therefore, it is possible that not all of Student's current goals were being addressed. Student's mother also testified to her frustration that she had no IEP document listing Student's program and goals that she could take to another school district if necessary with the expectation that the new district would know exactly what constituted Student's IEP.

65. First, it must be noted that Student's parents and representatives have created this situation themselves by giving piecemeal consent to the different IEP offers. Parents could have simply signed each proposed IEP document, indicating *on the document itself to which provisions they were consenting and which they were rejecting*. Parents chose not to do so. Rather, they gave consent primarily through letters from their attorney or educational consultant that laid out what portions of the proposed IEP were agreeable and which portions Parents were rejecting. It is disingenuous for Student to blame the school districts for a situation created solely by Parents and their representatives.

66. In any case, Student has cited to no statute or case law that supports the proposition that a school district must reduce all terms of an IEP to one specific IEP

document, or that Parents must sign consent to an IEP document in a specific form, for there to be an IEP in effect. To the contrary, that position has been rejected by two judges in the District Court for the Central District of California.

67. In two separate cases involving parents of disabled children, the attorney for the parents advised her clients not to sign IEP documents as a means of consenting to them. Rather, the attorney sent letters to the school districts advising that the parents consented to the IEP's. The attorney for the parents took the position that as agent for the parents, she was authorized to give consent by way of her letters. The school districts objected to receiving consent through correspondence, and insisted that the parents had to sign the IEP documents in order for consent to the IEP to be in effect.

68. The school districts prevailed at the administrative hearings, but those decisions were overturned by the district courts. Although these unpublished court orders are not binding legal precedent, they are highly persuasive on the proper interpretation of the law on this issue.

69. On May 4, 2012, United States District Court for the Central District of California, in *A.T. v. East Whittier City School District*, Case number CV 10-10030-GHK(Ex) (*East Whittier*), considered the question of whether an attorney's letter consenting to a district's assessment plan, without a parent's signature on the plan, constituted valid consent. The court found that the letter was sufficient to constitute consent. It overturned the OAH decision to the contrary, finding that:

In reaching a contrary decision, the ALJ emphasized that Plaintiff's parents never returned a signed copy of the Assessment Plan, as requested by District in its February 18, 2010 letter. However, we believe that analysis improperly elevates form over substance, as the consent granted in the March 1 letter was clear.

70. In a ruling in *J.L. v. Downey Unified School District*, case number CV 12-2285-GW(SSx) (*Downey*), the United States District Court for the Central District of California, also found that California agency law applies to special education documents such as assessment plans and IEP's. The court's decision overturned the December 21, 2011 OAH decision in *Parent on Behalf of Student v. Downey Unified School District*, OAH consolidated case numbers 2011050579, 2010100321 and 2011030557. The court's ruling found that the child's mother could give valid consent to documents such as assessment plans and IEP's through an attorney's consent letter under California agency laws. (See also, *Student v. Garden Grove Unified Sch. Dist., et al.* (2012) Cal.Offc.Admin.Hrngs Case No. 2012060342, at pp. 42-46.)

71. Here, the letters from Student's attorney and educational consultant to Spencer Valley indicated that the representatives had the authority to act on Parents' behalf and that they were consenting or denying consent to specific IEP provisions as set forth in the letters. At the hearing in this case, Ms. Langerman acknowledged that she had the authority to act and speak on behalf of Parents and that she gave her consent to portions of the IEP's through her letters to Spencer Valley. Under the plain holdings of the two recent federal cases, these letters constituted valid consent, and since under these rulings a school district cannot require a parent to sign an IEP document, likewise parents cannot claim that their letters of consent had to be reduced to an IEP document in order for the consent to be valid.

72. Mother's frustration with not having a single IEP document identifying Student's program is understandable. It was difficult to identify all components of Student's current IEP. Given the multiple IEP's which constituted Student's program, consent through correspondence created confusion as to which portions of the IEP's were actually in effect. However, the district courts rejected similar arguments. Further, in the instant case, the parties were careful to constantly reiterate which portions of Student's



many IEP's were in force.

73. The preponderance of the evidence therefore indicates that Spencer Valley did not fail to have an IEP in effect for Student from the time he enrolled in the district until the end of the 2012-2013 school year.

Failing to Complete an IEP by May 28, 2013 (Spencer Valley's Issue 2(c))

74. Spencer Valley contends that it was not under an obligation to complete Student's IEP by May 28, 2013. Student contends that the failure to do so was a procedural violation that denied him a FAPE.

75. A school district is required to review a disabled student's IEP at least annually. (34 C.F.R. 300.324(b)(1).) In this case, Spencer Valley convened an IEP team meeting for Student on May 28, 2013, after the charter school completed its triennial assessment. Student's IEP team met for over eight hours but was not able to finish developing Student's IEP in that time. Spencer Valley addressed outstanding issues regarding the IEP, and sent a full draft to Parents, through their educational consultant, on June 23, 2013. Parents never signed the draft. Instead, they indicated consent to portions of this IEP through an August 24, 2013 letter from their educational consultant.

76. Student provides no persuasive argument that Spencer Valley was somehow required to finish the IEP that it started on May 28, 2013. It is unclear what Student believes Spencer Valley should have done; barring an attempt by Spencer Valley to force the IEP team members to remain for 24 hours and not permit them to leave until the IEP document was signed, Spencer Valley did all it possibly could have by holding an IEP team meeting that lasted more than eight hours, and then reducing the agreements obtained at that meeting to writing as soon as possible. Spencer Valley met its legal obligations by holding an IEP team meeting within a year of Student's previous IEP team meeting in August 2012. No procedural violation occurred by Spencer Valley's failure to have an IEP document completed by the end of the May 28, 2013 IEP meeting.

Failing to Have an IEP in Place on the First Day of the 2013-2014 School Year  
(Spencer Valley's Issue 2(d))

77. Spencer Valley asserts that it did have an IEP in place for Student at the beginning of the 2013-2014 school year. Student contends that there was no IEP in place because no one document existed delineated the parameters of the IEP in force for Student when he started school that fall.

78. A school district is required to have an IEP in effect at the beginning of each school year for all children who have been found eligible for special education placement and services. (34 C.F.R. § 300.323(a).)

79. Contrary to Student's assertion, Spencer Valley did have an IEP in place for Student at the beginning of the 2013-2014 school year. That IEP consisted of the portions of the May 28, 2013 IEP offer from Spencer Valley to which Parents had consented, as confirmed by Ms. Langerman's August 24, 2013 letter to Spencer Valley, and the stay put provisions of Student's April 2011 IEP, August 2012 IEP, and January 2013 amendments to the August 2012 IEP. Spencer Valley reduced the May 28, 2013 IEP discussions to writing and presented a full and complete document to Parents for their signature. Parents chose not to sign it but instead, again, chose to give partial consent (as is their right) by means of a letter from their representative. Spencer Valley implemented Student's IEP pursuant to the patchwork of consent letters it received from Student's representatives. As stated in Legal Conclusions 63 through 75 above, parents may validly give their consent to IEP's through letters from their representatives, and school districts must accept those letters as consent to implement the IEP provisions at issue. Here, Spencer Valley had an IEP in place for Student on the first day he started school for the 2013-2014 school year. No procedural violation occurred.

Alleged Implementation of Goals without Parental Consent (Spencer Valley's Issue 2(e))

80. Spencer Valley asserts that it did not implement any goals proposed in Student's October 25, 2013 IEP without consent of Student's parents. Student contends that his parents never consented to the goals from the IEP. He contends that the fact that Spencer Valley provided progress reports on these goals supports a conclusion that they were implemented without his parents' consent.

81. A school district may not implement any portion of a child's IEP without the consent of the child's parents, or through an administrative or judicial order. (20 U.S.C. § 1414(a)(1)(D)(II).)

82. Student's parents, through their educational consultant, consented to a portion of the goals proposed in Student's May 28, 2013 IEP. At the October 25, 2013 IEP team meeting, Student verbally consented to the remainder of the proposed goals. Ms. Langerman confirmed consent to the goals in her December 30, 2013 letter to Spencer Valley.

83. Student's only dispute is with the fact that Spencer Valley rewrote the goals to have a start date of October 25, 2013, and an end date of October 2014, although Parents never consented to a change in the annual date for Student's IEP. However, the dispute over whether Spencer Valley had a right to unilaterally change the date of Student's annual IEP does not somehow change the fact that the goals being implemented by Spencer Valley are the same goals to which Parents consented. Student has created an issue where no issue exists.<sup>16</sup>

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<sup>16</sup> Had Student wished to allege that the unilateral change in the date of his annual IEP was a procedural violation of his rights, he should have done so. However, since neither party raised the issue in this hearing, it will not be addressed.

84. The weight of the evidence demonstrates that Spencer Valley has only implemented goals to which Parents, through their educational consultant, have consented. No procedural violation has occurred.

Refusal to Schedule an IEP Team Meeting at Parents' Request (Spencer Valley's Issue 2(f))

85. Spencer Valley contends that it did not fail to hold an IEP team meeting after Parents requested one. Student contends that in Ms. Langerman's December 30, 2013 letter to Spencer Valley, Parents requested that an IEP team meeting be convened in the latter half of May 2014, and that as of the hearing in this matter (which started on June 24, 2014), Spencer Valley had still not held the meeting.

86. A school district is required to hold an IEP team meeting within 30 days after a parent makes a request for one. (Ed. Code, § 56043(l).) Here, it is not disputed that Parents, through Ms. Langerman, requested that Spencer Valley hold Student's annual IEP team meeting in May 2014. Spencer Valley agreed to hold a meeting at that time to discuss any issues presented by Parents, but continued to assert that May was no longer Student's annual IEP date. Spencer Valley wrote to Parents in April 2014, asking if they were still interested in holding a meeting in May. Parents responded that they did not want to meet during the instant hearing. Because the hearing dates changed a couple of times, the IEP meeting did not take place before the hearing started.

87. The failure to hold an IEP team meeting in May 2014 therefore cannot be attributed to Spencer Valley's refusal to hold a meeting, but rather to Parents' lack of specificity as to a date and their desire to wait until this hearing concluded before meeting. No procedural violation occurred.

Failure to Implement the Behavior Supports Required by Student's IEP (Spencer Valley's Issue 3(a) and Student's Issue 5)

88. Spencer Valley asserts that it did not fail to implement any of Student's

behavior supports since the time Student enrolled on April 22, 2013. Student, on the other hand, contends that Spencer Valley materially failed to implement the behavior supports required in his current IEP. Student contentions are two-fold: first, that Spencer Valley was required to provide Student with an RDI program through an RDI trained aide; and, second, that Spencer Valley failed to materially provide the full complement of behavior support hours required by Student's IEP.

89. When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child falls "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*).) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Id.* at p. 821.)

90. Student's first contention is that Spencer Valley was required to provide him with an RDI program through an RDI trained aide.

91. The *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at pp. 207-208.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeals noted, the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*Ibid.*) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to

become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*RolandM. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley, supra*, 458 U.S. at p. 207-208).)

92. The reauthorized IDEA does not mandate that a district use a particular methodology. For example, courts have consistently rejected the proposition that an Applied Behavior Analysis-only program is the only effective method of instruction for autistic students. (*Dealv. Hamilton County Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. Lexis 27570, pp. 51-57; 46 IDELR 45, 106 LRP 29290, [which provides a comprehensive summary of decisions discussing the matter].) Rather, courts have determined that the most important issue is whether the proposed instructional method meets the student's needs and whether the student may make adequate educational progress. (*Id.* at pp. 65-68.)

93. The Ninth Circuit, in *Mercer Island, supra*, 592 F.3d at p. 952, reiterated its position that a district is not necessarily required to disclose its methodologies. The Court found that it is not necessary for a school district to specify a methodology for each student with an IEP if specificity is not necessary to enable the student to receive an appropriate education. In finding that the district had not committed a procedural violation of the Act by failing to specify the teaching methodologies it intended to use, the court stated, "We accord deference to the District's determination and the ALJ's finding that K.L's teachers needed flexibility in teaching methodologies because there was not a single methodology that would always be effective." (*Ibid.*)

94. Here, RDI as a specific behavior methodology and an RDI trained aide have never been identified in any of Student's IEP's. Prior to enrolling at Spencer Valley, Student tried to insist with his charter school that his IEP's contain the RDI designations. The charter school declined the request. Although the decision in the Student's prior case in front of OAH found that Student had benefitted from RDI, the decision also found that RDI

was only one of a few behavior techniques employed with Student that had been successful. The decision also found that it was not a procedural violation to fail to refer to RDI on Student's IEP. Finally, the decision found that Student had failed to raise the issue of whether RDI as a behavior methodology was substantively *required* to be included on Student's IEP because it was the only behavior methodology that could address Student's behavior.

95. There is no persuasive evidence that RDI was required under Student's IEP's. First, like the situation in the prior case, Student failed to raise the issue of whether RDI was necessary in order for Student to make progress. If Student believes such to be the case, he must specifically raise the issue in front of OAH.

96. Second, the weight of the evidence indicates that Student was well-aware that RDI was not specified on his IEP. At hearing, Student's educational consultant testified that she deliberately did not insist that RDI be identified as a required methodology because she knew Spencer Valley would never agree to include it. Instead, Ms. Langerman developed tactics to address Student's behaviors that were based on RDI strategies, such as the principle of spotlighting. Her goal was to include the strategies as part of Student's IEP without specifying them as based upon RDI. Therefore, in spite of Student's contention that RDI is stay put for him, there is no persuasive evidence that Spencer Valley agreed to that through the IEP process. Spencer Valley therefore has demonstrated by a preponderance of the evidence that it did not materially fail to implement Student's IEP by failing to provide him with an RDI trained aide to implement RDI.

97. Student also contends that Spencer Valley failed to implement the RDI based supports that were contained in Dr. Haytasingh's behavior intervention plan. However, Student has provided only anecdotal evidence in support of this contention. For example, Student contends that his increased behavioral issues after Ms. Pawlicki left in December 2013, are an indication that his behavior plan was not being implemented.

There is no persuasive evidence to support this contention. It is equally plausible that Student's off task behaviors and difficulty following classroom lessons were the reasons for his increased maladaptive behavior. Neither party provided persuasive evidence of just what was the cause for the increase. Additionally, although Ms. Crouch testified that she did not see Student's aide employing RDI tactics on the day she observed Student in class, her testimony is not persuasive on this issue. First, she only observed Student for a short time on one day. Whatever happened or did not happen that one day is not supportive of a finding that Spencer Valley materially failed to implement the behavior plan. Additionally, Ms. Crouch is an inclusion expert, not a behaviorist. While she may have some training in RDI, Student presented no evidence that she is competent to testify as an expert regarding behavior. Finally and most significantly, Ms. Wagner, who is competent to testify as a behavior expert, opined at hearing that Mr. Moles was implementing RDI strategies on the day she observed Student in class.

98. The weight of the evidence therefore supports Spencer Valley's position that it was not required to provide Student with an RDI trained aide and that it did not fail to implement Student's behavior plan. Likewise, the weight of the evidence supports a finding that Student has failed to meet his burden of proof on those same issues.

99. Student also contends that Spencer Valley failed to materially implement the behavior support hours required under his IEP. However, as stated in the Factual Findings, the evidence does not support such a finding. Ms. Brown materially provided all hours of behavior support that were required. There was no failure to implement Student's IEP in this regard.

#### Failure to Implement APE Services

100. Student's IEP's required that he receive APE services during the school year. There is no dispute that the services were not provided as indicated in the IEP's because Spencer Valley was unable to find any provider, either within the SELPA or from a non-



public agency, who could or would provide the service at Spencer Valley during the school year. There is no dispute that Spencer Valley cannot find anyone to date who is willing to provide the service.

101. Spencer Valley informed Parents of the inability to locate a provider around the time Student first enrolled at the school. Parents informed Spencer Valley that APE for Student was not of primer importance to them. They readily agreed to move Student's APE instruction to the summer, when Spencer Valley was able to find a provider. Student's mother acknowledged her acquiescence during her testimony at hearing. Spencer Valley provided compensatory APE to Student during the extended school year 2013 as agreed to by the parties.<sup>17</sup>

102. Here, the weight of the evidence shows that Parents were consulted as to how best to address the issue of providing Student with APE, and that they agreed to have Student receive the services during extended school year. The evidence also demonstrates that Student received APE services during the summer of 2013, as agreed to by the parties. There was no interference with Parents' right to participate in the decisions concerning APE nor were Student's rights to a FAPE impeded. Finally, because Spencer Valley compensated Student for the loss of the services during the school year, there is no persuasive evidence that he suffered any deprivation of educational benefit. Since there was no substantive impact on the rights of the Parents or Student, Spencer Valley has demonstrated by a preponderance of the evidence that it did not commit a procedural violation by failing to provide APE services to Student during the school year.

#### OTHER ALLEGED FAILURES TO IMPLEMENT STUDENT'S IEP (STUDENT'S ISSUE 5)

103. Finally, Student contends that Spencer Valley materially failed to implement

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<sup>17</sup> Spencer Valley offered to provide compensatory APE again during the summer of but Parents declined because of conflicts with this hearing.

his IEP because it did not provide him with the amount of hours of speech-language therapy, inclusion support services, or specialized academic instruction consultation, since October 25, 2013.

104. With regard to speech and language services, Student only put on evidence regarding the time period from the start of the 2013-2014 school year through January 2014. Student contends that he lost over 20 percent of his speech and language therapy hours during that time period. However, Ms. Weaver testified that at most, Student should have received 38 hours of speech and language services during this period. The records show that Student only received just over 30 hours of services. However, Student lost three hours of services due to being absent or tardy, which prevented him from accessing the services. Therefore, the weight of the evidence indicates that Spencer Valley failed to provide Student with approximately five out of the 38 hours Student was supposed to get during the time at issue. This amount does not constitute a material failure to implement Student's IEP. Student has not met his burden of proof on this issue.

105. As to the specialized academic instruction hours, Student failed to put on any persuasive evidence that there was a material failure to implement the number of hours of required by Student's IEP. The evidence supports a finding that Ms. Brown was present at least once a week at Student's school.

106. Student also contends that Spencer Valley did not materially implement the required hours of inclusion support from his IEP. Student, however, failed to put on any evidence to support this contention, and therefore has not met his burden of proof as to this issue.

107. However, Student also contends that Spencer Valley failed to provide *adequate* inclusion consultation and specialized academic instruction support that would support his needs in a general education classroom. In this regard, Student has met his burden of proof.

108. Although Student made progress on his goals, it was because his aide spent a considerable amount of time teaching him skills that were not yet even part of Student's goals. However, a general education placement is supposed to be more than an aide directly teaching a student. The intent of inclusion is to modify lessons so that the disabled student can be part of class lessons, even if he or she is only able to address an isolated concept of the lesson.

109. It was apparent from Ms. Schlotfeldt's testimony that she was not provided adequate support to enable Student to successfully access the general education curriculum. There was a disconnect between what was required by Student's May 28, 2013 IEP and what was happening in the classroom. Instead of having the inclusion specialist and the special education teacher prepare modified lessons for Student's aide and teachers to use with him, according to Ms. Schlotfeldt, the burden fell on her to try to find modified lessons on the internet. She had a difficult time doing so. She felt overwhelmed by the responsibility because she is not a special education teacher and was not trained to modify curricula. It is immaterial whether modifying lessons for an intellectually disabled child is easy or difficult, or whether it is a simple matter to find the lessons on the internet. The fact is that it *was not and should not have been* the responsibility of either of Student's general education teachers to worry about preparing modifications to their lessons, or to be overwhelmed by having a special needs child in their class. Rather, it was the responsibility of Spencer Valley to ensure that the general education teacher received all the support required for Student to be successful in his placement. (See Legal Conclusion 40 above). Student has therefore demonstrated by a preponderance of the evidence that Ms. Schlotfeldt, rather than the special education teacher or inclusion support provider, was improperly given responsibility for modifying Student's curriculum, which amounted to a failure to implement his IEP after October 25, 2013.

110. Finally, Student contends that Spencer Valley failed to implement Student's

IEP *en toto* during the week after spring break 2014. Spencer Valley did not have a substitute aide available for Student that week. Ms. Weaver, who had often filled that role subsequent to Ms. Pawlicki's departure, had other duties that week. She tried, but could not find a substitute through the SELPA to take her place. Ms. Weaver did not think to contract for a substitute aide through a non-public agency although there was no prohibition against her doing so.

111. Spencer Valley did not think that it was safe for Student to come to school without an aide present for him. Therefore, Spencer Valley informed Parents that Student would not be permitted at school that week. The following week, Spencer Valley hired an aide and Student returned to school.

112. Spencer Valley offered no legal justification for denying a child access to public school. It cannot be gainsaid that refusing a child entrance to school for week is not a material failure to implement the child's IEP. In this case, Student lost academic instruction, socialization with his peers, and his related services. Student has demonstrated by a preponderance of the evidence that Spencer Valley materially failed to implement his IEP by preventing Student from going to school at a time he was ready, willing, and able to do so.

## REMEDIES

113. When a person brings an action alleging a violation of the IDEA, the court, or an administrative law judge, is empowered to "grant such relief as [it] determines is appropriate." (See 20 U.S.C. § 1415(i)(2)(C)(iii).) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Puyallup*.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Id.* at p. 1497.) An award to compensate for past violations

must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. Dist. of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

114. ALJ's have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ., supra*, 471 U.S. 359, at pp. 369, 370; *Puyallup, supra*, 31 F.3d at p. 1496.) Teacher training is an appropriate remedy; the IDEA does not require compensatory education services to be awarded directly to a student. (*Park, ex rel. Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1034.)

115. As detailed above in the Factual Findings and Legal Conclusions, Student has met his burden of proof that Spencer Valley committed several procedural and substantive violations of Student's rights under the IDEA, which resulted in a denial of FAPE to Student. Student met his burden of proof that Spencer Valley predetermined its offer of placement to him. Student also met his burden of proof that a general education placement was his least restrictive environment as of the time of the October 25, 2013 IEP team meeting. Additionally, Student has shown by a preponderance of the evidence that Spencer Valley failed to materially implement Student's IEP by failing to permit him to go to school for a week when it did not have a substitute aide available for Student at school, and by failing to provide adequate inclusion and special education supports in Student's classroom so that Student's general education teacher did not have to assume a responsibility for his education that did not pertain to her. Under the facts of this case, the equities weigh heavily in favor of awarding a remedy for these actions.

116. In his written closing arguments, Students seeks the following remedies: (1) Six hours of inclusion training for every Spencer Valley employee from a qualified non-

public agency; (2) That the six hours per month of inclusion support already identified on Student's current IEP be ordered to be provided by a qualified non-public agency, or by another SELPA;<sup>18</sup> (3) Compensatory education for services Spencer Valley allegedly failed to materially implement.

117. Because this decision does not find that Spencer Valley materially failed to provide the related services due to Student under his IEP, there is no basis for Student's request for compensatory education. However, Student has met his burden of proof that Spencer Valley materially failed to implement his IEP by prohibiting Student from attending school for week. Student has also met his burden of proof that Student's inclusion support services failed to provide the support necessary for Student's teachers.

118. Spencer Valley argues that Student is not entitled to any of his requested remedies because Student failed to provide the necessary evidence to show that he suffered a loss of educational opportunity due to Spencer Valley's violations. However, the Ninth Circuit in *Van Duyn* specifically determined that a student is not required to prove a loss of educational benefit where a school district materially fails to implement the student's IEP. (*Van Duyn, supra*, 502 F.3d at p. 822.)

119. The prime consideration in ordering a remedy in this case is to what extent Student is entitled to equitable relief. Spencer Valley prevented Student from attending a week of school. On its face, this was only five days out of an approximate 180 day school year. When viewed as a percentage of Student's overall school year, five days does not appear to amount to a great deal. And, there is no requirement that educational losses be compensated on an hour-to-hour or day-to-day basis. (*Puyallup, supra*, 31 F.3d at p. 1496.)

120. However, Spencer Valley's decision to "shut the schoolhouse door" on

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<sup>18</sup> Student specifically names individuals he believes could be hired to provide the inclusion supports.

Student for a week, while all other students were permitted to attend school, because Spencer Valley would not consider hiring an aide from a non-public agency, inherently speaks to more than just Student's loss of five days of school. Student had a right, like his typical peers, to attend school while it was in session, and not to be treated differently than his peers because of his disability. The lack of an aide was beyond Spencer Valley's or Student's control, but securing a substitute was entirely within Spencer Valley's control. Given these circumstances, a weighing of the equities compels a finding that in this circumstance, Student is entitled to a remedy to make up the five days of instruction, socialization, and services he missed because of Spencer Valley's unfortunate decision in this case. It is appropriate that Spencer Valley be ordered to directly fund Student's attendance for a minimum of five days at a camp or other educational program that serves children with disabilities. The camp or program shall be selected by Student's Parents, but may not be religious in nature, and must be run by a recognized organization such as the YMCA or ARC. It need not be a program specifically for children with disabilities as long as the program is willing to enroll Student. Spencer Valley shall be ordered to fund up to \$1,500.00 toward the cost of this program and/or toward the cost of transportation to the program. Student may attend a program either after school or during one of his school breaks, but must access a program within 24 months from the date of this order, or forfeit his rights to it.

121. Student's request for an order that Spencer Valley be required to contract with a non-public agency for the six hours per month of inclusion support and consultation required by Student's IEP is overly broad. Student has not demonstrated that Spencer Valley will be unable to provide the required support. There is no evidence as to who will be taking Ms. Patterson's and/or Ms. Brown's place, and therefore no evidence that those individuals will be unable or unwilling to provide ongoing modification of Student's curriculum and support to his aide and general education teachers.

122. However, Student's request for a block of hours to supply training on inclusion to staff at Spencer Valley is an appropriate remedy under the circumstances of this case. During their testimony, both Ms. Schlotfeldt and Ms. Weaver expressed how overwhelmed they were by the responsibility of educating Student and the frustration they experienced at not knowing how to meet his needs. The evidence supports a finding that teachers and administrators did not receive adequate instruction on how to include an intellectually disabled child in the classroom. The evidence also supports a finding that adequate modified materials were not provided to the teachers or Student's aide. Because entirely new staff will be providing services and consultation to Student in the upcoming school year, it is appropriate and equitable to ensure that all staff receive adequate inclusion training to support him during the upcoming school year. Spencer Valley will therefore be ordered to contract with a certified non-public agency or other appropriate inclusion support organization or provider for six hours of inclusion support for Student's teachers, aide, special academic instructor, and new inclusion support provider, as requested by Student. Each of these individuals is to receive the full six hours of training; however, all may be trained together at the election of Spencer Valley. The six hours may be broken into segments, but Spencer Valley shall ensure that all six hours are provided over the next school year, with at least four of the hours provided prior to the 2014 winter break.

123. Since this decision finds that Spencer Valley predetermined its October 25, 2013 FAPE offer, and that the offer failed to provide Student a placement in his least restrictive environment, Spencer Valley is not entitled to its requested remedy of an order that it can implement its IEP even absent the consent of Student's parents. As to Spencer Valley's second issue, OAH declines to provide an advisory opinion presented as equitable relief.

124. Spencer Valley has, however, met its burden of proof as to the majority of



the issues it raised as procedural violations, and is therefore entitled to an order that it is the prevailing party as to those issues.

## ORDER

1. Spencer Valley shall fund for Student an appropriate camp program or other program designed to provide recreational or educational services for children. The program shall be selected by Student's Parents, but must not be religious in nature, and must be willing and able to enroll Student. Spencer Valley shall directly fund the program up to \$1,500.00. Student shall access the program within 24 months of the date this decision issues, or forfeit his right to it.

2. Spencer Valley shall contract with a certified non-public agency or provider with whom it can legally contract, to provide six hours of inclusion support training to Student's two general education teachers, his specialized academic instructor, his aide, and his inclusion consultant. Each of these named providers shall receive a full six hours of inclusion instruction/training, but may all be trained at the same time. Spencer Valley shall ensure that at least four of the six hours are provided prior to the 2014 winter break, and that the full six hours are provided prior to the end of the 2014-2015 school year.

3. All other relief requested by Student is denied.

4. Spencer Valley's request to be able to implement its October 25, 2013 IEP offer over the objections of Student's parents is denied.

5. Spencer Valley's request for an advisory opinion concerning the viability of a decision to move Student from his general education at Spencer Valley to a general education placement at another school district is denied.

6. All other relief requested by Spencer Valley is denied.

## PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision

must indicate the extent to which each party has prevailed on each issue heard and decided. In accordance with that section the following finding is made: Student prevailed fully as to issues 1(a), 1(b), and 4. Spencer Valley prevailed fully on issues 2(a) through 2(f), 3(a), and 3(b). Both parties prevailed in part as to issue 5.

## RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code § 56506, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code § 56505, subd. (k).)

Dated: August 22, 2014

/s/

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Darrell Lepkowsky

Administrative Law Judge

Office of Administrative Hearings