BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. OAKLAND UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015120810

AMENDED DECISION[1]

Student's Parents filed a request for due process hearing with the Office of Administrative Hearings on December 18, 2015, naming the Oakland Unified School District.

Administrative Law Judge Charles Marson heard this matter in Oakland, California, on January 26, 27, and 28, and February 2, 3, and 4, 2016.

Parents represented Student. Student was not present.

Lenore Silverman, Attorney at Law, represented Oakland and was assisted on the first day of hearing by Jennifer Abbe, Attorney at Law. Geri Baskind, Oakland's Director of Legal Support Services for its Program for Exceptional Children, represented Oakland on all hearing days except February 2, 2016, on which John Rusk, Coordinator for Oakland's Program for Exceptional Children, represented Oakland.

On February 4, 2016, the matter was continued to March 1, 2016, for the filing of

[1] This Amended Decision makes minor changes in Factual Findings 3, 50, and 94, at the request of Parents, to delete facts that might identify Student and Parents. No other changes are made to the original Decision.

written closing arguments. The parties filed closing arguments on that day, the record was closed, and the matter was submitted for decision.

ISSUES[2]

I. In the 2014-2015 school year, did Oakland commit the following procedural violations which resulted in a denial of a free appropriate public education to Student:

A. failing to assess Student in all areas of suspected disabilities; namely, for auditory processing disorder;[3]

B. rejecting Parents' request for assessment of his social interaction in specific locations;

C. rejecting Parents' conditions on their consent to assessment;

D. withholding information about the tests to be used in the assessment process;

E. cancelling or delaying assessments in May and/or June 2015;

F. withholding test protocols and test scoring records Parents requested;

G. failing to provide speech and language assessment results within the time required by law;

H. providing false information about Student's academic ability to Parents, thus precluding them from being able to give informed consent to Student's program;

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[2] The issues 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 Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

[3] Parents' complaint asserts failure to assess for "audio" processing disorder, which is assumed here to mean "auditory" processing disorder.

I. cancelling the August 28, 2015 IEP team meeting; and

J. Predetermining its individualized educational program offers of September 24, 2014 and June 3, 2015?

II. Did Oakland substantively deny Student a FAPE in the school year 2014-2015 by:

A. failing to implement the March 5, 2015 IEP amendment;

B. failing to provide adequate remediation and support services for his auditory processing and speech and language disorders, his social and adaptive deficits, and his prosopagnosia;

C. failing to provide a one-to-one aide;

D. failing to provide individual pull-out tutorials, individual pull-out speech and language therapy, group social speech therapy; an individualized accelerated and expanded curriculum, and attendance at one science class a day;

E. failing to provide adequate goals, modifications, and accommodations and rejecting Parents' proposed goals and modifications;

F. failing to provide an IEP that appropriately used the "strength-based model" to remediate his weaknesses; and

G. failing generally to provide an IEP appropriately suited to his needs and abilities?

III. In the 2015-2016 school year, did Oakland commit the following procedural violations which resulted in a denial of FAPE to Student:

A. unilaterally placing Student in kindergarten rather than first grade without Parents' informed consent;

B. predetermining its IEP offer of September 15, 2015;

C. unduly limiting and interfering with Parents' expression of their views at the IEP team meetings of October 6 and November 10, 2015; and

D. failing to provide timely prior written notice of its September 2015 reduction of speech and language services and its rejection of Parents' requests made at the September 15, 2015 IEP team meeting?

IV. Did Oakland substantively deny Student a FAPE in the school year 2015-2016 by:

A. failing to implement the speech and language services required by his governing IEP;

B. failing to place Student in the least restrictive environment of a general education first grade classroom rather than in kindergarten;

C. failing to provide adequate remedies and support services for his auditory processing and speech and language disorders, his social and adaptive deficits, and his prosopagnosia; and

D. failing to provide an IEP that appropriately used the "strength-based model" to remediate his weaknesses?

PROCEDURAL ISSUE

1. In his complaint, Student alleges that there were several substantive failings in his IEP during the school year 2014-2015, when he was privately placed at Skyline Preschool; these are numbered issues II.B, II.C, II.D, II.E, and II.G in the Issues statement above.[4] At hearing, Student moved to amend his complaint to add these same allegations for the 2015-2016 school year, when he was in kindergarten in Oakland's Chabot Elementary School. That motion was denied on the grounds that it was untimely and unsupported by the text of the complaint. (See 20 U.S.C. § 1415(c)(2)(E), (f)(3)(B); Ed. Code, § 56502, subds. (e), (i).)

[4] The issue designated II.A is considered here in connection with the school year 2015-2016 because that is when the IEP amendment was allegedly to be implemented.

2. However, at hearing, it became clear that the five substantive issues directed to the school year 2014-2015 only (II.B, II.C, II.D, II.E, and II.G) should have been directed to the school year 2015-2016 only. Parents made no serious effort at hearing to prove that Student's program while he was in Skyline Preschool had these defects, and it was Skyline that was responsible for his program in that year; Oakland was only responsible for related services. Parents' real argument is that Student's IEP's at Oakland's Chabot Elementary School in the school year 2015-2016 had these five defects.

3. These five defects are addressed on the merits here because Student's allegations in his complaint concerning the school year 2015-2016 are sufficiently broad to put Oakland on notice that the allegations in issues II.B, II.C, II.D, II.E, and II.G apply to the school year 2015-2016 as well. Student's allegation in issue IV.C., that in 2015-2016 Oakland failed to provide adequate support services for his auditory processing and speech and language disorders, his social and adaptive deficits, and his prosopagnosia, is broad enough (in a pleading by an unrepresented litigant) to embrace whether Student should have had a one-to-one aide, whether he should have been provided various services, and whether his goals, modifications, accommodations and general program were appropriate. Oakland vigorously litigated these claims in the context of the 2015-2016 school year, as if they were pleaded for that year, and cannot fairly claim surprise or lack of an opportunity to present evidence on them. They will therefore be addressed on the merits in connection with the school year 2015-2016 as part of issue IV.C.3.

SUMMARY OF DECISION

This Decision holds that Parents were fully informed when they voluntarily placed Student in kindergarten for the 2015-2016 year, and that Oakland properly exercised its discretion not to transfer him to first grade during the year. It holds that Oakland did

not procedurally violate any provision of law in conducting its assessments during the spring and summer of 2015 and reporting on them in the fall.

The Decision also holds that Oakland did not deny Student a FAPE by interfering with Parents' participatory rights, predetermining its IEP offers, or in any other procedural manner. In addition, it holds that the substantive program Oakland offered and provided Student in the 2014-2015 and 2015-2016 school years provided him a FAPE, except for a deviation in 2015-2016 from the speech and language services required by his governing IEP's. It remedies that violation but denies all of Student's other requests for relief.

FACTUAL FINDINGS

JURISDICTION

1. Student is a six-year-old boy who lives with Parents within the geographical boundaries of the Oakland Unified School District. He is eligible for, and has been receiving, special education and related services in the category of autism.

2. In June 2015, Parents consented to an IEP amendment that placed Student in kindergarten at Oakland's Chabot Elementary School in the fall. In September,[5] three weeks into the kindergarten year, they requested that Student be transferred to first grade, but Oakland declined to do so. Parents then requested this due process hearing.

STUDENT

3. Student, who was born in April 2009, is intellectually gifted. He has scored 158 on a non-verbal IQ test, in the 99.8th percentile on the Woodcock-Johnson Tests of Achievement (III)(WJ-III), and in the 99.9th percentile on that measure's test of academic ability.

[5] All references to dates that do not include a year are to 2015.

4. Student's expressive and receptive language skills are delayed. His pragmatic language is poor and he has difficulty socializing with other children. His speech can be hard to understand. He also displays numerous characteristics of autism, including rote or stereotypical language, reduced eye contact, reduced social interaction and responsiveness, some repetitive movement, and occasional obsession with objects.

5. When Student was four years old, Parents enrolled him in the private, play-based Skyline Preschool in Oakland for the school year 2013-2014. In September 2013, Parents requested that Oakland provide Student support for his speech and language difficulties while he was in preschool. Rachel Converse, then an Oakland speech and language therapist, assessed Student and reported that he met state eligibility criteria for a speech and language impairment. The parties held an IEP team meeting on September 25, 2013, at which it was agreed that Student was eligible for special education in the category of speech and language impairment, and would receive speech and language services from Oakland while at Skyline. The parties agreed on speech and language goals for Student, and also agreed that he would receive one weekly 45-minute session of group language and speech therapy while at Skyline.

THE 2014-2015 SCHOOL YEAR

6. At the end of the school year 2013-2014, when Student was five years old, Parents considered placing him in kindergarten in public school, but decided instead to re-enroll him in Skyline for the school year 2014-2015. At an IEP team meeting on September 24, 2014, the parties agreed that Oakland's speech and language services would continue, and that Student would receive one individual and one group session a week at Skyline. In November 2014 the IEP was amended to add goals and to provide that the group speech session would occur at Chabot instead of Skyline. Student received those services throughout the school year.

The Assessment Plan and Conditions

7. At an IEP team meeting on February 12, 2015, the parties discussed Student's placement for the school year 2015-2016, which the parties anticipated would be in kindergarten at Chabot. Oakland proposed to conduct a comprehensive set of assessments of Student and gave Parents a written assessment plan, seeking to assess in the areas of academic achievement, health, intellectual development, language/speech communication development, social/emotional status, and adaptive behavior. Parents did not immediately sign the plan; instead they negotiated with Oakland for the next two months concerning the nature of the assessments and the conditions under which they would be conducted.

8. By letter of April 17, Parents purported to authorize a speech and language assessment only. They stated: "We hereby consent to the Language/Speech Development portion of the [assessment plan] as specified herein." Parents mentioned two Oakland speech and language pathologists by name, but then specified that they wanted "Rachel Converse or an independent and similarly qualified speech pathologist to conduct the Language/Speech assessment." This was because an independent assessor "would be in a better position to perform the assessment objectively . . ."

9. Although Father claimed at hearing that the April 17 consent to the speech and language assessment was unconditional, both its text and later events showed that it was not. Parents continued to insist on an "independent" assessor, which in context meant an assessor not employed by Oakland. Parents repeatedly reminded Oakland of that condition. For example, in an email dated April 20, Parents referred to April 17 as "the day we formally requested language/speech assessment with the perimeters [sic] specified therein."

10. On April 28, Father signed an assessment plan authorizing both a speech and language assessment and a health assessment. Twice he wrote on the plan that his

consent was "[s]ubject to the letter Dated April 17, 2015" and "in accordance with the terms specified in my letter . . . dated April 17, 2015." Parents still did not consent to the other assessments proposed by Oakland in February.

11. On the next day, April 29, Parents delivered to Oakland a nine-page letter entitled "Qualified Consent to SELPA Assessment Plan," which conditioned Parents' consent to all of the assessments in the February plan (including speech and language) upon Oakland's agreement to a wide variety of demands. These included such matters as the identification of particular assessment measures to be used; particular physical methods of answering math questions; a limitation on science achievement testing to the interactions between Student and a particular teacher, and four sample questions to be used in that context; identification of a wide variety of materials the assessors would be required to consider; and a listing of the various settings on and off campus where social and emotional assessments would have to be conducted.

12. On May 1, Oakland sent Parents a prior written notice rejecting all of the conditions Parents had imposed on their consent to assessments. It asserted Oakland's right to choose its assessors, its test instruments, and the settings for its assessments, and suggested that Parents might be able to select their own test instruments by obtaining an independent assessment.

13. On May 7, Oakland program specialist Cary Kaufman sent to Parents for their signature a "clean" assessment plan, meaning a plan without conditions. The plan contained the same kinds of identifications and descriptions of the proposed assessments as had the February plan. In a telephone call, Mr. Kaufman informed Father that the 60-day timeline for completing the assessments would begin when Parents signed the plan without conditions. In an email that same day protesting the new timeline, Mother denied that there had been any restriction on the speech and language assessment "so long as it is independent." But on May 8, Father signed the May 7

assessment plan without conditions. That plan authorized assessment in intellectual development in addition to all the areas proposed by Oakland in February. Oakland's assessments were then conducted under the authority of that May 7 plan and May 8 consent, and the 60-day period for completing them began on May 8. June 10 was the last day of the school year. After summer break, classes began on August 24 for the next school year. Allowing for summer break, 60 days from May 8 was September 18.

The Suspension of the Assessment Plan

14. On May 22, Mother notified Oakland by email that it was likely Student "has some gradation of cortical visual impairment ("CVI")." Mother listed seven areas of alleged vision impairment, including difficulties with visual symbolic information, spatial interpretation, depth perception, and differentiating between background and foreground information; visual fatigue; impaired ability to see details in complex visual scenes; and partial field loss. She stated that Student "is exhibiting impairment of visual input and primary processing, impairment of higher visual processing, both dorsal stream disorder and ventral stream disorder." She requested that Oakland assess Student for cortical visual impairment, using a qualified teacher of the blind and visually impaired.

15. The assertion that Student suffered from cortical visual impairment – or any visual impairment at all – came as a surprise to Oakland. Several of the tests in Ms. Converse's 2013 speech and language assessment had depended upon Student's visual acuity, and he had taken them without any apparent difficulty. She reported, for example, that Student showed "strength in picture tasks." Student's previous IEP's had uniformly stated that parents expressed no concerns about vision or hearing, and that Student had passed visual and hearing screenings. Student's speech and language therapist had repeatedly reported that Student was a good visual learner; she had added visual aids to his instruction after noticing how reliant he was on them. As

recently as April 29, Parents had written: "We have taken [Student] to an ophthalmologist, who stated that [Student] has . . . no problems with his eyesight." On May 27, Oakland wrote to Parents suspending all its assessments because it feared that Student's vision impairment, if any, would render assessment results inaccurate.

16. Pamela Mills, a well-qualified psychologist who testified for Oakland, explained why the suspension of assessments was necessary.[6] From 1991 to 1997 Dr. Mills was the lead school psychologist for the San Francisco Unified School District, and from 1997 to 2009, she was the Supervisor and Program Administrator for Screening and Assessment for that district. In that capacity she reviewed assessments done by district staff, and analyzed independent assessments as well. Dr. Mill's testimony was measured and careful; her knowledge of Student and his records was extensive; and her testimony was not damaged on cross-examination. She was a credible witness, and her testimony is given substantial weight here.

17. Dr. Mills established that, if she had been supervising assessments of Student and had received an email from parents like the one Parents sent on May 22,

[6] Dr. Mills has a master's degree in education, doctorates in clinical psychology and counseling psychology, and certification in neuropsychological assessment. She has lifetime California credentials for teaching and counseling, and school psychologist and administrative services credentials. She belongs to the American Psychological Association, the National Academy of Neuropsychology, and other professional organizations and is licensed by the State both as a clinical psychologist and an educational psychologist. Dr. Mills taught for about 15 years, and then worked as a school psychologist at San Francisco Unified School District. She has administered and consulted on many special education assessments. She is now a psychologist and educational consultant in private practice working with school districts and parents.

claiming cortical visual impairment but not supplying any supporting medical information, she would have suspended the assessment process until she could rule out vision deficits. Such an assertion, if true, would require changes to the entire testing procedure, since Student's visual abilities were critical to the accuracy of the assessment measures, most of which depend on the student's ability, among other skills, to see and understand text and pictures.

18. Oakland's May 27 notice suspending the assessments requested that Parents provide "copies of medical findings regarding neurological functioning and field vision." In the absence of that information, Oakland offered to conduct a pediatric neurological evaluation to assess for developmental cortical visual impairment, and an opthalmological evaluation to assess for visual field deficits. Parents responded that day by stating that Student's pediatric neurologist was not available that month and that a medical diagnosis would therefore have to wait until June, and demanding that the assessments proceed immediately anyway. Parents suggested that any assessment of Student's vision be conducted by a pediatric neuro-opthalmologist, not a general opthalmologist as Oakland had suggested, to be followed by a functional assessment by a teacher of the blind and visually impaired.

19. On May 31, Oakland reiterated its request for medical information, and requested that Parents furnish a release of confidentiality so that Oakland could communicate with Student's physicians about the nature and extent of his named disorders. Parents responded on June 1 by invoking their legal right not to disclose any independent medical information to the district.

20. At an IEP team meeting on June 3, Parents stated that they had no medical diagnosis showing that Student suffered from cortical visual impairment. They declined to waive confidentiality or permit Oakland to talk to Student's physicians, and on June 16 declined the offered opthalmological assessment as well. Mother represented that

Parents were getting insurance company approval for diagnosing cortical visual impairment and did not need district assistance with that assessment. Parents never supplied any such assessment report or diagnosis, and no longer claim that Student suffers from cortical visual impairment.

21. Shortly after the June 3 meeting, the parties came to agreement about the assessments, and they were conducted in June and September. Oakland did not cancel any assessment to which Parents had consented. It delayed assessments because of Parents' claim of cortical vision impairment, but it resumed the assessments in June, and completed and reported on them within the time limits required by law. The assessors were instructed to cease the assessments if they found any signs of vision impairment, but they found none.

Failure to Assess for Auditory Processing Disorder

22. Auditory processing is the neural processing of an auditory stimulus or acoustical signal within the central nervous system. Auditory processing disorder (ADP) is a medical disorder in neural processing that is diagnosed by an audiologist in a soundproof booth using a specialized series of electrical instruments. The auditory processing of language, on the other hand, involves attributing meaning to that auditory signal, and is a behavioral concern commonly studied as part of a psychoeducational or speech and language assessment. In fall 2015, Parents asserted that Student had ADP; that his ADP had to be accommodated in his IEP's; and that Oakland should have suspected he had ADP and assessed for it in the previous school year 2014-2015. However, the preponderance of evidence showed that Oakland had no reason to suspect that Student suffered from APD until fall 2015, when Parents produced an assessment from Dr. Deborah Swaine diagnosing Student as having that disorder. Dr. Swaine's diagnosis is not given any weight here for the reasons set forth below.

23. In her September 2013 speech and language assessment, Ms. Converse reported that Student passed his newborn hearing screening; that in April and May 2013 Student's pediatrician and Oakland's diagnostic center attempted unsuccessfully to test his hearing; and that she was told by parents that his hearing was "within normal limits." Ms. Converse conducted several tests that depended upon Student's auditory processing, and reported several conversations in which the two engaged, but did not report that he had any difficulty hearing. Student scored in the 18th percentile in auditory comprehension on a standardized test, and Ms. Converse found his receptive language to be "broadly within normal limits."

24. Student's IEP from the September 2013 team meeting states that a nurse was unable to administer a standard hearing screening device, but that "[o]bserved gross functional hearing appears to be within normal limits." The nurse also reported: "Functional hearing is described by parent as within normal limits (hears quiet sounds). Parent does not have any concerns about child's ability to hear." Parents did not challenge these statements.

25. For two years, starting in fall 2013, Oakland speech and language pathologist Erin Leong provided speech therapy to Student pursuant to his IEP, both individually and in small groups. In her experience, Student was able to hear her and respond to verbal stimuli.

26. On January 27, in advance of an IEP team meeting on February 12, Mother wrote to the team a lengthy letter "to elaborate on [Student's] disabilities . . ." She extensively described his asserted difficulties with receptive language and understanding basic narrative, but made no mention of any suspicion of ADP. The notes of the February 12 meeting contain no reference to ADP. In their nine-page letter of April 29 imposing conditions on their consent to assessments, Parents discussed all of Student's alleged impairments at length but did not mention ADP or any hearing

problem.

27. On May 20 and 22, Parents wrote Oakland requesting numerous accommodations for Student during the assessments, including administration of subtests in a particular order, the presence of a parent during particular tests, a larger than normal worksheet, and various procedures to be followed during particular tests. They did not request any accommodation for ADP or any hearing problem.

28. At the June 3 IEP team meeting, as part of a discussion of the absence of medical information concerning Student's asserted deficits, Parents stated that they had suspicions about the existence of several deficits. They did not mention ADP or hearing. After the meeting, Parents heavily edited the meeting notes and added four textual "riders," but did not refer to ADP or hearing.

29. As the assessments proceeded in June, Oakland's assessors were alert to the possibility that Student might have some kind of hearing impairment. Oakland's resource specialist Barbara Kass assessed Student's academic performance, and reported that he passed the hearing screening for his triennial review. She administered the WJ-III and the Wide Range Achievement Test – Revision 4 (WRAT). Student performed in the superior range on the WJ-III's reading fluency subtest, which measures scanning ability, overall processing speed, and basic reading comprehension.

30. The math problems on the WJ-III and the WRAT are presented orally, requiring the subject to hear and understand them. Student scored in the 99th percentile in math computation on the WRAT, and higher than the 99th percentile on math calculation on the WJ-III. The WJ-III in part measures auditory modalities, and Ms. Kass's assessment report makes no mention of auditory processing difficulties. Ms. Kass established at hearing that Student scored in the superior or very superior range on a variety of subtests that required understanding oral information, and she did not notice any patterns or behaviors consistent with APD. Students with ADP usually have

problems with academics and spelling, and Student did not.

31. An occupational therapy assessment also conducted in June disclosed no hearing difficulty Student might have.

32. On June 16, as part of her evaluation, school psychologist Jennifer Porter interviewed Mother, who described at length all the difficulties she perceived Student as having. She made no mention of APD or any other hearing difficulty. Neither did Bernadette Quattrone, Student's preschool teacher, whom Ms. Porter interviewed. Ms. Porter noted in her report that Student "passed both of his hearing and vision screenings at school . . ."

33. On June 24, as part of her evaluation, Oakland speech and language therapist Adrienne Wroebel interviewed Mother, who again described her perceptions of Student's deficits at length but said nothing about APD or hearing. Ms. Wroebel did not report any shortcoming in Student's hearing. In listening to an orally presented sentence and pointing to a picture correlated with it, Student demonstrated "age appropriate skills." On the Preschool Language Scales -5, the same standardized test Ms. Converse administered in 2013, Ms. Wroebel found that Student's auditory comprehension had improved from the 18th percentile to the 30th percentile. In her opinion this score negated any hearing difficulty. On the CELF-5, all of the subtests measure aspects of auditory processing, and his scores did not indicate a disability. Ms. Wroebel also took a speech sample, which would have revealed auditory processing difficulties, and did not find any.

34. Events in the 2015-2016 school year confirmed that, in school year 2014-2015, Oakland had no reason to suspect Student suffered from APD. Daniel Nagatani, Student's kindergarten teacher, noticed no hearing problem in class or on the playground and believes that Student hears and understands everything he says.

35. On August 4, Dr. Deborah Swaine, a speech and language pathologist at

the Swain Center in Santa Rosa, administered a "language-based auditory processing assessment" to Student and reported her findings to Parents on September 8.[7] Dr. Swaine administered several standardized tests to Student and diagnosed him as having ADP. Parents gave this information to Oakland shortly before an IEP team meeting on November 10, and Dr. Swaine appeared by telephone at the meeting to present her report.

36. At hearing, Oakland proved that Dr. Swaine's diagnosis of ADP and her conclusions and recommendations were invalid and unreliable. Pamela Macy is a well-qualified speech and language pathologist with more than 30 years of experience.[8] She

[7] In her assessment report, Dr. Swaine described herself as "Ed.D., CCC Speech-Language Pathologist" and "Clinical Director" of the Swaine Center. Dr. Swaine told the November 10 IEP team that she had been on a task force of a California speech and language association that set criteria for the consideration of ADP by speech and language pathologists. She did not testify, and her credentials are not otherwise in the record.

[8] Ms. Macy has a bachelor's degree in speech pathology and audiology, and master's degrees in speech pathology and education. She has a clinical certificate of competence from the American Speech-Language-Hearing Association (ASHA) and is licensed by the State as a speech pathologist. She also has a rehabilitation credential in hearing and speech and an administrative services credential. She has been assessing children since 1970. She was the head speech pathologist and program coordinator for the San Francisco Unified School District from 2001 to 2005, and from 2006 to 2009 she was the supervisor and program administrator for all related services in that district, including speech and hearing services. Ms. Macy has personally assessed many students, including students with auditory processing difficulties, and has reviewed many other

is also an expert on ADP. While in her position as supervisor for related services for the San Francisco Unified School District, Ms. Macy wrote guidelines for the accurate identification of ADP because of growing awareness of the condition. In the course of doing so, she engaged in extensive research about ADP.[9] She also observed Student at school and was familiar with his records. Her testimony was balanced and well informed; she did not overstate her opinions or expertise; and cross-examination revealed no flaw in her analysis. She was a credible witness and her opinions are given substantial weight here.

37. Ms. Macy established that Dr. Swaine's diagnosis was professionally flawed in numerous respects. There is a difference between the audiological difficulties examined by a speech and language pathologist, and the clinical condition of ADP. A speech and language pathologist like Dr. Swaine is not competent by licensure, training

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assessments. She is now a speech pathologist and educational consultant in private practice who serves both students and school districts.

[9] Ms. Macy consulted the records of the American Speech-Language-Hearing Association (ASHA) conference on ADP in 1996 and its technical report on ADP published in 2005. She studied the recommendations from two task forces assembled in 2002 and 2006 by the California Speech-Language-Hearing Association (CSHA), and guidelines for identifying ADP published by state departments of education and school districts in Texas, Minnesota and Florida. In addition, Ms. Macy studied academic journals and consulted with internationally recognized experts in audiology. She consulted extensively with Dr. Robert Keith, an audiologist and past founder and president of the American Audiology Association, who is the author of the first and third editions of the Test for Auditory Processing Disorders in Children (SCAN and SCAN-3), the primary assessment tool used by Dr. Swaine.

or background to diagnose ADP; that must be done by a licensed audiologist in a soundproof room with sophisticated electronic equipment that examines the physiological path of sound. Dr. Swaine is not an audiologist, did not examine Student in a soundproof room, and did not use the equipment an audiologist would use. Instead, she reported she did not "formally" assess his hearing because he could not tolerate wearing a headset, a shortcoming that by itself invalidated her diagnosis.

38. In addition, Ms. Macy credibly opined that by professional standards ADP is not to be diagnosed before a child is seven years of age, as the audiological system is not fully developed until age 12 or 13. Student was less than six and one half years old when Dr. Swaine assessed him.

39. Ms. Macy identified several other flaws in the professionalism of Dr. Swaine's report. Dr. Swaine did not rule out the possibility of hearing loss, which must be done before making a finding of ADP. Dr. Swaine obtained information about Student only from a "client history form" and from Mother. Dr. Swaine mentioned the existence of Ms. Converse's speech and language assessment of September 2013, but made no effort to reconcile her own findings with conflicting findings by Ms. Converse, or with certain internally conflicting findings in her own report. She used an obsolete version of the SCAN-C-3, which was revised in 2009. The earlier version she used, the SCAN-C, was published in 1999. It is unethical to use an older test version for more than a year after a new one replaces it. She obtained a rating scale from Parent on a screener called the Listening Inventory, but did not obtain one from Student's teacher, which the test also requires.

40. Ms. Macy also established that Dr. Swaine did not observe Student at school or talk to Ms. Converse, to any of Student's teachers, or to anyone else other than Mother. She made extensive educational recommendations without any information on Student's grades or his progress in an educational setting. She confused

scaled scores with standard scores, and did not report scores on subtests on the Lindamood Auditory Conceptualization Test, making those results impossible to analyze fully.

41. Dr. Swaine also misreported her diagnostic findings in the following passage, which uses classification codes that reference the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM):

> Diagnosis: Auditory Processing Disorder (315.32)
>
> MIXED EXPRESSIVE RECEPTIVE LANGUAGE DISORDER (315.32)

Ms. Macy established that there was no such DSM designation as "Auditory Processing Disorder (315.32)" in either the fourth or fifth editions of the DSM. "Mixed Expressive Receptive Language Disorder (315.32)" was included in the fourth edition of the DSM, which was published in 1994. It does not exist in the fifth edition, which was published in May 2013, and had been in effect more than a year when Dr. Swaine wrote her report, making it ethically improper for her to use or cite the fourth edition.

42. Ms. Macy concluded that, because of the shortcomings addressed above, Dr. Swaine's diagnosis of ADP, and all the conclusions and recommendations drawn from it, are invalid and unreliable. Parents made no attempt to refute her opinion. Instead, shortly after Ms. Macy testified, Parents withdrew Dr. Swaine from their witness list, and neither she nor anyone else defended her assessment. Parents no longer rely on Dr. Swaine's diagnosis.

43. The evidence showed that Dr. Swaine's diagnosis of ADP was invalid and unreliable, and Oakland rightly chose not to rely on it. The evidence also showed that at no time during the 2014-2015 school year did Oakland have any valid reason to suspect that Student suffered from ADP. Finally, it showed that Oakland's two speech and language assessments and its psychoeducational and academic assessments were sufficient to determine for educational purposes the nature of any auditory processing

deficits Student may have.

Failure to Assess for Social Interaction In Specific Locations

44. In their April 29 letter, Parents requested that, in addition to assessing Student in class, Oakland also assess Student's social interaction at his play-based preschool playground, the Chabot playground, and in his interactions with Chabot's science teacher after school. Oakland assessed Student's social interaction on his preschool playground and in class at Chabot, but not in his preschool class or in his interactions with the science teacher. There was no evidence that Oakland's failure to assess in these latter locations had any effect on the accuracy or usefulness of Oakland's assessment of his social interaction.

Withholding Information About Tests and Assessments

45. Each of the assessment plans Oakland proposed to Parents, including the one they signed on May 8 under which the assessments were eventually conducted, identified each proposed assessment by title and area, and added a brief explanation for each, such as: "Language/Speech Communication Development: These tests measure your child's ability to understand and use language and speak clearly and appropriately." From February 2015 until the time Oakland's assessments were conducted, Parents made repeated requests for detailed information about the tests the assessors would use, the procedures they would use, and the conditions under which the assessments would be conducted. These included requests for meetings and telephone calls with the assessors in advance of the assessments. Oakland and its assessors provided Parents with some information in response to those requests, but generally declined the requests on the ground that provision of the information was not required by law.

Withholding Speech and Language Test Protocols and Raw Data

46. Ms. Kass evaluated Student on June 10 and 11 in the area of academics, finished her report on September 1, and provided it to Parents a few days before the September 15 IEP team meeting, at which it was presented. Ms. Wroebel evaluated Student on June 9, 12, 17, and 19, finished writing her speech and language report on August 18, and also delivered it to Parents a few days before the September 15 IEP meeting.

47. On July 2, before the reports had been written, Parents requested all of Student's academic records, specifically including the "protocols" – test questions and answers – used by Oakland's assessors, under the authority of section 300.562 of title 34 of the Code of Federal Regulations and section 56504 of the Education Code. Oakland declined to provide the protocols before the assessments were completed, and did so only in September when the reports had been distributed.

48. Ms. Kass explained at hearing that she thought it was improper to provide to Parents the raw materials of her assessment before her report was completed. Ms. Mills established that distribution of test protocols raised copyright concerns, and that early release could compromise the integrity of the still-unwritten reports. Parents introduced no contrary evidence.

Providing Allegedly False Information About Student's Abilities

49. Father testified that on September 24, 2014, when Student was beginning his second preschool year, Oakland administrator Carrie Anderson told Parents that Student's advanced ability to do math was just a "splinter skill," and that "when he actually gets tested academically it will show that in tests of comprehension, math reasoning, and possibly other categories, he will be far below the kindergarten level." He also testified that Ms. Anderson said Student "would not have the aptitude for first grade." Both Parents testified that they placed Student in kindergarten in reliance on this

"false information."

50. Ms. Anderson remembered her statements differently, as relating more to autistic children in general than to Student in particular. But it is not necessary to decide whose memory of the conversation is better, because even if Parents recall Ms. Anderson's remarks correctly, their claim that they relied on those remarks is not plausible. In their correspondence and at hearing, Parents showed they are highly educated, sophisticated, intelligent people with a thorough understanding of special education law and practice. Both are lawyers; Father has a law degree and a degree in legal philosophy, and Mother is a law school graduate. Parents are also routinely skeptical of statements Oakland staff make to them. Both were aware that Ms. Anderson was not an assessor. It is more likely than not that Parents recognized Ms. Anderson's statement for what it was: an opinion and a prediction, but not a statement of fact.

51. Correspondence in fall 2014 shows that Parents were not then considering placing Student in first grade in any event; they were considering kindergarten or transitional kindergarten, a placement that prepares children for kindergarten. Their principal concerns were that Student might not have been sufficiently toilet-trained for kindergarten, and that he had a history of running away from preschool. On October 25, 2014, they wrote that they had "some doubts about [Student's] readiness for kindergarten, and we are still leaning toward a Transitional K[indergarten] program . . ."

52. In addition, Parents have been aware of Student's high intellect ever since he was a small child. They told others that he started spelling at age two and could do simple addition and subtraction at age three. Parents were also aware that Student's remarkable abilities would emerge on tests. They told others he had taken a MENSA test and scored higher than the average adult. In summer 2013 they took Student to be assessed by Dr. Dan Peters, a child psychologist. The record does not show what assessment measures Dr. Peters used, but he reported that Student was "profoundly

gifted with asynchronous development." Parents repeated that diagnosis at meetings and in correspondence throughout fall 2014 and spring 2015. In March they argued for an "accelerated" curriculum set to Student's high achievement levels. On May 20 they estimated Student's math computation aptitude as at least third grade level (which proved to be low). In light of that knowledge and those actions, it is extraordinarily unlikely that two remarks from an administrator, who barely knew Student when the statements were made, would cause these sophisticated people suddenly to conclude their child would test far below the level of the average kindergartner in comprehension and math reasoning.

53. Parents did not prove either that Ms. Anderson made false statements of fact or that they relied on the statements she made when making any decisions related to Student's educational program and placement.

Predetermination of IEP Offers of September 24, 2014 and June 3, 2015

54. The IEP of September 2014, as amended, primarily addressed services to be provided Student in his 2014-2015 year in preschool. It also addressed some aspects of his first month in kindergarten in fall 2015, before his annual IEP team meeting in September. For the latter purpose it assumed Student would be in kindergarten, but that placement decision was not fixed; the document describes the school setting as "Reg early childhood prgm or K." It did not address aide support in kindergarten.

55. The IEP of June 3, 2015, placed Student in kindergarten with a two-to-one aide, as did the subsequent offer on September 15. No evidence was introduced at hearing to show that any of these offers was predetermined aside from the similarity of the offers.

The Alleged IEP Team Meeting on August 28th

56. On May 18, and again at the IEP team meeting on June 3, Parents

requested that Oakland conduct an IEP team meeting on August 28 to discuss the upcoming speech and language assessment. (August 28 was 60 days, allowing for summer break, from Parents' conditional consent to a speech and language assessment on April 17.) At the June meeting, Mother complained that Oakland had not set a time for a meeting on August 28 to discuss the speech and language assessment. Oakland responded that it had already set that meeting for September 15, and informed Parents repeatedly that it would not conduct an IEP team meeting on August 28 because the assessments would not be ready. Parents later wrote that they were "shocked and dismayed" that the meeting arranged for August 28th was cancelled. The evidence established that one was never scheduled. The only evidence that a meeting was scheduled was Mother's testimony that an Oakland speech and language pathologist had promised to help arrange one.

57. Parents are thoroughly familiar with special education law and know how IEP team meetings are scheduled. By the summer of 2015, Parents also knew, from experience, that IEP team meetings are scheduled by formal written notice from the district stating the date and time, listing the participants, and requesting written confirmation from Parents of their intention to attend. No such notice was ever given for a meeting on August 28th. Parents' claim in several writings and in their testimony at hearing that such a meeting was scheduled and then cancelled was disingenuous, and undermined their credibility as witnesses.

THE 2015-2016 SCHOOL YEAR

Student's Needs and Program

58. Oakland's proposal for Student's program reflected the view that his deficits were not just a function of speech and language impairment (previously his

eligibility category), but of autism as well. School psychologist Jennifer Porter[10] administered to Student a number of assessment measures that indicated he was eligible for special education in the classification of autism. With assistance from Karen Laursen, another Oakland school psychologist, Ms. Porter administered the Autism Diagnostic Observation Schedule – Second Edition (ADOS-2), on which at least nine specific characteristics must appear before a subject is considered autistic. Student displayed 14 of these characteristics, causing Ms. Porter to conclude that he was eligible for special education in the category of autism spectrum disorder. This conclusion was confirmed by her observations of Student's significant social difficulties in interaction with peers in preschool, and by ratings scales provided by Mother as well as Student's preschool teacher.

59. School psychologist Karen Laursen has extensive experience with students having autism, and assisted Ms. Porter in administering the ADOS-2 to Student.[11] She

[10] Ms. Porter has a master's degree in counseling and marriage and family therapy, bachelor's and master's degrees in educational psychology, and a California school psychology credential. She has been a school psychologist for Oakland since 2004, and from 1999 to 2004 held the same position in the San Francisco Unified School District.

[11] Ms. Laursen has a bachelor's degree in science and psychology and a master's degree in education with an emphasis on school psychology from the University of Washington, where she worked for four years with Dr. Geraldine Dawson, an expert on autism spectrum disorder, on several studies of autistic children. (Professor Dawson was the chief science officer for Autism Speaks, and is now a professor at Duke University.) In this role Ms. Laursen worked with at least 200 children with autism, as well as with typically developing children, and received specialized training in administering the

and Ms. Porter reviewed all Student's other test results, his rating scales, Parents' comments, and Ms. Porter's observations, and decided that all these indicia confirmed the results of the ADOS-2. Like Ms. Porter's testimony, Ms. Laursen's testimony was careful, consistent and well informed, displayed a thorough knowledge of Student, and stood up under cross-examination. Both were credible witnesses whose conclusions are given substantial weight here.

60. Ms. Laursen established that, during the ADOS-2 testing procedure, Student displayed many characteristics and behaviors indicative of autism spectrum disorder. He engaged in some repetitive behavior; was object-oriented; displayed little eye contact or social referencing; tended to use stereotyped language; repeated words and phrases; used carrier phrases; and referred to himself in the third person. Considering his expressive language level, he was unable to answer open-ended questions or follow up; instead he would walk off and engage in unrelated activity. He was not interested in social interaction and could not sustain it.

61. Ms. Laursen established further that children with autism can appear to have auditory processing delays, though these are frequently not isolated conditions but part of autism spectrum disorder. Many studies confirm that children with autism can also have trouble recognizing faces. Ms. Porter and Ms. Laursen were persuasive in their testimony that Student's primary needs are functions of autism. In reliance on their findings, the IEP team decided at the September 15 meeting that Student's appropriate

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ADOS, which she described as the "gold standard" for determining whether a subject is on the autism spectrum. She has a pupil personnel services credential and has been a school psychologist for Oakland for 12 years. She introduced the ADOS to the District, and frequently acts as a consultant to her colleagues on autism. She administers between 2 and 4 ADOS assessments a week.

eligibility category was autism.

62. On September 15, Oakland offered Student an IEP that Parents accepted on December 2, with exceptions and reservations. It is the program evaluated here. It provided for continuing placement in kindergarten, aide support, speech and language therapy, occupational therapy, and a variety of accommodations and modifications discussed below. It also provided for 200 minutes a week of small group specialized academic instruction, and a program for the extended school year with speech and language and occupational therapy support.

63. The September 15 IEP addressed Student's speech and language deficits, social, emotional and behavioral needs, and fine motor difficulties with several goals. For Student's social difficulties, one goal addressed his difficulty introducing and maintaining appropriate topics of conversation and joining or leaving conversations. Another addressed his difficulty in initiating and maintaining play activities with peers and his preference for playing alone during recess and unstructured times. A third sought to increase his ability to ask for help. A fourth addressed his tendency to be excessively physical with his peers and to disregard personal boundaries.

64. For Student's more technical speech problems, one goal sought to ameliorate his difficulty in answering when, who, how, what, and why questions while reducing visual supports. Another addressed his challenges in using grammatical forms such as articles, pronouns, verb tense and sentences without visual supports. All these speech and language goals were to be pursued in class, but also in two 30-minute sessions a week of pull-out (outside of class) group therapy by a speech and language therapist. In addition, once a week Student would be encouraged in his social skills in a small "Lunch Bunch" club lasting 30 minutes

65. Oakland also addressed Student's behavioral challenges with goals. One goal addressed Student's difficulties in keeping his eyes on a speaker and his hands to

himself, and waiting his turn, by encouraging whole-body listening. Another sought to reduce the visual and gestural supports he needed to follow whole class directions. These goals were to be implemented primarily by support from a two-to-one aide for 200 minutes a day (out of a total of 360).

66. In addition, Oakland identified fine motor, and perceptual and visual motor problems Student had with such tasks as writing and cutting. One goal addressed cutting, and another addressed writing, including functional grasp. These goals too would be worked on in class, but also by an occupational therapist in a small group setting once a week for 30 minutes. The evidence established that Student's needs were the needs identified in the September 15 IEP and that the IEP contained goals written in those areas of need.

67. Accommodations and modifications proposed by the September 15 IEP included a health plan to address Student's irritable bowel syndrome, short explicit written and verbal instructions with checks for understanding, visual supports such as a written schedule, written rules (such as sitting, controlling hands, and paying attention), and visual prompts. The evidence established that the accommodations and modifications provided in the IEP were appropriate for Student and allowed Student to access his educational program.

68. Parents allege that there are several defects in Student's 2015-2016 program, which are addressed in the following sections.

Failure to Implement the March 5 IEP Amendment

69. Student began to attend his kindergarten class on August 24, and was given for the most part the same kind of curriculum as his classmates. Parents argue that Oakland had promised Student a more accelerated and differentiated curriculum in an IEP amendment dated March 5.

70. At an IEP team meeting on February 12, while Student was still in

preschool, the parties had tentatively discussed Student's curriculum for the following year. Parents hoped that, in light of Student's intellectual prowess, lessons would be individualized for him and directed to his unusual levels of ability. Nothing concerning the curriculum was agreed to in the IEP documents from the meeting.

71. Throughout their dealings with Oakland, Parents routinely requested that their comments, usually supplied in writing days after an IEP team meeting, be added to an IEP. Oakland usually complied, noting that the inserted language constituted Parents' comments. Shortly after the February 12 meeting, Parents asked that a paragraph they wrote concerning curriculum be included in the IEP. Oakland agreed, and the March 5 amendment to the February 12, 2015 IEP document provided as follows:

> Purpose of Meeting
>
> Parents have requested that the following comments be added to the Amendment IEP dated 2/12/15 for district consideration.
>
> Changes to the IEP dated 9/24/14
>
> "Parents and team agree that [Student] should stay with his peers in his classroom for all subjects, provided that differentiated educational programs and/or services are given by his teachers to reflect and develop his strengths, interests and intellectual abilities while accommodating his learning disabilities and/or weaknesses. This will include accelerated and enriched individualized instruction adaptations and accommodations, appropriate strategy and skill instruction."

No additional changes have been made to the IEP dated 9/24/14

72. When Parents originally proposed the amendment in an email on March 3, they stated it was "to reflect our input during the IEP (and our statement in our Email dated Jan 27)." Subsequent emails showed, however, that Parents came to believe that this amendment was more than a statement of their own views; it was an agreement entered into by the full IEP team on February 12 and bound Oakland to deliver the educational program changes described in the paragraph inserted into the IEP. There was no other evidence that the IEP team made such an agreement.

73. The evidence showed that Oakland never intended that the insertion of the paragraph in the IEP would create a binding obligation; it believed that it had only promised to consider such a proposal. This is reflected in the text of the amendment, which describes the substantive paragraph as "comments" that are added "for district consideration." Oakland consistently maintained that view. The parties' minds never met on the meaning of the March amendment. When Student entered kindergarten, Oakland did not provide the curriculum Parents believed had been promised in the amendment.

Predetermination of IEP Offer of September 15

74. There was no evidence that the September 15 offer was predetermined except that it was similar to the June 3 offer. Oakland made some changes in response to Parents' objections to the September 15 offer. It changed push-in (in class) occupational therapy support to pull-out, and it responded to Parents' competing set of goals by altering Oakland's proposed goals to incorporate some but not all of Parents' proposed goals. Parents did not agree to the amended goals.

Interference with Parents' Expression of their Views at the October 6 and November 10 IEP Team Meetings

75. The September 15 IEP team meeting lasted approximately one hour and forty minutes. Most of it was consumed by Oakland's reports on Student's adjustment to kindergarten and on the several assessment reports Oakland was required to present. Student's classroom teacher reported on his adjustment to kindergarten, which had been good. The classroom inclusion teacher also reported. The school nurse reported that Student passed vision and hearing tests. Each of the assessors – the school psychologist, the speech and language pathologist, the occupational therapist, and the resource teacher who assessed Student's academic skills – presented her report. Ms. Laursen also discussed Student's test results and stated that he should be regarded as eligible for special education because of autism.

76. Throughout Oakland's presentation, district speakers invited questions and comments from Parents, who voiced more than two dozen of them. Then, for the last 17 minutes of the meeting, Parents addressed their concerns, and had not finished when the meeting was stopped by Oakland because district participants had to attend other meetings.

77. Another IEP team meeting was held on October 6 for Parents to continue expressing their views. Father immediately assumed control of the meeting. Dr. Beverly Tompkins, a psychologist consulted by Parents, reported on her observation of Student that morning and recommended placement in first grade. Then Father began to present Parents' views in a lengthy monologue characterized by anecdotes concerning Student's brilliance, extended metaphors (such as being trapped in an elevator), and a description of Student's typical day in kindergarten. Oakland participants mostly listened, but grew impatient with the monologue and began interjecting questions and comments. When this occurred, Father would ask district participants to hold their comments and questions to the end of the meeting.

78. Father's stated reason for asking not to be interrupted during his monologue at the October 6 meeting was that, on September 15, Oakland had asked Parents to save their comments to the end of the meeting, and Parents did so. Father repeatedly requested the "same courtesy" from Oakland. Father's recounting of the September 15 meeting was not accurate; the recording of the meeting shows that, during Oakland's presentation, Parents had voiced more than two dozen questions and comments, some invited by district speakers, some spontaneous. Since the district participants on October 6 remembered that, they grew restless and resentful of Father's repeated attempts to silence them.

79. The last 40 minutes of the recording of the October 6 meeting include background noises such as shuffling and muttering, and occasional annoyed comments and interjections by Oakland speakers, including a protest that Father had been talking non-stop for a very long time and was losing his audience. Dr. Tompkins testified that the body language of Oakland members included throwing up their hands, rolling their eyes, going through their purses, and looking away from Father. Her testimony is consistent with the background sounds on the recording. However, it is also clear from the recording that these instances of impatience and perceived rudeness were motivated not by any hostility to Parents' expressions of their views, but by Father's extended, elaborate monologue and the perceived unfairness of his repeated attempts to forbid or postpone questions and comments. Parents' concerns were what the Oakland team members wanted to question and discuss; they did not want to sit silently through a lengthy speech. Oakland stopped the October 6 meeting after about 46 minutes of Parents' presentation of their views, so that participants could attend a faculty meeting and other activities.

80. Another IEP team meeting was held on November 10 so that Parents could continue to express their views. The parties agreed in advance the meeting would

last an hour, and it lasted a little over that. Again Father orchestrated the presentation, introducing three experts appearing for Parents. Dr. Tompkins reiterated her views from the October 6 meeting, primarily arguing that Student should be with his age-equivalent peers in first grade. Dr. Swaine reported on her findings, including her medical diagnosis of APD. Dr. Dan Peters, a psychologist who works extensively with gifted children, reported on his administration of the Test of Nonverbal Intelligence – Fourth Edition (TONI-4) to Student in September, which showed his intelligence was very high. Dr. Peters offered many suggestions for Student's program, most of which were received favorably by Oakland staff. Oakland representatives asked each speaker numerous and appropriate questions. Toward the end of the meeting Father summarized Parents' positions, and the dialogue became repetitive.

81. In the course of these three IEP team meetings, Parents presented their views vigorously and at length, and the dialogue indicates Oakland participants well understood their positions. In addition, before and after each of the meetings, Parents sent to the IEP team lengthy multipage letters or emails protesting various things said by Oakland staff during the meetings, asking for amendments to meeting notes, and again setting forth their views in detail. These communications were supplemented by numerous emails and telephone calls to various team members, as well as by personal appearances on campus by Parents, who would talk to district staff in the course of dropping Student off or picking him up.

82. On November 16, in a prior written notice, Oakland rejected most of Parents' requests, including a transfer to first grade, a one-to-one aide, and a specialized curriculum for Student. The text of the notice shows that Oakland staff had understood and considered Parents' views.

Failure to Provide Speech and Language Services Required by the Governing IEP

83. Student's September 2014 IEP, as amended in November 2014, provided that every week Student would receive one individual 45-minute session of speech therapy, and one 30-minute group session.

84. These provisions were superseded in the IEP of June 3, which provided for two 30-minute sessions a week of group speech therapy. Father testified that Parents did not agree to the June 3 IEP, but the preponderance of evidence showed that Parents did agree to it. Oakland's copy of the IEP does not show a parent's signature, but Student's copy does. Student introduced in evidence Student's Exhibit 15, starting with the signature page of the June 3 amendment to the September 14, 2014 IEP. The exhibit was authenticated at hearing by Dr. Sharon Falk[12] at Student's request and successfully introduced by Student. On the signature page, Father's signature appears just under the statement "I agree to the contents of the amendment to the IEP dated 9/24/2014."[13] Father also initialed the statement, and dated it June 3, 2015. Mother's signature is beside it, with the same date. So with Parents' consent, starting on August 24, the beginning of kindergarten, Oakland was obliged to provide Student two 30-minute group sessions of speech therapy a week.

85. The September 15 IEP also provided for two 30-minute group sessions of speech therapy a week. Parents agreed to that part of the September 15 IEP on

[12] Dr. Falk is the Director of Oakland's Special Education Local Plan Area. She facilitated Student's September 15 IEP team meeting and was familiar with his records.

[13] The June 3 document was technically an amendment to the September 2014 IEP because the latter had a few provisions that were still in effect because they addressed Student's first few weeks in kindergarten.

December 2, under protest. So throughout Student's kindergarten year Student was entitled to two weekly 30-minute group speech therapy sessions, not the 45-minute individual session and 30-minute group session provided for in the amended September 14 IEP, which had been superseded on June 3.

86. Cherie Estuar-Ziff, the speech therapist who actually delivered Student's speech therapy during the fall, testified that, notwithstanding the provisions of the governing IEP's, she actually delivered one 30-minute group session a week and one 30-minute individual session, because she could not find an appropriate partner for Student for one of the two required weekly group sessions. She did not notify Parents of this fact, and may not have notified her employer. Throughout the fall semester, therefore, Oakland did not actually provide the speech and language therapy required by Student's governing IEP's.

Failure to Provide Timely Prior Written Notice of Reduction of Speech and Language Services

87. Oakland did not give Parents prior written notice of the June 3 change in Student's speech therapy services because Parents were aware of it, having agreed to the IEP amendment making the change.

Failure to Provide Adequate Speech and Language Support

88. Parents argue that group speech therapy sessions are insufficient, and that both weekly sessions should be individual because of the severity of Student's deficits. Student's speech therapists believe that both sessions should be in a group, to foster Student's pragmatic language in dealing with peers. By the time of hearing, Student had made measurable progress toward all his annual speech and language goals, but had not fully reached any of them.

89. The only professional who opined that Student should have exclusively individual speech and language therapy was Dr. Swaine, who – as shown above – based her recommendation on invalid tests and whose findings and recommendations were invalid as a result. Neither Dr. Swaine nor anyone else other than Parents appeared at hearing to argue that Student needs individual speech therapy. As shown herein, Student's speech deficits, while significant, are not as drastic as Parents argue. There was no evidence, aside from Parents' unsupported opinions, that Student cannot make measurable progress on his speech and language goals without two individual sessions of group speech therapy a week.

Failure to Provide Timely Written Notice of Rejection of Requests Made at the September 15 IEP Team Meeting

90. As the September 15 meeting was ending, Oakland's administrator told Parents there was no time to respond to their requests, including requests for a one-to-one aide, an individualized curriculum, individual pull-out tutorials using materials at Student's grade level in each subject, two sessions a week of individual speech therapy, attendance in science classes at or above first grade level, and transfer to first grade. She stated that Oakland would respond to them in writing. During the next two months Parents frequently reiterated these requests in IEP team meetings, letters, emails, and in person, and during the process their requests evolved somewhat. Most of the requests were discussed at the IEP team meetings of October 6 and November 10. On November 9, Parents proposed to Oakland a rewritten set of goals. On November 13, Parents sent another letter summarizing their requests and demanding an answer within five days. On November 16, Oakland sent a prior written notice stating its reasons for declining those requests.

Failure to Provide a One-to-One Aide

91. Parents' highest priority throughout these events was obtaining a one-to-one aide for Student at Chabot. They first requested the aide at a November 2014 IEP team meeting, while Student was still in preschool. Oakland responded that it was not ready to agree to the request, especially since it had no comprehensive assessments of Student at the time.

92. Parents then began a campaign to persuade Oakland to provide a one-to-one aide. This campaign typically involved Parents' researching specific conditions and ailments on the Internet, diagnosing Student by themselves as having some of those conditions, and then writing to Oakland claiming he had those ailments and needed a one-to-one aide to cope with them. These letters extensively described the ailments, using so much medical and technical jargon (also obtained from the Internet) that a reasonable reader would assume that Parents' amateur diagnoses had medical findings to support them. The letters strongly implied – but never quite stated – that Parents' claims were supported by medical findings. In fact, with one exception not in dispute here,[14] Parents had no such support, at least not until they began to obtain some medical letters during Student's fall in kindergarten. That support proved unpersuasive.

DEVELOPMENTAL PROSOPAGNOSIA

93. Developmental prosopagnosia is "face blindness"; those who have it cannot recognize familiar faces. Parents argue that Student needs an aide with him at all times to help him recognize people.

[14] A physician advised Oakland that Student has irritable bowel syndrome, and Oakland agreed to accommodate it. Parents must ensure that Student's bowels are cleared in the morning before school. This makes Student late, which Oakland allows; it does not treat Student as tardy. No aide is involved in this process.

94. On January 27, Mother wrote to Oakland listing a variety of deficits Parents perceived Student had. One extensive passage began: "[Student] has DP (or face blindness). While we have consulted with our doctor and leading experts in the field, there is no known cure for it." She went on to describe many incidents in which Student allegedly mis-identified people, including children in the park or at the zoo, as preschool classmates, and mistook other women as his grandmother or his teachers. According to Mother, he even "mistook another . . . woman at the park for me," even though the woman looked nothing like her. The letter quoted technical academic writing about prosopagnosia and claimed that, without a one-to-one aide, Student would be in danger all the time because "any stranger who remotely resembles any of his relatives or teachers can kidnap/take him away without his protest, since [he] would have mistaken that stranger for a familiar face."

95. Mother's statement that Student had developmental prosopagnosia and that "[w]hile we have consulted with our doctor and leading experts in the field, there is no known cure for it" was not quite false, but it was misleading. Mother testified that she downloaded a test for prosopagnosia from the Internet and administered it herself; the results were positive for prosopagnosia. There was no evidence that the test was valid or its administration proper. She admitted that when she took Student to an opthalmologist, he "wasn't in a position" to diagnose prosopagnosia. She made a reference to being referred to a pediatric optometrist, but stated that the resulting report was too expensive to purchase.

96. Nonetheless, Parents continued to claim that Student needed a one-to-one aide to cope with his prosopagnosia, and to imply that this condition has been medically confirmed. On April 29, Parents wrote that Student's (unnamed) doctor had advised them that prosopagnosia is a medical condition affecting about 2 percent of the population, and that "since [Student] has PD," he may not "light up" like other children

at the sight of his mother.

97. Oakland repeatedly asked for medical support for the prosopagnosia diagnosis. Parents responded at first that they could not be compelled under the law to provide it, but then, at the June 3 IEP team meeting, admitted they had no diagnosis, only "suspicions." The next day Oakland sent Parents an assessment plan offering to conduct a medical assessment to examine Student's neurological and opthalmological needs, in order to determine whether Student suffered from cortical visual impairment or prosopagnosia. Parents declined to consent to the assessment. On June 16, Mother told school psychologist Porter that Parents were "pursuing medical testing" to confirm or rule out prosopagnosia. On August 19 she wrote: "I've obtained letters from [Student's] doctors regarding his medical conditions/disabilities," and promised to email them.

98. On November 4, Parents sent Oakland a letter from Candida Brown, a medical doctor, stating: "In a review of symptoms, it is clear that [Student] meets criteria for developmental prosopagnosia." In support of her diagnosis, Dr. Brown cited only statements made by Parents. Dr. Brown's letter does not describe her field of medicine or her credentials to make that diagnosis. It does not state that she had examined Student, tested him, or even met him. It makes extensive educational recommendations (which are nearly identical to Parents' several requests for accommodations), but it does not show that Dr. Brown knew anything about Student's education except what Parents told her. There is no suggestion in the letter that Dr. Brown observed Student at school, or spoke to anyone at school about him. The text of Dr. Brown's letter shows that she simply made her diagnosis – her "review of symptoms" – on the basis of what Parents told her and nothing else.

99. Oakland did not find Dr. Brown's letter convincing. Several Oakland witnesses established, credibly and without contradiction except by Parents' opinions,

that Student has no difficulty recognizing faces at school. The school nurse reported that Student was "recognizing many of the staff at school after 2 weeks." Daniel Nagatani, Student's kindergarten teacher, has never noticed Student has any difficulty recognizing people. He knows "everybody in our class, all the adults, [and] some of the other teachers." He has never seen Student make a mistake in recognizing someone. Speech and language pathologist Estuar-Ziff does not believe he has face blindness; he can identify each of the staff members in a group of them, and he immediately recognized her after three months of maternity leave. Natalie Weinberger, the inclusion specialist who works with Student in his kindergarten class, helps Student on identification of people in order to improve his pragmatic language. Staff often ask him: "Do you know who this is? Can you greet them?" Ms. Weinberger has not seen that Student has significant difficulty recognizing faces. Recently Ms. Weinberger did an informal assessment of Student based on photographs of staff members, and he was able to identify 19 out of 19.

100. The preponderance of evidence showed that Student does not suffer from developmental prosopagnosia. Instead, Ms. Laursen established that difficulty or disinterest in recognizing people is common in people with autism spectrum disorder and pragmatic language challenges, and that Student's occasional slowness in recognizing people, at school at least, is more likely related to these difficulties than to prosopagnosia. In any event, the evidence did not show that any difficulty Student has in recognizing faces significantly interferes with his education, or that he needs a one-to-one aide to help him recognize people.

HYPERLEXIA TYPE III

101. On February 26, Parents claimed in a letter to a school psychologist that Student suffers from Hyperlexia Type III, which they characterized as a precocious ability to read coupled with paradoxical deficits in communication. Again they implied – but

did not state – that medical analysis supported the claim: "Only a few doctors in the world consider themselves to have extensive clinical experience with [Hyperlexia Type III]. One of them is renowned psychiatrist, Dr. Darold Treffert, whose advice we have sought."

102. Parents produced no evidence at hearing either that Student actually suffers from Hyperlexia Type III, or that any medical professional has examined him for, or diagnosed him as having, that condition.

ANXIETY

103. Parents claim Student suffers from anxiety. To establish this, they employed Dr. Kimberley Tompkins , a pediatric clinical psychologist at the University of California at San Francisco.[15] Dr. Tompkins observed Student, spoke twice to Student's IEP team, wrote a letter supporting a first grade placement, and testified at hearing, but did not diagnose Student as having anxiety or argue that he needed any particular assistance because of anxiety.

104. Parents also consulted Dr. Tompkin's supervisor, Dr. Sanford Newmark, head of the Pediatric Integrative Neurodevelopmental Clinic at the Osher Center for Integrative Medicine at the University of California, San Francisco. In an undated letter, Dr. Newmark stated that Student has been under his care since September and was brought to him because of parental concerns of anxiety. Like Dr. Tompkins, Dr. Newmark did not diagnose Student as having anxiety or claim he needs assistance

[15] Dr. Tompkins has a Ph.D. in critical education from a joint program of the Pacific Graduate School and Stanford University, and during her residency was the chief resident in the Department of Psychiatry at Children's Hospital in Oakland. She is a California-licensed psychologist and has had a private practice since 2009. She also has experience as a credentialed special education teacher in Canada.

because of it. There was no evidence, other than Parents' lay opinions, that Student suffers from anxiety, and no evidence that he needs a one-to-one aide to cope with any anxiety he may have.

FLIGHT AND SAFETY

105. In January Parents wrote to Oakland that, without a one-to-one aide, Student would flee from class and school into traffic and perhaps be kidnapped. Student did occasionally run away from preschool, but there was no evidence that, in kindergarten, Student's wanderings have ever taken him out of the school yard and into any unsafe situation, or that Student's two-to-one aide and other supervising adults could not cope adequately with his wandering and keep him safe.

ENGLISH, GRAMMAR BLINDNESS, AND INABILITY TO SPEAK OR UNDERSTAND

106. Parents argue that Student needs a full-time aide at his side to function as an interpreter, explaining to him what other people are saying to him and then explaining to others how Student responds. Without such an interpreter, they wrote to Oakland, "he cannot access his education."

107. In a letter on April 29, Parents claimed that English was not Student's native language. They stated that English "is not the language normally used by his parents, nor is it the mode of communication normally used by [Student] since birth and throughout his early childhood." They explained that "while the language we normally use at home contains some features of Cantonese, Japanese, Moleitou, and Mandarin, it is not in substance not any of them, but rather a unique 'pidgin' created by the hybridization of multiple non-written dialects and languages, without any regularizable or formalizable syntax or grammar."

108. Parents also claimed that Student is "grammar-blind" – that is, he has "close to no ability to decode the grammar and syntax of natural (non-mathematical)

languages, whether it is English or other languages." At hearing, Father defined grammar blindness as meaning that Student can pick out individual words in a sentence but cannot understand the grammar in which they are delivered and has to speculate about the overall meaning. Mother testified that the term grammar-blindness came "probably from somewhere on the Internet."

109. Parents' April claim that English is not Student's native language contradicted their own previous and subsequent statements and conduct as well as all the reliable evidence produced at hearing. Parents have consistently declined opportunities to identify Student as an English Language Learner. In September 2013, speech and language pathologist Converse reported that Student "lives in an English-speaking home . . . . Cantonese was spoken in the home in the past; however, his parents report that they now use only English." The IEP notes of September 2014 report that Student "lives in an English speaking household with his parents." Parents, who routinely challenge statements in assessments and IEP's with which they disagree, did not challenge these statements. The IEP of September 2015 lists Student's native language as English. Mother wrote a five-page letter on October 1 challenging many statements made in the IEP, but not that one.

110. Each of the Oakland speech and language pathologists who assessed Student accepted that he was an English speaker, spoke with him individually and analyzed his speech at length. They observed his interactions with peers and other adults, listened to him name objects and answer questions, and did not report any suspicion he spoke anything other than English. Nor did they find that he could not understand others or be understood by them. Ms. Converse reported in 2013 that Student's speech sound production skills were within normal limits for his age, and his receptive language skills were "broadly within normal limits," with some gaps. Ms. Wroebel concluded in 2015 that both Student's overall receptive and expressive

language skills were in the average to low average range, and that Student was "100% intelligible to both familiar and unfamiliar listeners with context known and unknown."

111. Neither of Parents' experts –Dr. Tompkins or Dr. Swaine -- mentioned that Student might have any difficulty with the English language, could not understand or be understood by others, or needed an interpreter to explain what people said to him or what he said to them.

112. Student does have significant difficulty with spoken language related to his speech and language disorder and his autism. He can be hard to understand. He repeats back to people statements they make, and sometimes turns a declarative sentence into a question. He frequently speaks of himself in the third person. His speech can have a segmented, halting quality. But these difficulties do not so interfere with his communication that he cannot speak directly to an adult or child and be understood without the intervention of an interpreter. As many individual anecdotes in the assessments show, every assessor who assessed him communicated with him directly and successfully. Other children generally understand him; they approach him on the playground and ask him to solve math problems, which he does. The adult staff in his kindergarten communicate with him directly. Mr. Nagatani established that Student had no problem filtering sounds or following verbal directions. Because of Student's habit of repeating directions given to him, Mr. Nagatani believes that Student understands everything he tells him, and he has no difficulty understanding Student in return. Mr. Nagatani has never heard him speak in any language other than English.

113. Student introduced in evidence four videos taken by Parents in parks, playgrounds and activity centers, showing interactions between Student and Parents or strangers. The ALJ reviewed the videos. They show that, at least when discussing scientific concepts with Father, Student speaks and understands English well.

114. The evidence showed that Student, if not an entirely native English

speaker, speaks English as his primary language and has no difficulty understanding or speaking it that might be caused by exposure to other languages. The evidence showed that Parents' claim that Student is "grammar-blind" is based on a term either of their own invention or found somewhere on the Internet. There was no evidence grammar blindness is a recognized disorder or that it has any medical or educational relevance. The evidence convincingly showed that Student, within the limitations of his disabilities, speaks and understands language well enough to communicate with others directly, and does not need a one-to-one aide to interpret for him.

FACILITATION OF SOCIAL INTERACTION

115. The parties agree, and the evidence showed, that Student's primary challenges lie in the area of pragmatic language and social interaction. In kindergarten Student has received aide services at roughly the ratio of two students to one adult, and the aide is responsible (along with other staff members) for facilitating interaction between Student and others. Parents argue that the two-to-one aide has failed to facilitate that interaction adequately, and that only a one-to-one aide can do so. Their argument is based on two observations of Student in his kindergarten environment, one on October 6 and the other on February 1, 2016, while the hearing was in progress.

The Observations on October 6

116. Dr. Tompkins observed Student briefly on October 6. She did not test Student, but read his records and spoke to Parents. She accepted Parents' representation that "Medically, [Student] has been diagnosed with Auditory Processing Disorder and with Mixed Expressive Receptive Language Disorder, as well as Prosopagnosia . . ." Dr. Tompkins presented her opinions to the IEP team on October 6 and again on November 10. Her view primarily concerned Student's grade placement; she believes he should be in first grade because he is eligible for it by age, can cope

with the academic requirements, and would benefit from interaction with same-age peers. She opined that his placement in kindergarten "rails against" the requirement of placement in the least restrictive environment. Dr. Tompkins also opined that Student "would benefit" from a one-to-one aide to help him with "adaptive functioning, communication, and processing input." Such an aide would "help him . . . hear and process and carry forth the demands from the classroom teacher . . ." The aide would also "be helpful" with his social needs, including the need to make himself understood.[16]

117. Dr. Tompkins testified that on October 6, she observed Student in class and during the morning recess. She noticed that, in the classroom, Student's aide was helping another Student, and that at recess, Student sat alone for a time, away from his peer group, eating a container of yogurt. Teachers were nearby, but none facilitated social connections "in that moment," although toward the end of recess, a resource specialist came by and helped Student relate to another student briefly, perhaps for a minute or two. During the recess she did not see Student's aide with him.

118. Mother observed the same events but reported them differently. Mother stated that, in the 20 minutes of class she observed, Ms. Jackson, Student's two-to-one aide, was present with the students during circle time. Ms. Jackson redirected Student when he spoke to a girl next to him, once showed him a behavioral card (such as "sit down"), and checked with him (at Mother's request) to see if he wanted to remove his

[16] In his letter, Dr. Newmark, Dr. Tompkin's supervisor, supports Dr. Tompkin's and Dr. Swaine's recommendations for a one-to-one aide, as well as Dr. Swaine's diagnoses. This portion of his letter consists wholly of recitals of what Parents and Dr. Tompkins told him. It does not show any independent analysis of Student's needs or that Dr. Newmark acquired any information about his educational situation other than from Parents.

jacket. She also redirected her other student when needed. At the recess, which lasted between 10 and 15 minutes, Mother noticed that Ms. Jackson, who had come out to recess with Student, did not facilitate engagement with nearby students, but encouraged Student to finish eating his yogurt snack. Ms. Weinberger, the inclusion specialist, did facilitate one or two minutes of conversation between Student and two of his peers.

119. Dr. Mills also observed these events, and testified that in class Student was very active. He did not interact a lot with other children, participate in choral responses or ask questions. She, too, saw Ms. Jackson redirect him when needed. Student went to the bathroom and Ms. Jackson helped him rearrange his clothing when he returned. Ms. Mills agreed Student did not interact much with the other children. At recess he interacted minimally with other children.

The Observations on February 1, 2016

120. Halfway through the hearing and at Parents' request, Student was observed in school by Mary Jean Remington, a state-licensed marriage and family therapist with substantial experience in education.[17]

121. Ms. Remington observed Student in class during normal instruction for 17 minutes, and at recess for about 10 minutes. She also observed a special event in class: first through third graders were preparing to celebrate the 100th day of the Chabot school year by rehearsing three songs together, and all three grades were in the

[17] Ms. Remington has a master's degree in special education from California Polytechnic State University and another master's in counseling psychology from John F. Kennedy University. She served for seven years on the Napa Preschool Program, where she taught students aged three to five years, and has significant experience in private preschool and juvenile court schools. She has had a private practice since 2006.

classroom for that event.

122. Ms. Remington testified that, during the regular class period, Student was not necessarily attending to what was being taught; he was constantly moving. An overhead projector was in use, and Ms. Remington was not sure Student was watching it. The teacher did not redirect him, but she saw a woman (probably Ms. Jackson) show him some kind of card. He was more focused and engaged during the singing, though he had difficulty with the hardest song. During the recess, she agreed that an adult facilitated Student's interaction with other students, but only for a minute, leaving Student alone part of the time.

123. Ms. Remington opined that Student needs a one-to-one aide to help with social facilitation, and needs much more direction and sensory support in class, in order to access his education. Ms. Remington's opinions were unpersuasive not only because her single observation of Student was so brief, and on an unusual day, but also because she knew very little about his program. In preparation for her observation, she spoke to Parents and reviewed two assessments selected by Mother, though she could not identify them. She read those "much more than the IEP." Although she opined Student's program was inadequate, she did not know what it was, and wrongly answered questions about what it contained. She believed he already had one-to-one aide support in his IEP, which explains her criticism of Student's aide coverage. She was critical of the lack of occupational therapy support in class, seemingly unaware that Parents had declined an offer of in-class occupational therapy support. She readily made sweeping criticisms of Student's program based on little knowledge, much of it erroneous. For these reasons her opinions are given no weight here.

124. Ms. Macy observed the same events. She believed Student did very well in the classroom portion of the morning's activities. He came in late, but put his lunch in its cubby, went over to his seat, sat down, put his name on a worksheet and looked up to

see what was happening. Soon he transitioned well to the carpet with the other students, and while he squirmed and looked around some, he was very attentive and displayed good listening behavior. He was independent, enthusiastic, and a participatory member of the class. He functioned well in the absence of visual or aide support.

125. At recess, Ms. Macy continued, Student sat with a teacher rather than other students, then moved to a sunnier area with her. A girl approached and spoke to him, but he did not respond. After a while the girl left. The opportunity was so brief that facilitation of their conversation was impractical.

126. Ja'Mia Jackson is Student's two-to-one aide. She worked in a private preschool before she became an instructional support specialist (inclusion specialist) in 2012. She has a site supervisor credential from the Council for Exceptional Children. Ms. Jackson testified that Student habitually wanders around the classroom, but when she redirects him, he responds appropriately. Ms. Jackson added that even when she needs to turn her attention to the other student for whom she is responsible, other adults in the class are available to supervise Student. "There is always support" from Ms. Weinberger or others. "There is always someone there."

Student's Progress with a Two-to-One Aide

127. Oakland produced extensive evidence at hearing, from a wide variety of witnesses, that Student has been making substantial progress in kindergarten with the help of his two-to-one aide. This is particularly true of his progress in his social skills and his relationships with his peers and with adults. The testimony from these witnesses was remarkably consistent and based on extensive exposure to Student in the classroom and on the playground. In no case did cross-examination undermine the persuasiveness of these observations and opinions. Individually and collectively, the testimony of these witnesses about Student's progress in kindergarten was credible and persuasive.

128. Parents agree that, when he arrived in kindergarten, Student had serious

social difficulties. He kicked and spit on staff, and assaulted other students. He ripped up a PTA binder and forced open the principal's door. He had so many tantrums when his father picked him up from school at the curb that dropoff and pickup had to be moved to the office and the front lawn.

129. Teacher Nagatani, who is with Student six hours every school day, established that Student has always needed frequent redirection in class, but has enjoyed a lot of growth in the way he receives it. When he arrived, he was very emotional and overwhelmed by redirection, and sometimes cried or was embarrassed. He is "so much more resilient" now; he does not take redirection personally, sometimes apologizes for his conduct, and understands now that staff are not angry at him.

130. Mr. Nagatani also established that when Student arrived, he lacked many of the foundation skills required for learning, including awareness of others, being part of a team in a community, taking turns, compromising, learning not to interrupt, and having the confidence to share. Kindergarten has brought out Student's latent skills in these respects; he has seen a "great amount of growth" and has "benefited a lot."

131. Academically, Mr. Nagatani observed, Student is "great" at math, and has some skills well beyond grade level, but he has gaps in those skills, has challenges at the level math is taught in kindergarten, and works on those skills at the same pace as his peers because of his behavioral difficulties. He is highly intelligent and understands academic concepts, but skips entire lines of texts in reading and has gaps in his answers to questions. Inclusion specialist Weinberger made the same observation.

132. Jessica Cannon, Chabot's principal, often observes Student and others in his kindergarten class and on the playground. She is aware that social facilitation is the main focus of Student's educational program, and has seen Ms. Jackson facilitating conversations between Student and his peers many times. Student's aide (usually Ms. Jackson) shadows him on the yard, asking him who he wants to play with, and assisting

him in making those connections. In class, she helps him have conversations with other students about academic content; for example, while Student is answering a question, she might suggest that they ask another student what he thought of the problem.

133. Ms. Cannon was asked whether the school intends that Student's aide accompany him at all times to facilitate social interaction. She responded that the school does not want to have the aide engaged with him every minute of the day or every minute during recess; it hopes to facilitate independence as well as social interaction. Accordingly, Student's aides are instructed to watch him from a distance and then approach if he needs help.

134. Ms. Jackson established that Student made "tremendous progress" so far this year. At first he could not keep his hands to himself; he was hitting, kicking, and pushing other students. He has more self-control now, he is more contained, and he communicates better with peers. He does not wander off as much, and he does more work independently, without redirection, than he did when he arrived. He is "progressing a lot." Ms. Estuar-Ziff agreed with Mr. Nagatani that Ms. Jackson effectively facilitates Student's social interaction.

135. Other district witnesses also reported that Student has made educational progress in kindergarten. Both the speech and language pathologists who serve him reported that he has made progress on all his speech and language goals, though he has not met them yet. Resource teacher Kass testified that he is "flourishing" in his relationships with peers, learning to be part of a group, and accepting redirection. Inclusion specialist Weinberger testified Student has made "really wonderful progress in terms of the whole child." Ms. Cannon believes that Student is "making the academic progress we expect a kindergartener to make," is benefiting from the curriculum, and now can access peers independently and function better with them. School psychologist Ms. Porter, who observes Student periodically, testified that his social skills were very

limited when he arrived; he hit, kicked, and threw things at his peers. Now he no longer pushes or bumps into them like he used to. Program Specialist Beverley Jenkins agreed that Student now accepts redirection more readily. Science teacher Ward testified that at the beginning of the year Student was reluctant to share his ideas in a group, but now is doing that "a whole lot more."

136. Dr. Mills, who observed Student on October 6, returned to Chabot in January to check on his progress. She noticed he has made growth in behavior. He is less active in class. He still moves around, but now he stays within the general area. He raises his hand now to ask questions, and follows redirection well.

137. With a single exception, Parents made no attempt to refute any of these reports of Student's progress in kindergarten. They do argue that he was capable of at least some social interaction before he arrived, and capable of sustained conversation, citing the four videos showing Student successfully interacting with Father and others in parks, playgrounds, and activity centers. However, those videos contain textual advocacy pertinent to the litigation. They are heavily edited, probably highly selective, and involve active parental prompting, so their significance is quite limited. They do not disprove any of the claims made by Oakland staff about Student's progress in kindergarten.

138. Based on her two observations, her review of Student's files, and her conversations with Oakland staff, Dr. Mills opined that Student does not need a one-to-one aide to be successful, and should not have one. In her view, he does not need such an aide to stay on task. He takes redirection well from any adult who provides it; he does not need a single person for that purpose. Based on her observation, review of records, and conversations with Oakland staff, Ms. Macy also opined that Student was sufficiently independent to function well without full-time aide support.

139. Science teacher Ward testified that Student did not need and should not have a one-to-one aide in science class. He is able to follow her directions without an

aide, and turn and talk with his group. His aides are now in the classroom for science, but not hovering over him, and Ms. Ward does not want them to do that. She wants him to be able to follow her own directions, and in her experience, he can. For similar reasons, Mr. Nagatani also does not believe Student needs a one-to-one aide.

140. The preponderance of the evidence showed that Student did not need a one-to-one aide in order to receive substantial educational benefit, and that he has received substantial educational benefit with the two-to-one aide provided.

FAILING TO PROVIDE INDIVIDUALIZED ACADEMIC TUTORIALS OUTSIDE OF CLASS AND DAILY UPPER-GRADE SCIENCE LESSONS

141. Student's levels of academic achievement vary by subject. He knows math concepts and matters of science and chemistry as high as the level of fifth grade. As noted above, he is still missing, and working on, some kindergarten-level math concepts even though other parts of his math knowledge are much more complex.

142. Since February 2015, Parents have asked Oakland to provide Student an "accelerated and differentiated" curriculum, by which they mean that they want Oakland to individualize his academic instruction in each subject to the highest level of which he is capable. They argue that these subjects must be taught to Student individually, outside of class, by tutors. In addition, they argue that he cannot receive a FAPE without being allowed to attend an upper-grade science class every day. In the afternoon after preschool, he frequently visited Ms. Ward in Chabot's Science Lab, with Father, to discuss science concepts, and Ms. Ward testified that his understanding of science is quite advanced in some respects.

143. Oakland has differentiated Student's curriculum somewhat to reflect his capabilities, but has declined to individualize his academic instruction in the way Parents prefer. Student attends one science class a week with kindergarten classmates, but will not attend the Science Lab until next year. According to Ms. Ward, his capabilities are

about average in his kindergarten class. It would not be appropriate for him to be in a higher-grade science class with other students; he would have to be able to communicate with them better and be more independent than he is now. No professional testified at hearing in favor of Parents' proposed curriculum. The evidence established that the curriculum provided in the kindergarten classroom to Student is appropriate and provides Student with educational benefit.

FAILURE TO PROVIDE ADEQUATE GOALS, MODIFICATIONS, AND ACCOMMODATIONS, AND REJECTION OF PARENTS' PROPOSED GOALS

144. Parents did not agree with the goals Oakland proposed in its IEP offer of September 15, and wrote a competing set of goals. Mother testified that she wrote Parents' goals to fine-tune Student's interventions, to reflect many of Dr. Swaine's recommendations, and to address his auditory weaknesses. Dr. Tompkins testified that in her opinion Parents' proposed goals were appropriate. But she also testified that Oakland's goals, in the proposed September 15 IEP, were appropriate.

145. Ms. Laursen examined Student's goals, as proposed by Oakland, and opined that they adequately and appropriately addressed his needs deriving from his autism spectrum disorder.

146. Based on her examination of Student's records, her communications with Oakland staff, the assessments conducted by Oakland staff, and her observation of Student, Ms. Macy opined that Oakland's goals in the proposed September 14 IEP appropriately addressed Student's needs and were properly based on the present levels of performance reported in the assessments of Ms. Porter and Ms. Wroebel. She also opined that three of the seven speech and language goals proposed by Parents were not appropriate. Ms. Macy explained that Parents' proposed goals focus insufficiently on the connection between his speech and language difficulties and his autism. One of them would require the production of grammatically correct 8- to-10 word "subject-

verb-object" sentences properly using prepositions, pronouns, regular past tense and future tense verbs and articles, which is "too lofty" for him to accomplish at this time. A second, requiring Student to initiate a conversation with a peer involving 6 to 8 conversational exchanges, was too difficult in light of his present levels of performance.

147. Ms. Macy also established that a third goal proposed by Parents was unnecessary because it was directed to an auditory processing disorder that he does not have. Instead, his difficulties with language and social communication are secondary to his autism, a higher order social deficit, and include inability to read social cues and understand the nonverbal language and perspective of others or the basics of social interaction.

148. In addition, none of Parents' proposed goals contain or have any apparent relationship to Student's present levels of performance, and as a result lack any baselines from which progress can be measured. The goals in the September 15 IEP were specific, measurable, addressed all Student's areas of need, and were appropriate.

149. Parents do not directly criticize the accommodations and modifications in Student's September 15 IEP, but they also desire accommodations and modifications to address Student's perceived prosopagnosia, anxiety, and other conditions discussed above, and to implement several of Dr. Swaine's educational recommendations. These are unnecessary for the reasons discussed above.

FAILURE TO USE THE "STRENGTH-BASED MODEL" TO REMEDIATE STUDENT'S WEAKNESSES

150. Dr. Peters recommended approaching some of Student's weaknesses through his strengths. At the IEP meeting on November 10, he explained that this would involve creating interventions that approached Student's deficits through, for example, science and math problems, since he was strongest in these fields. This might involve access to higher-grade curriculum and science class, for example. Dr. Peters thought

such interventions would better engage Student's interest, mentioned strength-based interventions as something the IEP team should consider, and noted the difficulty of fashioning a curriculum that would fit Student. He did not suggest in any way that Student could not make significant educational progress without the use of such strength-based interventions. The evidence established that the September 15 IEP appropriately addressed Student's needs without the use of strength-based interventions.

Unilateral Placement of Student in Kindergarten Rather Than First Grade

151. The evidence showed that Oakland did not unilaterally place Student in kindergarten. Parents spent months during the 2014-2015 school year considering Student's possible placements for the following year, and decided on kindergarten. In February they checked a form indicating that kindergarten was their choice. They appended notes to an IEP in April discussing Student's program "once he starts kindergarten in Chabot." They sent him to a kindergarten interview on May 6. They gave their informed consent to the kindergarten placement in the June 3 IEP amendment. As shown above, they were not deceived in this decision by false information from Oakland.

Least Restrictive Environment and Age

152. The evidence showed that Student is older than most, if not all, of his kindergarten classmates. Principal Cannon established that he is one of the three oldest in his class, and that "a few" kindergarteners may turn seven before the end of the school year. (Student will be seven in April.) Student would be in the "midrange" of age if he were in the first grade. Mr. Nagatani established that, at the time of hearing, most kindergarteners (like Student) are six, and will leave at the end of the year at six or seven.

153. Dr. Tompkins was not familiar with the exact age ranges of students in kindergarten or first grade at Chabot, but opined that it would benefit Student to be in first grade rather than kindergarten so that he could model his same-age peers. Neither she nor any other witness – aside from Parents – asserted that Student could not obtain a FAPE because of the ages of the students in kindergarten.

154. Several district witnesses established that although Student is more advanced than his kindergarten peers in some academic matters, he is less advanced than most of them in his social and behavioral skills, and the other kindergarten students are good models for him in those areas.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA[18]

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006);[19] Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

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

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel, that describes the child's needs, academic and functional goals related to those needs, and specifies the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp.

200, 203-204.) 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.) 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.)

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

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

SCHOOL YEAR 2014-2015

Issue I.A: Failure to Assess in All Areas of Suspected Disability, Namely for Auditory Processing Disorder

6. In California, a district assessing a student's eligibility for special education must use tests and other tools tailored to assess "specific areas of educational need" and must ensure that a child is assessed "in all areas related to" a suspected disability, such as vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social and emotional status. (Ed. Code, § 56320, subd. (c),(f).) Federal law also requires that the child "is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B).) Like the California statute, the federal statute requires assessment in all areas of educational need related to a suspected disability, such as, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (34 C.F.R. § 300.304(c)(4).)

7. Special education law does not require assessment in each of the subcategories of the areas identified above, nor in subjects as narrowly defined as "auditory processing disorder." Instead, it requires that a district assess in all "areas related to" a suspected disability, and gives statutory examples that illustrate the breadth of the term "areas," such as "health and development," "academic performance," and (most pertinent here) "hearing," "language function" and "communicative status." (See *J.K. v. Fayette County Bd. of Educ*. (E.D.Ky. Jan. 30, 2006, Civ. A. No. 04-158) 2006 WL 224053, p. 5 [because district addressed manifestations and needs created by bipolar disorder, IDEA not violated by failure to obtain official diagnosis].)

8. In the school year 2014-2015, Oakland assessed Student thoroughly in the

areas of language function and communicative status, and as thoroughly as practicable in hearing. In 2013 and 2015 Oakland assessed Student's hearing, though some measures were not successful, and found it normal. In 2013 and 2015 Oakland's speech and language assessment found his auditory processing to be within normal limits. In 2015 Student achieved very high scores on academic tests requiring him to hear, understand, and respond to oral questions. Parents did not identify APD (as opposed to auditory processing generally) as a concern during the 2014-2015 school year, and none of the information before Oakland's IEP team or assessors indicated that he suffered from it.

9. Although Parents do not contend that Oakland should have assessed for APD in the following academic year (2015-2016), events in that year confirm that Student did not have APD, or if he did, it had no effect on his education. None of Student's district assessors, teachers, or aides noticed any difficulties that could be attributed to APD. Dr. Swaine produced a report diagnosing Student with APD, but it was so deeply flawed that Ms. Macy persuasively rejected it, and all its recommendations, as invalid. Dr. Swaine did not testify. Parents made no efforts to defend her conclusions and have ceased relying here on her diagnosis.

10. Student did not discharge his burden of proof that, in the 2014-2015 school year, Oakland failed to assess him in an area of suspected disability, namely, auditory processing disorder. The evidence showed that Oakland's speech and language, psychoeducational and academic assessments were sufficient to determine the nature and extent of any auditory processing deficits for educational purposes.

Issue I.B: Rejection of Parents' Request for Assessment of Student's Social Interaction in Specific Locations

11. In selecting assessment tools, the assessor must do more than pick a generally valid instrument. Assessment tools must be "tailored to assess specific areas of

educational need . . .” (Ed. Code, § 56320, subd. (c).) “Special attention shall be given to the [child’s] unique educational needs . . .” (*Id.*, subd. (g).) Assessors must use "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) Tests of a pupil with impaired sensory, manual, or speaking skills must be selected and administered to best insure results “that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure . . .” (Ed. Code, § 56320,subd. (d).)

12. Student did not bear his burden of proving that he was denied a FAPE because Oakland did not assess him in his play-based preschool classroom as well as his preschool playground, or in his interactions with Chabot’s science teacher after school. There was no evidence that Oakland’s failure to assess him in those two locations had any effect on the accuracy or usefulness of his psychoeducational, academic, occupational therapy or speech and language assessments. Nor did he prove that Oakland failed to tailor its tests to his specific areas of need or use technically sound assessment instruments. Oakland did not deny Student a FAPE by declining to assess him in those two locations.

Issue I.C: Rejection of Parents’ Conditions on Their Consent to Assessment

13. As long as the statutory requirements for assessments are satisfied, parents may not put conditions on assessments; “selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities.” (*Letter to Anonymous* (OSEP 1993) 20 IDELR 542.)

14. Federal courts have held that a parent who insists on placing conditions on assessments may be regarded as having refused consent. In *G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299, affd. (11th Cir. 2012) 668 F.3d 1258, for example, parents purported to agree to a comprehensive triennial reassessment similar

to the one Oakland proposed here. However, they attached significant conditions to their approval, including requiring particular assessors, agreement to meetings with parents before and after the assessments, a preview of the assessments before an IEP team meeting, and limitations on the use of the assessments. The ALJ deemed this a refusal of consent, and the District Court agreed, noting: "With such restrictions, Plaintiffs' purported consent is not consent at all." (*Id.*, 704 F.Supp.2d at p. 1309.) In affirming, the Eleventh Circuit observed that parents' conditions "vitiated any rights the school district had under the IDEA for the reevaluation process . . ." (*Id.*, 668 F.3d at p. 1264.)

15. The same result was reached in *Student R.A. v. West Contra Costa Unified Sch. Dist*. (N.D. Cal., Aug. 17, 2015, Case No. 14-cv-0931-PJH) 2015 WL 4914795 [nonpub. opn.]. There a parent approved an assessment only on the condition that she be allowed to see and hear the assessment being conducted. The District Court upheld the ALJ's determination that this condition amounted to a refusal of consent: "[t]he request to observe the assessment amounted to the imposition of improper conditions or restrictions on the assessments, which the District had no obligation to accept or accommodate."(*Id*. at p. 13; see also *Haowen Z. v. Poway Unified Sch. Dist.* (S.D.Cal., Aug. 14, 2013, Case No. 13–CV–1589–JM (BLM))(Order Denying Motion for Preliminary Injunction) 2013 WL 4401673, p. 5 [district has discretion to determine assessment tools].)

16. Because Parents lacked the power to place their many stated conditions on Oakland's assessments, Oakland properly treated Student's April 17 and April 29 letters as refusals to consent to assessment. (*G.J. v. Muscogee County Sch. Dist., supra; Student R.A. v. West Contra Costa Unified Sch. Dist., supra*; *Haowen Z. v. Poway Unified Sch. Dist., supra*.) Consequently neither letter validly consented to, or initiated any time requirement for conducting, any assessment, and Oakland did not deny Student a FAPE

by rejecting the conditions.

Issue I.D: Withholding Information About Tests to be Used in Assessments

17. State law requires that an assessment plan explain the "types of assessments to be conducted." (Ed. Code, § 56321, subd. (b)(3).) There is no requirement that specific tests be identified or explained.

18. Every assessment plan Oakland proposed to Parents complied with this requirement by identifying each of the proposed assessments by type and adding a brief explanation. The law did not require further explanation, either in the plans or later by Oakland or its assessors. Student did not prove that Oakland unlawfully withheld information about the assessments or denied him a FAPE in doing so.

Issue I.E: Cancelling or Delaying Assessments in May or June 2015

19. Normally, an assessment must be completed within 60 days of the receipt of parental consent for it. (34 C.F.R. § 300.301(c)(1)(i), (ii); Educ. Code, § 56302.1(a).)

20. The evidence did not show that Oakland cancelled any assessment. It showed that on May 27, Oakland delayed the scheduled assessments in response to Parents' claim that Student suffered from cortical visual impairment and would need substantial accommodations in assessments as a result. Oakland delayed the scheduled assessments for approximately two weeks because it reasonably concluded that its assessments might be inaccurate or invalid unless its assessors took Student's alleged vision impairment into consideration and created accommodations for it. After finding that Parents had no medical information to support the claim of cortical visual impairment, Oakland reinstated the assessments and completed them within the initial time allowed by law. (See Issue I.G., below.) Student did not prove that Oakland violated any law or denied him a FAPE by delaying or cancelling assessments.

Issue I.F: Withholding Test Protocols and Test Scoring Records Parents

Requested

21. Parents must be afforded the opportunity to examine records relating to the evaluation and placement of their child. (34 C.F.R. § 300.501(a)(1); Ed. Code, § 56504.) Student records available under the federal provision must be disclosed before an IEP team meeting and in any event within 45 days; state law requires disclosure within 5 business days. (34 C.F.R. § 300.613(a); Ed. Code, § 56504.)

22. In defining the range of student records available, the IDEA uses the same definition as do the access provisions of the Federal Educational Rights and Privacy Act (FERPA)(20 U.S.C. § 1232g).) (34 C.F.R. § 300.611(b).) In order to be accessible under those rules, an "educational record" must be "maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A).)

23. In *Owasso Independent School Dist. No. I-011 v. Falvo* (2002) 534 U.S. 426, the Supreme Court held that student tests scored by fellow students but not yet placed in the school's system of permanent records were not subject to production under FERPA. It interpreted the requirement that an educational record must be "maintained" by the agency or a person acting for it as meaning that "records will be kept in a filing cabinet in a records room at the school or on a permanent secure database, perhaps even after the student is no longer enrolled." (*Id.* at p. 433.) The peer-graded student test papers did not, therefore, become educational records as soon as students graded them. "It is fanciful to say [the student graders] maintain the papers in the same way the registrar maintains a student's folder in a permanent file." (*Ibid.)*

24. Under *Falvo, supra,* 534 U.S. 426, the tests protocols possessed by Oakland's assessors were not yet "maintained" under federal law while still being used as raw data for then-unwritten assessment reports, and therefore were not required to be disclosed before becoming part of completed assessments and part of the school's

permanent file-keeping system.

25. In California, in order to be pupil records accessible under Education Code section 56504, the record must be "maintained by a school district or required to be maintained by an employee in the performance of his or her duties . . ." (Ed. Code, § 49061, subd. (b).) This definition is so similar to the federal definition of educational records that it is highly likely the *Falvo* interpretation would apply, although no California decision has addressed that question yet. Applying the *Falvo* definition of "maintained," the test protocols possessed by Oakland's assessors but not yet analyzed and reported on as part of their then-unwritten assessment reports had not yet become "maintained," within the meaning of the records access provisions of the Education Code, so Student was not entitled to them when requested.

26. Test protocols are generally copyrighted. In *Newport-Mesa Unified Sch. Dist. v. State of Calif.* (C.D.Cal. 2005) 371 F.Supp.2d 1170, 1175-1176, the district court held that production to Parents of test protocols was a "fair use" and therefore not preempted by federal copyright law, and could be compelled under Education Code section 56504. However, the district court cautioned that "In order to minimize the risk of improper use, the District may choose to use appropriate safeguards [and] reasonable measures." (*Newport-Mesa Unified Sch. Dist., supra,* 371 F.Supp.2d at p. 1179.) Ms. Macy established that in order to protect the integrity of copyrighted protocols and assessment reports, assessors in California school districts do not release test protocols until after their assessment results are completed. This is a reasonable measure, and so under governing federal copyright law, Oakland could lawfully withhold Student's test protocols until the assessment results were completed.

27. In the alternative, any violation by Oakland of record production requirements by its delayed release of the protocols was harmless and did not significantly impede Parent's participatory rights. The assessors interpreted the test

results shown by the protocols in their final reports, which were given to Parents before the September 15 IEP team meeting, in time for Parents to use them to advocate for adoption of their views. Parents vigorously used the results for that purpose at the September 15, October 6 and November 10 IEP team meetings.

28. Student did not prove that Oakland violated federal or California law in declining to produce his test protocols until assessment reports were completed, or that Oakland denied him a FAPE by delaying their production.

Issue I.G: Failure Timely to Provide Speech and Language Assessment Results

29. State law requires that, after an assessment has been completed, parents must be given "the assessment report and the documentation of determination of eligibility . . ." (Ed. Code, § 56329, subd. (a)(3).) Federal law imposes the same requirement. (34 C.F.R. § 300.306(a)(2).) Normally this must be done, and an IEP team meeting held to discuss the report, within 60 days (exclusive of breaks longer than 5 days). (34 C.F.R. § 300.301(c)(1)(i), (ii); Ed. Code, §§ 56043, subd. (f)(1), 56302.1, subd. (a).)

30. As found above, Parents' April 17 consent to the speech and language assessment was improperly conditioned on selection of an assessor independent of the district. That and other purported parental consents were rejected by prior written notice on May 1. That rejection was lawful for the reasons set forth above in the resolution of Issue I.C. In a telephone call on or about May 7, Mr. Kaufman informed Father that the timeline for completing the assessments, including the speech and language assessment, would begin when Parents signed an assessment plan without conditions, which they did on May 8. That recalculation of the timeline was lawful and correct.

31. The 60-day timeline for completing the speech and language assessment therefore did not begin to run until May 8, not April 17 as Parents argue. As a result,

allowing for summer break days (Ed. Code, §§ 56043, subd. (f)(1)), the speech and language assessment did not have to be completed and discussed until September 18. The assessment was completed and the report given to Parents before the September 15 IEP team meeting at which the report was discussed. Oakland therefore did not fail to provide the speech and language assessment results in the time required by law, and did not deny Student a FAPE by the timing of its reporting on the assessment.[20]

Issue I.H: Providing False Information About Student's Academic Ability to Parents, Thus Precluding Them From Being Able to Give Informed Consent to Student's Program

32. Valid consent to an IEP requires that the parent "has been fully informed of all information relevant to the activity for which consent is sought . . ." (34 C.F.R. § 300.9(a); Ed. Code, § 56021.1, subd. (a).)

33. Parents argue that they enrolled Student in kindergarten because they were informed of false facts by Oakland; namely, that Ms. Anderson told them in September 2014 and again in June 2015 "as fact" that Student would obtain very low cognitive and reasoning scores on standardized assessment tests, showing that he had very low academic aptitude, and therefore would have to attend kindergarten, not first grade. They claim that they did not then know what Student's academic aptitude was, and it was not until they obtained test protocols and assessment results in September that they realized Student could prosper in first grade and "requested 1st grade placement immediately upon discovering the truth about [Student's] academic aptitude, on 9/15/15."

[20] At hearing an Oakland witness purported to concede that Oakland took more than 60 days to provide the speech and language assessment results. For the reasons above, that concession was erroneous and is rejected here.

34. For the reasons set forth in the Factual Findings, this claim is not credible. Parents had been aware of Student's superior academic aptitude since he was very young. They knew tests would reveal that aptitude: they took Student to be assessed in summer 2013 by Dr. Peters, who reported he was profoundly gifted. They took pride in Student's MENSA IQ score.

35. Even if they quote Ms. Anderson correctly, these sophisticated lawyer-parents knew that she was making a prediction, not stating a fact. In addition, Parents are both so well versed in special education law that they knew no placement decision would be made before Student was actually assessed, and then would be made by an entire IEP team, not Ms. Anderson. They also knew that they had the option of choosing first grade. At hearing, Parents did not testify that they were unaware that they could have initially placed Student in first grade if they chose to do so.

36. The evidence did not show that Oakland deceived Parents into agreeing, in the June 3 IEP amendment, to place Student in kindergarten. It showed that all throughout fall 2014 and spring 2015, Parents thoughtfully considered the appropriate grade placement for Student, visited possible placements, and gathered relevant information. During that period, Parents never considered a first grade placement; for reasons of Student's readiness and safety, they were considering instead placing him in transitional kindergarten. When they decided, they knowingly agreed on June 3 to place him in kindergarten. Nothing in the record indicates any parental desire to place Student in first grade until September 15, when Student had already been in kindergarten for three weeks. The evidence showed that Parents were fully informed when they chose to place Student in kindergarten, and only later came to regret their decision.

37. Oakland obtained Parents' informed consent to the June 3 IEP amendment. It did not provide false information to Parents about Student's academic

ability, did not mislead them into choosing kindergarten, and did not impede their participatory rights or deny Student a FAPE by predicting Student's performance on assessments.

Issue I.I: Cancelling the August 28 IEP Team Meeting

38. As set forth in the Factual Findings, no August 28 IEP team meeting was ever scheduled. Parents knew this from being told at the June 3 IEP team meeting that the meeting would be on September 15 instead, from their understanding of special education law, and from their experience in calling for and participating in earlier IEP team meetings. Oakland did not violate any law or deny Student a FAPE by cancelling an August 28 IEP team meeting; there was no such meeting to cancel.

Issue I.J: Predetermining the IEP Offers of September 24, 2014 and June 3, 2015

39. Federal and State law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.)

40. "[T]he informed involvement of parents" is central to the IEP process. (*Winkelman v. Parma City School Dist*. (2007) 550 U.S. 516, 524 [167 L.Ed.2d 904]). Protection of parental participation is "[a]mong the most important procedural safeguards" in the Act. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

41. Predetermination violates the above requirements, and occurs when a

school district has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified Sch. Dist*. (I) (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County Sch. Dist*. (9th Cir. 2008) 552 F.3d 786, 801, fn. 10.) "Participation must be more than mere form; it must be meaningful." (*Deal v. Hamilton County Bd. of Educ*. (6th Cir. 2004) 392 F.3d 840, 858 [citations omitted].)

42. Parents argue that the September 2014 and June 2015 offers were predetermined because they were "identical" (and identical to the later September 2015 offer) in offering kindergarten with a two-to-one aide. As to the September 2014 IEP, the factual premise is inaccurate; the choice of kindergarten in fall 2015 was tentative, and the September 2014 IEP did not address aide support in kindergarten at all. The IEP documents from November 2014 show that Parents were still looking at placements, considering the possibility of transitional kindergarten, and awaiting a discussion of "kindergarten options" with Ms. Anderson.

43. The June 3 IEP placed Student in kindergarten because that is what Parents wanted and agreed to at the time. Documents from the winter and spring of 2015 show that Parents' choice of kindergarten became more firm over that period, as Oakland knew. The stated purpose of the February IEP team meeting, for example, was to discuss transition to kindergarten. Sometime during that month Parents checked "kindergarten" on a form giving them enrollment choices. The fact that Oakland gave Parents the grade placement they then wanted does not indicate predecision.

44. Student did not prove that the September 14, 2014 and June 3, 2015 IEP offers were predetermined, or that Oakland denied him a FAPE by predetermining them.

Issue II.B: Failure to Provide Adequate Remedies and Support Services for Student's Auditory Processing and Speech and Language Disorders, His Social and Adaptive Deficits, and His Prosopagnosia

Issue II.C: Failure to Provide for a One-to-One Aide

Issue II.D: Failure to Provide Individual Pull-out Tutorials, Individual Pull-out Speech and Language Therapy, Group Social Speech Therapy; an Individualized Accelerated and Expanded Curriculum, and Attendance at One Science Class a Day

Issue II.E: Failure to Provide Adequate Goals, Modifications, and Accommodations, and Rejection of Parents' Proposed Goals and Modifications

Issue II.F: Failure to Use the "Strength-based Model" to Address Student's Weaknesses

Issue II.G: Failure Generally to Provide an IEP Appropriately Suited to Student's Needs and Abilities

45. As explained above in the section entitled "Procedural Issue," these arguments were misdirected at Oakland because Student was in private preschool during the 2015-2016 school year, and his overall program was the responsibility of Skyline Preschool, not Oakland. Student did not prove and does not now argue that any of these alleged failings denied him a FAPE at Skyline Preschool in the school year 2014-2015. They are addressed below in connection with the 2015-2016 school year. Student did not prove that Oakland denied him a FAPE in the school year 2014-2015 for any of the reasons set forth in Issues II.B through II.G.

SCHOOL YEAR 2015-2016

Issue II.A: Failing to Implement the March 5, 2015 IEP Amendment

46. To provide a FAPE, a district must deliver special education and related services "in conformity with" a Student's IEP. (20 U.S.C. § 1401(9).) In *Van Duyn v. Baker*

School Dist. 5J (9th Cir. 2007) 481 F.3d 770, the Ninth Circuit held that failure to deliver related services promised in an IEP is a denial of FAPE if the failure is "material"; meaning that "the services a school provides to a disabled child fall significantly short of the services required by the child's IEP." (*Id.* at p. 780.) The court found in *Van Duyn* that a district's provision of only five hours of math tutoring out of a promised 10 hours was a material failure to provide services in conformance with the student's IEP. (*Id.* at p. 781; see also *Sumter County School Dist. 17 v. Heffernan* (4th Cir. 2011) 642 F.3d 478, 481, 485-486; *Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal., May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569, p. 7.)

47. The March 5 amendment only placed the language proposed by Parents as "comments" that were added "for district consideration." The parties had different intents in adding the amendment, but Oakland did not intend to bind itself to the substantive content of Parents' comments, and did not. Student therefore did not prove that Oakland denied him a FAPE by failing to implement the March 5 amendment.

Issue III.B: Predetermining the September 15, 2015 IEP Offer

48. Student argues that the September 15 offer was predetermined for the same reason that its predecessors were predetermined; the September 2014, June 3 and September 15, 2015 offers were "identical." With respect to the first two of those IEP's, the flaws in that argument are described above. The September 15 offer also proposed placement in kindergarten, not because that placement was predetermined but because Parents had already agreed to it in the June 3 IEP, Student was three weeks into kindergarten and doing well, and Parents had not begun to argue for placement in first grade until a few minutes before the September 15 meeting.

49. There was no evidence that the offer of a two-to-one aide was predetermined in the sense that it deprived Parents of meaningful participation in the IEP process. If Oakland members of the September 15 IEP team arrived with the view

that Student did not need a one-to-one aide, that was a product of the extensive parental participation that had already occurred. The parties had been discussing the asserted need for a one-to-one aide in IEP team meetings, letters, emails and in person since the previous November and had thoroughly explored the issue. The Oakland members of the September 15 IEP team continued to believe (correctly) that Student did not need a one-to-one aide. Parents had meaningfully participated in that discussion for 10 months.

50. Oakland was not inflexible in its September 15 offer. In response to Parents' objection at the September 15 meeting, it changed occupational therapy support to outside of class, not in class as originally proposed. It altered its proposed goals by accepting some parts of Parents' goals, in an attempt to compromise.

51. Student did not prove that Oakland deprived Parents of a meaningful opportunity to participate in the IEP process, or deny Student a FAPE, by predetermining the September 15 offer.

Issue III.C: Unduly Limiting and Interfering With Parents' Expression of Their Views at the October 6 and November 10 IEP Team Meetings

52. Parents had ample opportunities before, during, and after the October 6 and November 10 IEP team meetings to convey their views to the other team members. In addition, they routinely wrote lengthy statements to the other team members before and after these meetings, as well as before and after earlier IEP team meetings, addressing some of the same issues. Parents frequently spoke to other team members personally or by telephone, and supplemented their views with emails and letters. Overall, during fall 2015, Parents' participation in the IEP process concerning their son was not just meaningful; it was pervasive. Student did not prove that Oakland's actions at the October 6 and November 10 meetings resulted in excluding them from IEP team decisions or significantly impeding Parents' participatory rights, and therefore did not

prove that those actions denied him a FAPE.

Issue III.D: Failure to Provide Timely Prior Written Notice of its Rejection of Parents' Requests Made at the September 15 Meeting

53. A school district must provide written notice to the parents of a pupil whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4, subd. (a).) The notice must contain: (1) a description of the action refused by the agency, (2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal, (3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards, (4) sources of assistance for parents to contact, (5) a description of other options that the IEP team considered, with the reasons those options were rejected, and (6) a description of the factors relevant to the agency's refusal. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4, subd. (b).) The statutory requirements for a prior written notice do not impose any particular time limit within which it must be provided.

54. Student did not prove that Oakland was untimely in waiting until November 13 to provide prior written notice of its rejection of Parents' September 15 requests. Those requests were subject of an ongoing discussion at later IEP team meetings on October 6 and November 10, and extensive communication between the parties. During that time Student's requests evolved; for example, Parents offered a substitute set of goals shortly before the November meeting. Oakland did not finally decide on these requests until after the November 10 meeting. If Oakland had provided its prior written notice earlier, it would have been vulnerable to the criticism that it had predecided the issues addressed at meetings in October and November.

Issue III.D: Failure to Provide Timely Written Notice of its September 2015 Reduction of Speech and Language Services

55. Contrary to their contention, Parents accepted the IEP amendment of June 3. They therefore were not entitled to prior written notice of the change in speech services, as they knew about it and approved it. Oakland did not deny Student a FAPE by failing to give Parents prior written notice of the June 3 change in speech services.

Issue IV.A: Failure to Provide the Speech and Language Services Required by Student's Governing IEP

56. As set forth above, noncompliance with an IEP is measured by the rule of *Van Duyn v. Baker School Dist. 5J, supra,* 481 F.3d at p. 780: failure to deliver related services promised in an IEP is a denial of FAPE if the failure is "material."

57. Student proved that his speech and language services during kindergarten have not been in conformity with the governing IEP's, but not in the manner he anticipated. Student's contention that the September 2014 IEP, as amended, still governed the delivery of speech therapy in kindergarten must be rejected because Parents agreed to the change to two group sessions a week in the June 3 IEP amendment.

58. However, Ms. Estuar-Ziff's testimony, which was uncontradicted, established that Student was receiving one group and one individual session of speech therapy in kindergarten, notwithstanding the requirements of the June 3 and September 15 IEP's that he receive two group sessions a week. This constituted a material failure to deliver the service in conformance with the governing IEP's, as it affected half of Student's speech services throughout the fall and into the hearing, and may be continuing. Oakland thus denied Student a FAPE by failing to deliver two group speech therapy sessions a week from the time he began kindergarten until the hearing.

59. School districts may be ordered to provide compensatory education or

additional services to a student who has been denied a FAPE. (*Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid v. District of Columbia* (D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be fact-specific. (*Ibid.*)

60. The IDEA does not require compensatory education services to be awarded directly to a student, so staff training can be an appropriate remedy. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid.*)

61. Determining a proper remedy for this violation presents an unusual issue. It would not be equitable to award Student additional group speech therapy sessions, even though he missed at least 20 (and perhaps more) group sessions to which he was entitled. That would be the opposite of what Parents sought by filing for a due process hearing; they argue that Student needs individual sessions only. Oakland's violation actually brought Student closer to what Parents think he needs than if Oakland had fully complied with the IEP; he has had more individual sessions of speech therapy than the number he should have had. Moreover, Student was able to work on his speech goals during the unauthorized individual sessions, and the evidence showed he made progress on them.

62. It is more equitable to grant relief intended to end the violation and

ensure that Student and others receive the services provided in their IEP's. Oakland's unilateral determination to change the services because a peer was unavailable, and failure to inform Parents of the change, can be remedied. Oakland will be ordered to provide training to all of Student's IEP service providers that they must implement the services as listed on his IEP's, and that if the services cannot be implemented they must inform their supervisors, and Parents, so that Oakland can obtain private services to supplement district services when needed. This training must be at least one hour in length, be taught by a special education attorney or college professor not affiliated with Oakland, and be completed no later than June 1, 2016. No other remedies are awarded for this failure to implement a portion of Student's IEP.

Issue IV.C: Failure to Provide Adequate Remedies and Support Services for his Auditory Processing and Speech and Language Disorders, His Social and Adaptive Deficits, and His Prosopagnosia

63. As mentioned above, a student receives a FAPE when his program is created in compliance with the IDEA's procedural requirements, and when he receives access to an education that is reasonably calculated to "confer some educational benefit" on him. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204.) This education must include any needed related services, which are "transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education." (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

64. In determining the validity of an IEP, a tribunal must focus on the placement offered by the school district, not on the alternative preferred by the parents:

> Even if the [placement was] better for [Student] than the District's proposed placement, that would not necessarily mean that the placement was inappropriate. We must uphold the appropriateness of the District's placement if it

was reasonably calculated to provide [Student] with educational benefits.

(*Gregory K. v. Longview Sch. Dist.*, (9th Cir.1987) 811 F.2d 1307, 1314.) Student's contentions that his IEP's did not provide a FAPE are addressed below.

NEED FOR A ONE-TO-ONE AIDE

65. Student does not need a one-to-one aide to help him because of developmental prosopagnosia. The evidence did not show that he suffers from that condition. As Ms. Laursen testified, it is more likely that his occasional disinterest in faces is a symptom of his autism. Nor did the evidence show that any difficulty Student may have in recognizing faces has such an effect on his education that he needs someone with him at all times to help him identify people.

66. There is no evidence (other than Parents' unconvincing lay diagnoses) that Student has Hyperlexia Type III, cortical visual impairment, or anxiety, so he does not need a one-to-one aide to help him with the consequences of those conditions. Parents consulted Dr. Tompkins and Dr. Newmark about the possibility that Student suffered from anxiety, but neither of those professionals reported that he did.

67. Student has no need for a one-to-one aide to prevent his flight from kindergarten into unsafe situations. He has no history of endangering himself in that fashion while in the care of his two-to-one aide and other kindergarten staff.

68. Student failed to prove that he needs a one-to-one aide to help interpret others' statements to him, interpret his statements to others, assist his understanding of the English language, or cope with grammar blindness. On the contrary, the evidence showed that Student speaks English as his primary language, and understands and speaks to others adequately without an interpreter. If he has grammar blindness, it does not significantly affect his access to education.

69. Student failed to prove that he needs a one-to-one aide to facilitate social interaction. The most that can be gleaned from the observations by Mother, Dr. Tompkins and Ms. Remington is that there are times when the two-to-one aide is helping another student and not facilitating social interaction between Student and his peers. In addition, Ms. Remington's opinions are of little or no relevance because they were formed well after any of the IEP team meetings addressed here, and were not available when the decisions at issue were made. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) Parents and their supporters may desire that Oakland fill every one of Student's idle moments with social facilitation, but that is not necessarily educationally appropriate and is certainly not required for him to make meaningful progress in social interaction. The evidence convincingly showed that Student is making meaningful social progress with a two- to-one aide, who (with her colleagues) facilitates considerable interaction between Student and his peers, in class, in the lunch club, and on the playground. As established by the Supreme Court in *Rowley, supra,* the IDEA does not require that Oakland maximize Student's potential in social interaction or anything else. Instead, it requires that Student's program be reasonably calculated to allow him to obtain some educational benefit. (*Rowley, supra,* 458 U.S. at pp. 200, 203-204.) The evidence showed that Student's program has conferred meaningful and substantial benefit on him in social interaction and the other areas Parents sought to address with a one-to-one aide.

70. The weight of expert opinion also showed that Student does not need a one-to-one aide for social interaction. Dr. Tompkins testified that such an aide would be "helpful," but that is not the standard by which FAPE is measured. Dr. Tompkins's primary reason for believing that Student needs a one-to-one aide was that he needed help in overcoming his communications difficulties, by which she apparently meant the "medical" diagnoses of ADP, mixed expressive receptive language disorder and

prosopagnosia that she took at face value but that later proved invalid or unpersuasive. The opinions of Dr. Mills, Ms. Macy, Mr. Nagatani, and Ms. Ward that Student does not need a one-to-one aide were based on more and better information about Student and his program than Dr. Tompkins had, and were more persuasive. The extensive and undisputed evidence of Student's progress in social interaction supports their opinions.

71. Student did not prove that he needs a one-to-one aide to facilitate his growth in social skills, access his education, or obtain meaningful educational benefit from his program, and Oakland did not deny him a FAPE by declining to provide one.

FAILURE TO PROVIDE ADEQUATE SPEECH AND LANGUAGE SUPPORT

72. Student did not prove that he needs two individual speech and language sessions a week to obtain a FAPE. No professional expressed that opinion except Dr. Swaine, whose findings and recommendations were exposed as invalid. Student has been making progress on all his speech and language goals with a mix of group and individual speech therapy sessions. Parent did not show that Student, who has extensive needs in the area of social communication, does not receive educational benefit in group sessions. The speech therapists who work with Student persuasively testified that group sessions are appropriate for him. Therefore, Oakland's offer of two group sessions per week (if actually delivered) would provide Student a FAPE in the area of speech and language.

FAILURE TO PROVIDE INDIVIDUALIZED ACADEMIC TUTORIALS OUTSIDE OF CLASS AND DAILY UPPER-GRADE SCIENCE LESSONS

73. Student did not prove that he needs individual tutorials in each subject adjusted to his grade-level skills to satisfy IDEA's requirements for an individualized education or to obtain a FAPE. No professional expressed that opinion, and no authority supports that argument. The evidence showed that Student is making meaningful

academic progress under his current program. It also showed that he could not adequately communicate with the other students in advanced science classes. Oakland did not deny Student a FAPE by declining to provide these curriculum modifications.

FAILURE TO PROVIDE ADEQUATE GOALS, MODIFICATIONS, AND ACCOMMODATIONS, AND REJECTION OF PARENTS' PROPOSED GOALS

74. An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

75. Student did not prove that Oakland's goals were inadequate. Ms. Laursen's and Ms. Macy's opinions that they were adequate were persuasive and undisputed. Ms. Macy's opinion that Parents' proposed goals were not appropriate was much more detailed and analytical, and therefore more persuasive, than Dr. Tompkins's opinion to the contrary. Even Dr. Tompkins believed that Oakland's goals were also appropriate. Oakland's goals were clear, measurable, and directed at Student's known needs, and met all legal requirements.

76. Student also did not prove that there are any flaws in the modifications and accommodations Oakland afforded Student. Parents criticize those provisions only because they do not allow for the prosopagnosia, auditory processing disorder, and other conditions that the evidence did not show he has, and because they do not incorporate several suggestions by Dr. Swaine, whose conclusions were shown to be

invalid. Oakland's goals, modifications and accommodations provided Student a FAPE.

FAILURE TO USE THE "STRENGTH-BASED MODEL" TO ADDRESS STUDENT'S WEAKNESSES

77. Student did not prove that Oakland's failure to embrace Dr. Peters's methodology for addressing his deficits through his academic strengths denied him a FAPE. Dr. Peters only made those proposals as suggestions; neither he nor any other professional stated that they were required for Student to make meaningful educational progress, which Student has made. As long as a school district otherwise provides a FAPE, choice of methodology is left to the district. (*Rowley, supra,* 458 U.S. at p. 208.)

Issue III.A: Unilateral Placement of Student in Kindergarten Rather Than First Grade Without Parents' Informed Consent

78. State statutes generally require initial placement of a child in kindergarten or first grade depending upon the age of the child. A child "shall be admitted to a kindergarten" if the child will have his or her fifth birthday on or before September 1 of the school year. (Ed. Code, § 48000, subd. (a).)[21] A child "shall be admitted to the first grade" if the child will have his or her sixth birthday on or before September 1 of the school year. (Ed. Code, § 48010, subd. (a).) Since Student was six years old on or before September 1 of the 2015-2016 school year, Student argues that Oakland was required to place him in first grade by virtue of the statutory command that a child of his age "shall be admitted to the first grade . . ." (*Ibid.*)

79. Oakland responds that Parents agreed to the June 3 IEP amendment placing Student in kindergarten in August; that he was therefore lawfully placed there in the first instance; and that it then had the discretion to deny Parents' September 15

[21] Kindergarten is not mandatory because compulsory attendance is not required until age 6. (Ed. Code, § 48200 [1st par.].)

request to move him to first grade by virtue of the following provision:

> A child who has been lawfully admitted to a public school kindergarten . . . and who is judged by the administration of the school district . . . to be ready for first-grade work may be admitted to the first grade at the discretion of the school administration of the district and with the consent of the child's parent or guardian if the child is at least five years of age. (Ed. Code, § 48011 [2d par.].)

80. The evidence showed that Parents agreed to the June 3 IEP amendment placing Student in kindergarten in August. It also showed that, on September 15 and later, the administration of the school district did not judge Student to be ready for first-grade work. Student's statutory argument therefore fails because Oakland had the discretion to deny Parents' request to move Student, which it did. (Ed. Code, § 48011 [2d par.].)

81. Student's statutory argument could succeed only if he discharged his burden of proving that his initial enrollment in kindergarten was unlawful. Student failed to discharge that burden. As found earlier, Parents were not misled by false information into agreeing to place Student in kindergarten; they did so freely, and never asserted that they were unaware they had the choice of initially enrolling Student in the first grade. The June 3 amendment to the September 2014 IEP clearly placed Student in kindergarten for the school year 2015-2016.[22]

[22] The conclusion that Parents agreed to the June 3 IEP amendment rests on page 1 of Student's Exhibit 15, which was authenticated by Dr. Falk and admitted at Student's request without objection. That exhibit may be used to support a finding because it supplements and explains the testimony of Parents and Ms. Anderson about the

Issue IV.B: Failure to Place Student in the Least Restrictive Environment of a General Education First Grade Classroom Rather Than in Kindergarten

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

83. Student relies heavily on *Rachel H., supra,* analogizing it to Oakland's decision to leave Student in kindergarten rather than put him in first grade. He argues that kindergarten is "restrictive" because the students there are younger than Student. But *Rachel H.* is inapplicable here. That case involved the choice between a general education classroom and a highly restrictive special day class populated only by other disabled students. This case involves a choice between two general educational classrooms having – as far as the record shows – the same mix of disabled and nondisabled students.

84. The purpose of the least restrictive environment requirement is not to

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February 12 and June 3 IEP team meetings. (Cal. Code Regs., tit. 5, § 3082, subd. (b).) In addition, viewed as hearsay, it would be admissible over objection in a civil action. (*Ibid.*) Because Parents preserved it and introduced it in evidence at hearing as being what it purports to be, it is an adoptive admission. (Evid. Code, § 1221.) It is also a party admission and an inconsistent statement. (Evid. Code, §§1220, 1235.) .

ensure that students of the same age share a classroom; it is to encourage the mixing of disabled and nondisabled students. The rule seeks to ensure that "[t]o the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled . . ." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i).) The LRE requirement can even override age differences, rather than prohibit them. In the lower court in *Rachel H., supra,* whose decision was affirmed, the school district argued that the student should be with her same-age peers in fourth grade, not with younger children in a second grade general education class. The district court rejected the argument, stating: "[I]t is not necessary that there be an exact match. Rachel is no more than two years older than the children with whom she is now placed. This age difference is not so pronounced that she is learning inappropriate behavior, or is not perceived as part of the class." (*Board of Educ. v. Holland* (E.D.Ca. 1992) 786 F.Supp. 874, 883, fn. 10.)

85. The age difference between Chabot's kindergarteners and first graders is not great. Chronologically, Student is one of the three oldest in kindergarten and would be in the middle, in age, among first graders if he were in first grade. His social and behavioral skills are at a level younger than the average kindergartner. Student has not established that age differences matter to a least restrictive environment analysis. But if they do, these age differences are "not so pronounced" (*Board of Educ. v. Holland, supra,* 786 F.Supp. at p. 883, fn. 10) that kindergarten can be characterized as a restrictive environment for the purpose of the least restrictive environment rule. Student did not prove that his continued placement in kindergarten is not in the least restrictive environment.

86. In sum, Student might have succeeded had he been elevated to first grade, but he has enjoyed considerable progress in kindergarten under Oakland's program for him.

With the single exception of its departure from the speech and language requirements

of Student's IEP's, Oakland offered and provided Student a FAPE in the least restrictive environment in kindergarten.

ORDER

1. Within 15 days of the date of this Decision, Oakland shall take all reasonable measures to ensure that Student is receiving speech and language services in conformity with his governing IEP. If this proves impossible because of the absence of a peer partner or for other reasons, Oakland shall contract for and deliver equivalent private services at its expense.

2. By June 1, 2016, Oakland shall provide to all of Student's related service providers at least one hour of training specifically directed to the legal necessity of compliance with Student's IEP and the IEP's of other students, including the instruction that if some condition or event makes compliance impossible, the providers shall promptly report that fact to their special education supervisors and to the affected parents. This training shall be at least one hour in length, and shall be presented by a special education attorney or qualified college or university professor not affiliated with Oakland.

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

PREVAILING PARTY

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

RIGHT TO APPEAL

This Amended Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this

Amended Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: April 6, 2016

/s/

CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings