

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

BONSALL UNIFIED SCHOOL DISTRICT,

OAH Case No. 2016080681

v.

PARENTS ON BEHALF OF STUDENT,

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2016070664

v.

BONSALL UNIFIED SCHOOL DISTRICT.

DECISION

Parents on behalf of Student filed a due process hearing request with the Office of Administrative Hearings on July 6, 2016, naming the Bonsall Unified School District. District responded to the complaint on August 10, 2016.¹ On August 15, 2016, District filed a due process hearing request with OAH, naming Parents on behalf of Student. On

¹ District did not file its response with OAH, but its response is in evidence in this case that established that Student received a copy. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. March 27, 2017) ___ F.3d ___, 2017 WL 1131821, 5 -6; 20 U.S.C. § 1415(c)(2)(B).)

August 19, 2016, OAH granted the parties' joint motion to consolidate and continue the two matters.

Administrative Law Judge Darrell Lepkowsky heard this matter in Bonsall, California, on January 24, 25, 26, 30, and 31, 2017, and February 1, 2, 7, 8, 9, 10, and 13, 2017.

Deborah R. G. Cesario and Jimmy D. Sanft, Attorneys at Law, appeared on behalf of District. Lori Cummins, District's Director of Student Services, attended the hearing.

Cararea C. Lucier and Helen O. Ghio, Attorneys at Law, appeared on behalf of Student. Student's mother attended the hearing. Student's father attended several hearing days. Student did not attend the hearing.

At the request of the parties, OAH continued this matter to enable the parties to file written closing arguments. The record closed and the matter was submitted on March 13, 2017, upon timely receipt of the parties' closing briefs.

ISSUES²

STUDENT'S ISSUES:

1. Did District deny Student a free appropriate public education for the 2014-2015 school year by:
 - (a) Inappropriately placing Student in a general education classroom without sufficient supports to address Student's mood disorder; anxiety; attention

² The ALJ clarified the issues at the prehearing conferences and during the hearing. The ALJ has authority to clarify a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- deficit hyperactivity disorder; pervasive developmental disorder and possible schizophrenia; or her academic needs;
- (b) Changing Student's placement from October 16, 2014, to January 20, 2015, outside the individualized education program process;³
 - (c) Failing to offer and provide appropriate behavioral supports to address Student's behaviors;
 - (d) Failing to offer and provide related services, such as specialized academic instruction for writing; intensive counseling; and occupational therapy to address self-regulation techniques, writing, and keyboarding; and
 - (e) Failing to offer an extended school year placement for summer 2015?⁴

2. Did District deny Student a FAPE for the 2015-2016 school year and extended school year by:

- (a) Inappropriately offering Student a general education classroom placement for 95 percent of the school day when Student required a more intensive placement to support her social, emotional, behavioral, and academic needs;
- (b) Failing to offer and provide appropriate goals in all areas of need, including writing; reading comprehension; and task completion;
- (c) Not making a specific, written offer of FAPE at the June 3, 2015 IEP team meeting;

³ At hearing, Student acknowledged that her complaint only alleged a failure to implement her IEPs during this specified time period during the 2014-2015 school year.

⁴ At the beginning of the hearing, Student withdrew the issue identified as 1(f) in the Order Following Prehearing Conference, which had alleged a failure to have a general education teacher at Student's October 9, 2014 IEP team meeting.

- (d) Failing to offer and provide behavioral supports to address Student's behaviors, causing her to miss instruction and suffer a loss of academic benefit; and/or
- (e) Failing to implement the designated education time, behavior strategies, and behavior intervention plan, as specified in Student's IEP?

3. Did District deny Student a FAPE for the 2015-2016 school year, by failing to provide a complete set of Student's educational records within five business days of Parents' request on May 10, 2016, which denied Parents the ability to participate in Student's IEP process and effectively monitor and enforce the IEP since that date?

4. Did District deny Student a FAPE for the 2016-2017 school year and extended school year by failing to offer Student an appropriate placement at the IEP team meetings of May 17, 2016, and June 2, 2016, which addressed her behavioral, social, sensory, mental health, and academic needs?

DISTRICT'S ISSUE:

5. Did District's May 17, 2016 IEP, completed on June 2, 2016, offer Student a FAPE in the least restrictive environment, such that District may implement it in its entirety without Parents' consent?

SUMMARY OF DECISION

Student was a young girl with serious behavior and mental health problems that impacted her education. She asserts various procedural and substantive violations against District stemming from District's attempts to address those concerns.

District frequently modified Student's educational plan in an attempt to meet Student's unique and changing needs. However, despite its good faith efforts, District denied Student certain procedural and substantive rights.

Consequently, this Decision finds that District is obligated to reimburse Student for educational expenses related to its violations.

Additionally, because District's May 17, 2016 and June 2, 2016 IEPs were procedurally and substantively deficient in some ways, District is not entitled to an order that it may implement the IEPs without Parents' consent.

FACTUAL FINDINGS

THE STUDENT

1. Student was a nine-year-old girl who resided with her parents within District's boundaries at all times relevant to this case. Student received special education and related services under the eligibility category of autism.

2. Autism is a neurodevelopment disorder generally marked by impaired social and communicative skills, "engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences."⁵

3. Student had also been diagnosed with disruptive behavior disorder, mood disorder with psychotic features, intermittent explosive disorder, bipolar disorder with psychotic features, anxiety, and attention deficit hyperactivity disorder.

4. Student began manifesting mental health issues at a young age. At three, she began having aggressive tantrums, some of which lasted over an hour. At five, Student began seeing private psychiatrists and psychologists for hallucinations. Student saw men, ghosts, or angels in her room. Student also claimed she could fly, freeze things, and other special powers. These private services continued through the date of the hearing. Student's psychiatrists and other doctors prescribed medications to address

⁵ 34 CFR §300.8(c)(1)(i) (2016); Cal. Code Regs., tit. 5, § 3030, subd. (b).

Student's aggression, mood disorders, and attention deficit, with varying degrees of success. The private therapist did not determine the specific triggers or reasons for Student's behaviors. They changed the medications when Student either had a negative reaction to them or when a medication did not appear effective. Student took medication daily as of the time of this hearing.

5. Student's behavior problems were significant at home. She directed much of her behaviors toward her brother and Mother. In 2011, Student's grandmother moved in with Student and her family to help assist Student and her family. Additionally, Parents provided Student applied behavior analysis, a behavior service, through a nonpublic agency.

6. Student started attending school in District for preschool in a special day class. She transferred to Bonsall Elementary School, her home school, for kindergarten for the 2012-2013 school year. Student demonstrated behavioral challenges soon after beginning kindergarten. Various District aides began taking observation notes of the behaviors. During an approximate one-week period from September 3 – 10, 2012, Student had several episodes of disruptive behaviors that included screaming, stomping her feet, throwing chairs, and acting aggressively toward her classmates, teacher and classroom aides. The behaviors were sometimes precipitated by Student being asked to do something she did not want to do, such as sit in a certain place, or do a non-preferred assignment such as writing something.

7. District responded to Student's behavioral challenges by changing her placement to a special day class, which would provide Student with more individualized attention. With input from Mother; school psychologist Ashly Wherry; special education teacher Ruth Haggerty; a classroom aide; and Lori Cummins, who was then principal at Bonsall Elementary School and, later, District's Director of Student Services, District also developed a behavior support plan to address Student's maladaptive behaviors.

8. The behavior support plan was successful. The plan, along with a new medication, brought Student's behaviors substantially under control. By mid-February 2013, Student was doing well in her kindergarten classroom, which Mother acknowledged in a letter to District. Student continued to have difficulty with writing assignments because it was a non-preferred activity for her. Doing any kind of written work continued to be a non-preferred activity and, sometimes, a trigger for her maladaptive behaviors through the date of this hearing.

FIRST GRADE

9. Student's IEP for first grade was dated September 4, 2013. By the time the IEP was developed, just after the start of 2013-2014 school year, Student's behavior in class had significantly improved. She could transition between activities and engage in academic work and occupational therapy with minimal redirection. On the few occasions Student had difficulty managing stress in class, she was easily redirected after being calmed down. Based on the substantial improvement in Student's behavior, her IEP team, including Parents, agreed that Student no longer required a behavior support plan.

10. The September 2013 IEP included placement in a general education classroom for 95 percent of Student's school day, with 15, 30-minute occupational therapy sessions a year. Parents consented to the IEP. Student's IEP team also agreed to change the due date of Student's annual IEP from early September, to early June, so that Student's educational program could be determined prior to the following school year.

11. Student's first grade teacher was Kelle Pato. Ms. Pato had been teaching for 12 years at the time Student began attending her class. In addition to her multiple-subject teaching credential, she had training in working with children with behavioral issues, including in classroom and behavior management. As did every teacher who

testified at the hearing, Ms. Pato presented as a dedicated, concerned, and compassionate educator.

12. Ms. Pato's classroom was highly structured, with a planned daily schedule and concrete expectations for classroom behavior and completion of assignments. Ms. Pato had a positive reward system in class as incentives for her students. She developed a strong rapport with Student. Due to the rapport, Student tried to please Ms. Pato. She did not demonstrate the maladaptive behaviors she had had at the beginning of kindergarten.

13. Student did well academically, socially, and behaviorally in Ms. Pato's classroom. She did not present with any notable fluctuations in mood, behavior or temperament. Student participated fully in classroom assignments and activities, including group projects. She had friends in class, was able to pick a partner for shared assignments, and played well with other children during recess and lunch break.

14. Student had only one significant behavior instance during first grade, when she became frustrated during a writing assignment, crumpled the worksheet, and threw it on the ground. Ms. Pato asked the special education teacher for assistance with Student on that occasion. Student did not repeat the behavior during first grade.

15. Although Student was progressing academically, socially, and behaviorally at school in first grade, her behavior at home was substantially more challenging. Mother took videos of some of Student's more extreme behaviors. For example, she recorded an incident at home on January 16, 2014. Student had a tantrum because a trash can was moved, continued the tantrum because she did not want to do her homework, laughed uncontrollably at one point, and became very aggressive and hit Mother several times.

16. Mother spoke with Ms. Pato each week, and sometimes mentioned that Student was acting out at home. However, Mother did not show Ms. Pato Student's

IEP team the videos, or told them the extent of Student's home behaviors. Mother did not tell Ms. Pato or the IEP team that Student was at times violently resistive to doing homework, and never asked for school assistance in dealing with Student's in-home behavior.

17. District was not aware during first grade that Student had any issue that impacted Student's ability to access her education. Whatever the reasons for Student's in-home behavior, it did not carry over to school. During first grade, Student continued to receive private behavioral therapy, and continued to receive private psychological and psychiatric counseling that included the prescription of medication to address Student's mental health issues that were manifesting at home.

JUNE 2014 TRIENNIAL ASSESSMENT⁶

Psycho educational Assessment

18. On June 3 and 4, 2014, District conducted a triennial assessment in preparation for Student's triennial IEP team meeting. Dr. Wherry administered the cognitive portion of the psycho educational assessment. Dr. Wherry had a bachelor's degree in psychology, a master's degree in school psychology, and a doctorate in educational psychology, as well as her pupil personnel services credential, which gave her authority to work as a school psychologist. She had worked with District since 2006. Prior to working as a school psychologist, Dr. Wherry worked as a behavioral therapist for approximately four years, providing various types of behavioral therapy to children

⁶ The terms "assessment" and "evaluation" are synonyms. Professionals conducting such tests use the terms interchangeably. For most purposes, this Decision will use the term "assessment" as that is the one used in California statutes.

on the autism spectrum, as well as training to the families and teachers of children on the spectrum.

19. Dr. Wherry reviewed Student's records; conducted observations of Student at school and during testing; interviewed Mother and Ms. Pato; and administered several standardized testing instruments as part of her assessment.

20. Dr. Wherry used the Behavioral Observation of Students in School to measure Student's academic engagement. This observational tool compared a student to his or her peers in class, and showed whether a child was engaging in the class activity either actively or passively. During this observation, Student was fully engaged in class activities. Although Student demonstrated a need to shift around in her chair, it did not interfere with her participation. Student was more actively engaged than the other children in class.

21. Dr. Wherry administered the Differential Abilities Scales – Second Edition, to assess Student's cognitive abilities. Student scored in the average range for verbal and nonverbal reasoning abilities, and working memory. She scored in the high average range in the area that assessed spatial abilities. Her overall General Conceptual Ability score of 107 was well within the average range. Student demonstrated no significant weaknesses or processing deficits.

22. Dr. Wherry administered the Behavior Assessment System for Children – Second Edition to measure Student's adaptive behaviors at home and in school. This instrument was comprised of rating scales completed by a child's teacher and parent or other caregiver. Scores in the clinically significant range suggested a high level of maladjustment in a given area. Scores in the at-risk range suggested either a significant problem that might not be severe enough to require formal intervention, or the potential of a developing problem that might need monitoring.

23. Ms. Pato completed the teacher rating scales. She scored Student as at-risk in hyperactivity, aggression, depression, attention problems, withdrawal, adaptability, social skills, and leadership. She did not score Student as clinically significant in any area. Mother scored Student as clinically significant in hyperactivity, a typicality, activities of daily living, and functional communication. Mother scored Student as at-risk in the areas of aggression, somatization, attention problems, adaptability, and social skills. The differences in their scores were indicative that many of the behaviors Student demonstrated at home were not manifesting at school.

24. Dr. Wherry administered the Autism Spectrum Rating Scales as part of her assessment. This test also consisted of rating scales, Ms. Pato and Mother completed. Their scores were indicative of Student being on the autism spectrum. Based on input from Ms. Pato and Mother, Dr. Wherry also noted in her report that Student continued to struggle to initiate new friendships and maintain relationships. Student also struggled with changes in her routine and transitions in the beginning of new school years, which affected her ability to control her behavior in class. Based on all her findings, Dr. Wherry found that Student continued to be eligible for special education under the primary condition of Autism.

25. Ms. Haggerty administered the Kaufman Tests of Educational Achievement, Second Edition, to Student to determine Student's present academic levels for the triennial assessment. The test contained subtests in reading, mathematics, written language, and oral language. Student scored in the average or above average range on every subtest covered by the Kaufman. However, her written language composite score of 89 was more than one standard deviation (15 points) lower than her score of 107 on the General Conceptual Ability on the Differential Abilities Scale assessment. Additionally, her written language composite score was 24 points lower

than her comprehensive achievement composite score of 113 on the Kaufman. This demonstrated that Student's weaknesses were in written language.

Occupational Therapy Assessment

26. James Davis, District occupational therapist, administered an occupational therapy assessment to Student as part of the triennial assessment. Mr. Davis had been an occupational therapist for almost 20 years, most of which spent providing occupational therapy assessments and services to children. Mr. Davis had provided occupational therapy to Student during kindergarten to address her needs in the area of self-regulation and to address deficits with her handwriting. Mr. Davis's assessment consisted of observations of Student during testing and in class, an interview with Ms. Pato, administration of a writing sample and a cutting test, and the administration of standardized tests.

27. During testing, Student was easily re-directed and able to finish the tests. She did not demonstrate any deficits in her gross motor skills, visual tracking skills, or visual motor skills. She had normal range of motion with her hands and with her ability to hold and use a pencil. For the writing sample, Student was required to copy two sentences from a near target model. Student's writing was appropriate for her age.

28. To determine Student's ability to experience sensation and make adaptive response to sensory information, Mr. Davis administered a testing instrument called the Sensory Profile School Companion, a checklist filled out by Ms. Pato. Student's scores demonstrated that she was more sensory seeking and more sensory avoiding than her peers. The scores also showed that she had more sensitivity to sensory information than her peers. Student's scores also demonstrated that, in the classroom, Student needed more external supports than her peers, had less awareness and attention in class than her peers, and had less tolerance for sensory input.

29. Mr. Davis also administered the Developmental Test of Visual Perception – Second Edition. This test consists of eight subtests used to determine visual perceptual skills and visual motor integration skills. Visual perception is the ability to perceive and cognitively make sense of what one sees, which is necessary for activities such as following a map. Visual motor integration is the ability to transfer a perceived visual image into a motor act, such as copying a design or producing written work.

30. The eight subtests consisted of eye-hand coordination; position in space; copying; figure-ground perception; spatial relations; visual-closure; visual-motor speed; and form constancy. Student scored in the average or high average range on each subtest except for the area of visual-closure, which is the ability to visually distinguish incomplete forms.

31. Based on the results of Mr. Davis's testing and observations, Student continued to qualify for educationally related occupational therapy to address deficits in self-regulation and sensory processing in the classroom.

JUNE 11, 2014 IEP

32. District convened a triennial IEP team meeting for Student on June 11, 2014, to develop an IEP for Student for the 2014-2015 school year, second grade.

33. The IEP team reviewed Student's present levels of performance in the areas of academics; communication; fine and gross motor development; social, emotional, and behavioral development; vocational development; and adaptive and daily living skills.

34. Student had met one of her behavioral goals and partially met the second. She had also fully met her functional writing goal.

35. Ms. Pato reviewed Student's academic progress using Student's school work, as reflected in her report cards, and the Measures of Academic Progress, a classroom-based assessment that measured reading and mathematics. Student was at

grade level in all academic areas. She was proficient in all academic and behavior areas addressed on her report card. She received scores of "excellent" for her effort in all academic and non-academic subjects taught during first grade, and scores of "satisfactory" or "excellent" in all areas of social skills and work habits. Student had learned the importance of taking responsibility for her actions, and was able to deal with change. Student was able to follow directions and understood and participated in classroom routines. Overall, Ms. Pato expected that Student would do well in second grade.

36. Mr. Davis reviewed the results of his assessment. Student's hand writing had improved. Her written work was legible and she generally self-corrected any mistakes she made in letter formation. Student followed directions in class and completed her work. She had age-appropriate daily living skills and self-help skills. However, Student continued to demonstrate some sensory issues. Mr. Davis recommended that sensory tools be used such as placing Velcro underneath Student's desk, and that accommodations for her sensory needs be permitted, such as allowing Student to move around the room during class.

37. Student's behavior in class had improved substantially from kindergarten and she had a very successful first grade year. Although she sometimes encroached upon the personal space of others, she was easily redirected. Student still demonstrated behavioral and social deficits. She needed social prompting and re-directing, did not typically seek the company of other children and struggled to keep a conversation going. The IEP team recognized that Student might have behavioral difficulty at the beginning of the school year, transitioning to second grade; however, all team members expected the difficulties to be short-lived, as Student became accustomed to her new teacher and her new classroom.

38. The IEP team developed five goals for Student, all of which were in the area of social skills. Since Student was not demonstrating any maladaptive behaviors in class and had not for most of first grade, the team did not develop a behavior goal for Student. Because Student was at grade level in all academic areas, the team did not develop any academic goals. Student was not demonstrating any resistance to doing assignments at school, and her hand writing and written work were at grade level. The team therefore did not develop any written communication goals.

39. The IEP did not include any occupational therapy goals or direct services to address Student's sensory issues, despite Mr. Davis's conclusions that Student continued to have sensory deficits. However, beginning in late August 2014, Mr. Davis continued to provide some direct occupational therapy services and occupational therapy consultation services to Student during second grade.

40. The June 11, 2014 IEP provided Student placement in a general education second grade class for 95 percent of the school day, with specialized academic instruction as needed. The IEP included the daily nutritional breaks and sensory modulation breaks that the prior IEP contained.

41. Student was at grade level academically and had made behavioral progress. She did not require extended school year services because there was no evidence that she would experience academic or behavioral regression any more than would typically developing children during the summer break.

42. Student's parents did not show the IEP team the videos Mother had taken of Student at home. They did not inform District that Student's behavior at home was sometimes out of control. They did not inform District that the applied behavior analysis therapy Student received outside of school had not been able to control the behaviors, or that Student's privately funded psychologist and psychiatrist had not been able to bring Student's in-home behavior under control. Nor did Parents inform District at this

IEP team meeting that Student's behaviors often involved resisting homework and that Mother and Grandmother had to make significant efforts to ensure that Student completed the homework. District had no indication that Student's academic or educationally related behavioral and social needs would not be met through the placement, services, and supports offered in the June 11, 2014 IEP.

SECOND GRADE: 2014-2015 SCHOOL YEAR

Student's Escalation of Maladaptive Behavior

43. Student was assigned to Lorie Reel's general education second grade class for the 2014-2015 school year. Ms. Reel met with Ms. Pato before school started. Ms. Pato informed her that she had not had any significant issues with Student during first grade. Ms. Reel also met with Dr. Wherry, Student and Mother before school started to transition Student into second grade. She gave Mother and Student a tour of her classroom so that Student would be familiar with the environment.

44. During the first few weeks of the 2014-2015 school year, Student was indistinguishable from her classmates. She had no behavior problems, participated in class, and completed assignments.

45. Student's behavior changed on September 29, 2014, five weeks after the start of the 2014-2015 school year. That morning, the class had a reading assignment that required students to answer questions. Student did not want to do the assignment. She began whining, groaning, pouting, and complained about having to do the work. She first slumped in her chair, then hit the table, fell out of her chair, got up, and began wandering around the classroom while stomping her feet. Ms. Reel had Student leave the room and stand in the hallway for a while. Student returned to class after recess, but continued her whining, groaning, pouting, complaining, and stomping of her feet when asked to do a math assignment. She did not stop until Ms. Reel told her she was going

to call school principal Diane Lillibridge, to help address Student's behavior. By the time Ms. Lillibridge arrived, Student had stopped engaging in the maladaptive behavior, was doing her work, and acting as if nothing had happened.

46. Three days later, on October 2, 2014, Student had another loss of control in class. Initially, Student did not want to finish a writing assignment from the previous day. She began complaining loudly, whining, yelled "no," "I don't want to," and "you can't make me," and refused to do the work. She began hitting the table with the flat of her hands. Ms. Reel had Student move to another desk, but Student continued yelling. Student ripped papers that were on her desk. At one point she began rolling on the floor. The other students were distracted and upset by the behavior; one little girl came over to try and soothe Student. Ms. Reel had to call for assistance from other staff. The first to arrive was vice principal Joseph Mendoza. He gave Ms. Reel permission to clear the classroom by taking the other children to an early recess. At one point, after the other students left the classroom, Student kicked the desk under which she was rolling around and broke one of the desk legs. In the meantime, Ms. Lillibridge had gone to the special day class taught by Janet Goodrich to get her to come to Student's class for more assistance. When they arrived at Ms. Reel's classroom, the room was empty except for Mr. Mendoza and Student, who was hiding behind a white board, crying. They were able to coax Student from hiding and to get her to calm down.

47. Ms. Lillibridge then took Student to another classroom so that she could calm down. Student later returned to Ms. Reel's classroom. Student did some of her assignments, but was resistant to some of the work and whimpered and cried for a portion of the afternoon. Student only calmed down fully toward the end of the school day. Ms. Reel called Mother in the afternoon after class to tell her what had happened.

48. Student's behaviors at home were much more aggressive than at school. As of the October 2, 2014 incident at school, Student behaviors outside of school

included purposefully spraining Mother's finger; kicking Mother in the head and frequently hitting her; biting Father, hitting Grandmother several times; hitting her brother in the head; and kicking the family dog. On various occasions, Student had undone her seatbelt in the family van and started moving around, forcing Mother to stop the vehicle. Student occasionally screamed and kicked and threw things while in the car. On at least one occasion, Student rolled down her window and tried to exit the moving vehicle. District was not aware of these incidents as of October 2, 2014.

49. When Student arrived home on October 2, 2014, after her loss of control at school, she immediately became very aggressive. During the course of the afternoon, she tried to stab her brother with a pencil; tried to stab her behavior therapist with a sharp object; and stabbed herself with a pencil. Student began hitting, kicking, screaming, biting, and spitting. She started a fire at the stove with paper towels. She was totally out of control.

50. Parents had previously been advised by several private mental health professionals that if Student's behavior became uncontrollable, they should hospitalize her. Therefore, in response to Student's behavior the afternoon of October 2, 2014, Parents took her to Rady Children's Hospital, where she was hospitalized for two weeks as a psychiatric patient who was a danger to herself and others. Even while hospitalized, Student exhibited out of control behavior. During one of Mother's visits, Student began tearing at the carpet, was screaming, tried to throw a chair, hit Mother hard enough to cause her pain, and threw a telephone. The outburst lasted for about 20 minutes.

51. Mother sent an email to Ms. Reel on October 3, 2014, reiterating Student's actions in class the day before, and informed Ms. Reel about Student's behavior at home. Mother also informed Ms. Reel that Student had been hospitalized. For the first time, Mother recounted the aggressive behavior Student engaged in at home. Mother also told Ms. Reel that Student's behavior in class the previous day was similar to her

behavior during kindergarten, but that the behaviors had been under control because of medication Student's doctor had prescribed for her. Mother told Ms. Reel that it appeared that the medication was no longer working, and that Student's doctors believed that Student was going to need more support than just medication.

52. In her October 3, 2014, email to Ms. Reel, Mother requested that District hold an emergency IEP team meeting to establish what supports Student was going to need to address her behavior when released from the hospital. District agreed to the request.

October 9, 2014 IEP Team Meeting

53. District convened an emergency addendum IEP team meeting on October 9, 2014. Dr. Wherry, Ms. Lillibridge, Ms. Goodrich, Mr. Mendoza, and Mr. Davis attended the meeting on behalf of District. Mother attended with a parent advocate.

54. The team members reviewed Student's October 2, 2014 behavioral incident, and her behavior at home that triggered the hospital admittance. Mother described Student's behaviors at home, that she often went days without any incidents and, without warning or an apparent trigger, could have a behavioral meltdown. Mother also conveyed that Student had recently been diagnosed by her psychiatrist with intermittent explosive disorder.

55. District team members suggested several ways to address Student's needs when she returned to school, including more sensory aides such as a weighted lap belt and a sensory diet, and additional sensory breaks during class, including taking breaks in the special education classroom if needed, or going to a sensory area within her general education classroom.

56. The team members also discussed ways to modify Student's placement to better address her needs. District team members suggested that Student spend time in Ms. Goodrich's special day classroom when she felt overwhelmed, anxious, or frustrated.

They suggested Student use a card to let Ms. Reel know if she needed to go to the special day class or the sensory area. The card would act like a pass for Student to be able to leave the classroom when she needed it. Mother agreed to the idea of having Student move between the general education classroom and the special day class on a flexible schedule to meet her needs. Student's IEP team amended her IEP to reflect those changes.

57. The team agreed that Student's resistance to written assignments was a trigger for some of her behaviors at school and at home. Mother suggested, and the rest of the IEP team agreed, that additional assessments were warranted to determine Student's needs. District agreed to administer a functional behavior assessment and assistive technology assessment to Student; to re-assess her in the areas of occupational therapy and speech and language; and to refer her for an educationally related mental health services assessment.

October 20, 2014 IEP Team Meeting

58. Student's IEP team met again on October 20, 2014, immediately after Student was discharged from the hospital. Present were Mother and Father; two parent advocates; Mr. Davis; Ms. Cummins; Ms. Reel; Ms. Goodrich; Ms. Lillibridge; Ms. Haggerty; Dr. Wherry; District counselor Lindsay Barth; and District speech and language pathologist Kristina Moore.

59. The team agreed Student required sensory breaks, sensory interventions such as a weighted lap pad, and an area in class where she could go when overly stimulated or anxious, as well as the ability to go to the special day classroom if she needed a break. The team, including Parents, agreed that Student required these program modifications pending the administration of the assessments District had agreed to conduct. As discussed at the October 9, 2014 meeting, District team members and Parents agreed that Student would have a card she would keep at her desk, which

she could use as a pass to go to the special day classroom when she needed a break. Also, Ms. Reel would have a similar card to give to Student if she felt Student needed a break.

60. Mother agreed that the approach to Student's breaks be fluid and flexible, particularly if Student was resistive to leaving the general education classroom. Nonetheless, Mother requested that, for the first week after Student's return to school, Student be required to go to the special day classroom on a scheduled basis. The IEP team agreed that Student's time away from the general education classroom would be adjusted according to her needs, until the assessments were completed and the IEP team would review Student's educational in light of the new information from the assessments.

61. The IEP team, including Parents, agreed to implement the following procedures: front loading writing activities with a sensory break; sensory items to be placed in the reading area in Ms. Reel's classroom; Student would have daily afternoon recess breaks with the special day class; there would be daily communication between District staff and Mother; social skills sessions would be implemented; Student's behavior would be documented; Student would be provided with a pass to go to the resource room (also called the Learning Center) for breaks if needed; District staff would encourage Student's general education peers to be supportive of her; and District would provide 25, 30-minute sessions of individual counseling to Student during the school year.

Student's Program Between October 16, 2014 and January 20, 2015

62. On October 20, 2014, Student returned to school after her two-week hospital stay. Ms. Goodrich and Ms. Reel initially emailed Mother each day with an update on Student's behavior in class. Mother also emailed Student's IEP team when Student had difficult times at home so that school staff would be prepared in case the

behaviors at home were repeated at school. After a few days, to make it easier to chart Student's behavior, Dr. Wherry created a behavior chart for Ms. Goodrich and Ms. Reel to fill out to document Student's daily behavior. The charts were sent to Mother, although both teachers continued to correspond through email with Mother.

63. Student continued to have behavioral challenges in class. She was off-task daily. Between October 20, 2014, and December 1, 2014, she had seven tantrums in class, ranging in severity from moderate to extreme. Her behavior included stomping her feet, pushing papers off desks, kicking at furniture, yelling, slapping staff on the behind, kicking at staff, and throwing objects. However, unlike her behavior at home, Student did not deliberately attempt to hurt peers or adults. District responded to Student's behaviors using different strategies. Ms. Reel would sometimes not require Student to do a non-preferred task. If necessary, Dr. Wherry or other staff would take Student from her classroom outside, to a school office, or to Ms. Goodrich's classroom. Student was also offered the option of using her pass card to take a break. However, asking Student to take a break would often cause her to escalate rather than decrease her behavior.

64. On December 2, 2014, Student had another serious behavior incident in her general education classroom. Student became agitated when presented with a math assignment to do in class and refused to do the work. Ms. Reel gave her the option of asking for help with the assignment or, alternatively, going to the reading area of the classroom with a book. Student took a book to read, but remained agitated. Ms. Reel sent a text message to other staff asking for assistance.

65. Mr. Mendoza and Dr. Wherry arrived a few minutes later. Dr. Wherry tried calming Student and getting her to agree to do her assignments. Student responded by becoming more agitated. She began yelling and spit in Dr. Wherry's face. Ms. Reel removed the other students from class. Ms. Lillibridge then arrived in the classroom. By

that point, Student's behaviors had escalated to the point where she was kicking furniture, throwing chairs, throwing books off shelves, banging computer keyboards, and throwing things at the school staff as she walked around the room. Student head-butted Mr. Mendoza, hit him, and hit Dr. Wherry.

66. Unable to calm Student, Dr. Wherry called 911 for assistance. District staff also called Mother. By the time law enforcement arrived, Student had calmed and was sitting under a desk. Mother arrived, picked Student up, and took Student to the emergency room at the hospital at the University of California at Los Angeles for further evaluation. Student was not hospitalized at that time, as no beds were available.

67. Dr. Wherry emailed Mother the following day, so that District could update its plan for responding to Student's needs. Mother replied the same day, asking that District change Student's placement to have her spend more time in Ms. Goodrich's classroom. District responded by an email from Ms. Goodrich to Mother the following day, outlining a new schedule for Student consistent with Mother's request. The schedule consisted of Student spending the morning in Ms. Goodrich's classroom doing academic work in math, reading, and language arts; working on the computer; spending recess with Ms. Goodrich's class; having two sensory breaks if needed; and returning to Ms. Reel's classroom before lunch, to finish the school day there. Mother agreed to the change in placement.

68. Student had only minor behavior challenges between December 4, 2014, when her schedule was re-adjusted to include more time in Ms. Goodrich's class, and December 19, 2014, when District's two-week winter break began. In each instance, Student was easily calmed and re-directed.

69. Pursuant to the IEP amendment, District began providing Student with counseling sessions.

Functional Behavior Assessment

70. Dr. Wherry conducted the functional behavior assessment of Student. She collected data by observing Student on seven days between November 5 and November 20, 2014; interviewed Student's teachers, District staff, and Mother; and reviewed Student's records.

71. At the time of the assessment, Student was taking medication, received private applied behavioral analysis therapy twice a week, and saw a private psychologist every other week. Her maladaptive behavior at home had increased initially during second grade because of increased academic demands, but had decreased after Student's medication was changed, with her tantrums decreasing to a length of about five minutes at home.

72. Between when Student returned to school from her hospitalization and when Dr. Wherry completed her report, Student had had seven behavior incidents at school in which Student could not be redirected, and involved instances of her stomping her feet, pushing papers off desks, kicking at furniture, yelling, slapping staff on the behind, kicking at staff, and throwing objects. Student was off-task in class daily, but Dr. Wherry classified it as mild because Student's off-task behavior did not last for more than a few minutes.

73. Student engaged in the behaviors most often when she was asked to do a non-preferred activity or if she perceived a task to be difficult. She least often engaged in the behavior when permitted to do a preferred activity, and therefore did not have demands placed on her. Student did not engage in disruptive behaviors at recess or lunch.

74. Dr. Wherry noted that strategies, such as offering Student a break, had not been successful. She also noted that, in addition to changes in medication being a trigger for Student's behaviors, Student also had a negative reaction to writing

assignments, particularly assignments that involved independent ideas. Dr. Wherry hypothesized that Student's behaviors were the result of her wanting to escape doing the assignments.

75. Student had no control over her behavior once she was in the throes of a tantrum. Once the behavior had started, Student would not respond to attempts to reason with her. She lost all control over her emotions and her ability to cope or self-regulate. Dr. Wherry categorized Student's behaviors as extreme. She recommended that a behavior intervention plan be developed to address the behaviors.

Speech and Language Assessment

76. Ms. Moore conducted District's speech and language assessment of Student over several days in December 2014, and January 2015. Ms. Moore worked at District for seven years before moving to another school district. She had a master's degree in communication disorders, was a licensed speech pathologist, and had her certificate of clinical competence from the American Speech-Language Hearing Association. She had assessed over 200 children during her career and had attended about the same amount of IEP team meetings.

77. Ms. Moore's assessment included observations of Student during recess and in the classroom, the administration of several standardized testing instruments, and a non-standardized language sample.

78. Ms. Moore observed Student once in Ms. Reel's classroom and once in Ms. Goodrich's classroom. During the observation in Ms. Reel's class, Student was engaged in the class activities and interacted well with peers. During the observation in Ms. Goodrich's class, Student did the reading assignments without protest and listened to her teacher. Ms. Moore also observed Student once on the playground. Student ate a sandwich, interacted with peers, including initiating interaction, and played on the playground equipment. Nothing about her behavior at recess set her apart from other

students. Neither of Student's teachers expressed any concern about Student having difficulty interacting with her peers. Ms. Moore was often in Ms. Goodrich's classroom when Student was there, as she provided therapy to other children. Ms. Moore never noticed any signs of pragmatic deficits in Student during those times.

79. Ms. Moore administered the Pragmatic Profile subtest of the Clinical Evaluation of Language Fundamentals – Fourth Edition. This subtest consisted of a checklist that both of Student's teachers and Mother filled out. The checklist measured a child's communication skills. It was not standardized but rather was based upon a total raw score. The scores on the profile indicated that, at school, Student did not demonstrate any deficits in communication skills. Conversely, Mother's responses on the profile indicated that, outside of school, Student did not always respond when asked a question and sometimes responded off-topic to a posed question. Student's teachers did not note these behaviors at school.

80. The Comprehensive Assessment of Spoken Language measured a child's expressive and receptive language as well as their abilities in syntax and pragmatic language. Pragmatic language refers to social language skills people use when interacting with others. It includes whether a person can read and understand non-verbal cues such as tone of voice and body language and underlying inferences and meanings. Difficulty with pragmatic language is common in people on the autism spectrum.

81. Student scored in the average to high average range on every subtest of the Assessment of Spoken Language. She had no deficits in either receptive or expressive language. Even in the areas addressing pragmatic language, Student's scored in the average range. Her lowest score was on the inferences subtest, where she scored a 93, well within the average range on the test, which is anywhere between 85 and 115

points. Student was able to understand inferences, non-literal speech, and pragmatic judgment.

82. Ms. Moore took a 50-word language sample of Student's speech to observe her grammatical structures in spontaneous speech and to assess her speech intelligibility. Student's speech was age appropriate. Her ability to conjugate irregular verbs in speech was in the average range.

83. Ms. Moore administered the Goldman Fristoe Test of Articulation – Second Edition. Student's articulation score was in the mid-average range. Her articulation was hampered by the fact that her two top teeth were missing at the time of this test. Nonetheless, Student was able to self-correct some of the few mispronunciations she made during the test.

84. Based upon the result of her assessment, including her observations of Student and the test results, Ms. Moore concluded that Student did not qualify for speech and language services. Student's expressive and receptive language, including articulation, was in the average to high average range. Student used grammar correctly. Student's pragmatic skills also did not demonstrate any areas of deficit. Student had friends in class, participated in conversations and activities in class and interacted with peers. During Ms. Moore's classroom observations, Student participated in class activities, followed rules, and was able to stay focused. None of Student's teachers or other District staff who interacted with Student at school noted any deficits in Student's ability to interact with others.

85. Ms. Moore's report did not contain specific recommendations. Accordingly, during the IEP team meeting convened to discuss the assessment results, Ms. Moore informed the IEP team that Student did not have any deficits, including pragmatic language deficits, which required speech and language therapy intervention.

Occupational Therapy Re-Assessment

86. Mr. Davis reassessed Student in the area of occupational therapy on December 11 and 14, 2014. His assessment consisted of observations of Student in class and during testing; interviews with Student's teachers; having Student do a writing sample; and the administration of standardized testing instruments.

87. To assess Student's motor and manual dexterity, Mr. Davis administered the Bruininks-Oseretsky Test of Motor Proficiency – Second Edition. The test contained several subtests. Student scored in the average range on the subtests measuring fine motor skills; in the high average range for manual dexterity; and in the above average range in upper limb coordination. Student's results on this test meant that she did not have any deficits in any area tested.

88. Sensory processing refers to a person's ability to experience sensation and make an adaptive response appropriate to that sensory information. Sensory processing skills help people to, among other things, maintain focus and attention and shift from one activity to another. To assess Student's sensory processing skills, Mr. Davis used the Sensory Profile School Companion. He obtained information for this test through observations of Student and by having Student's teachers complete a checklist regarding Student's behaviors at school.

89. The checklist results in scores in three areas: quadrant scores, which reflect a student's pattern of behavior in regards to registering sensory information; school factor scores, which measure a student's need for external supports, his or her awareness and attention in the classroom, the student's tolerance level of sensory input and availability for learning; and section scores, which represent the student's performance within a sensory and behavior group.

90. The checklists completed by Ms. Reel and Ms. Goodrich showed that, although there were some differences between their scores overall, there were more

similarities than differences in the two classroom settings. While the scores demonstrated that Student had a high level of awareness and attention in class, she also demonstrated atypical sensitivity to various areas of sensory information, including a demonstrated need for external support and a low level of tolerance for stimuli in the classroom setting.

91. For the writing sample, Mr. Davis had Student copy from both a near and far target model. Student was told to write on a topic of her choice. Student initially protested having to do the samples, but then reluctantly agreed to do the tasks. Her letters were haphazardly formed and did not use proper line spacing or line orientation. Compared to the writing sample Student had given when Mr. Davis had last assessed her in June 2014, the present writing sample demonstrated reduced accuracy and quality. Student's ability to produce a neat work product had decreased since the previous testing.

92. Mr. Davis's observations of Student, and information he obtained from Student's teachers, showed that Student was generally happy when engaged in preferred activities, but that her behavior could quickly escalate without provocation. During Mr. Davis's interactions with Student, she would, on occasion, go from being completely unreasonable to very engaged and happy within a few minutes. Student's teachers noted that when her behavior escalated, she could not be reasoned with. Both teachers expressed concern that Student could potentially be a safety risk to herself or to others. To avoid escalation in Student's behaviors, her teachers often permitted Student to do independent work or preferred activities to facilitate her engagement in assignments, rather than require her to do a non-preferred activity. During Mr. Davis's observations, Student sometimes wandered around the classrooms or was otherwise off-task.

93. Mr. Davis concluded that Student had a variety of sensory-related challenges, including her ability to tolerate sensory input and attend appropriately. She had movement and touch seeking behaviors, was off-task, and had avoidance behaviors, which affected her ability to be successful in class. Additionally, Student's writing skills had regressed. Mr. Davis recommended that Student receive occupational therapy to address these needs. However, Student's IEP was not amended to include those services.

Educationally Related Mental Health Services Assessment

94. District did not conduct its own educationally related mental health services assessments, nor provide educationally related mental health services, other than counseling, to its students. Rather, it contracted with outside providers for those services. District contracted with the agency North County Lifeline to conduct Student's mental health assessment and to provide Student and her parents with mental health services.

95. Licensed clinical social worker and North County Lifeline employee Sara Sligh administered a thorough and detailed mental health assessment for Student. She described her findings in a behavioral health assessment report dated January 5, 2015.⁷

96. Ms. Sligh's assessment consisted of interviews with Parents; Ms. Reel; Ms. Goodrich; and Student's private psychologist, Dr. Lily Bhattacharya. She also contacted Student's primary care physician to review Student's medical records. She reviewed Student's IEPs; her previous assessments; psychiatric records; and other school reports and records. Ms. Sligh did a mental status examination of Student; a high risk assessment; an early development and home background review; analyzed Student's mental health using the Diagnostic and Statistical Manual of Mental Disorder, Fifth

⁷ Ms. Sligh did not testify at the hearing.

Edition; conducted behavioral observations of Student; and did a trauma screening review and a high risk indicators review checklists of behaviors.

97. Ms. Sligh interviewed Mother on four occasions between October 28, 2014 and December 30, 2014, and interviewed Father once. Mother described Student's behaviors at school and at home, including that Student continued to hear voices and see things that were not there. Mother's description of Student's mental health issues and behavioral challenges tracked the descriptions she previously gave to Dr. Wherry and other IEP team members, and expressed the same concerns she had also expressed to them. Father expressed that Student did not have good coping skills for managing her emotions and behaviors, that Student continued to kick, hit, and throw objects when angry, and that Student had difficulty communicating her thoughts and feelings.

98. Ms. Sligh interviewed Ms. Reel once. Ms. Reel informed her that Student's difficulty with self-regulation had increased. The antecedent for Student's behavior was generally asking her to do work, primarily writing assignments, that Student did not want to do. Student often would complete writing assignments without a behavioral incident. Student could sometimes be redirected when Ms. Reel was firm with her, but once Student's behavior had escalated substantially, Student would not respond to prompts for redirection. Student would also refuse to take breaks when upset.

99. Ms. Sligh interviewed Dr. Bhattacharya on November 13, 2014. It was the day that Dr. Bhattacharya closed Student's case after having treated her for a year and a half. She closed the case and referred Student to another psychologist because she could not control Student's behavior during their counseling sessions. Student was disrespectful, aggressive, hit everyone, and was out of control. Dr. Bhattacharya had to restrain Student on occasion. Dr. Bhattacharya informed Ms. Sligh that she had diagnosed Student as being bipolar with psychotic features, with possible paranoid

schizophrenia and indications of a thought disorder based on Student's non-linear thinking and being oblivious to her own safety.

100. Ms. Sligh observed Student at home on three occasions. During the first two observations, Student did not demonstrate any maladaptive behaviors, although she did abruptly change activities at one point and appeared to forget what she had been doing, which evidenced that she could become distracted by her own thoughts. During the third observation, Student's behavior escalated in spite of being aware that Ms. Sligh was in the home observing her. Student's behavioral therapist was providing a therapy session. She asked Student to accompany her upstairs to play games. Student, who had been calm to that point, abruptly lost control. She kicked Mother and the behavior therapist, yelled, groaned, stomped her feet, and verbally refused to go upstairs. She did not respond to reminders of positive rewards for participating in therapy or to being given a choice of activities. After a few minutes, Student calmed down, went upstairs with her behavior therapist, but soon began yelling, kicking, and spitting at her.

101 Ms. Sligh observed Student in her general education classroom on November 12, 2014. During the first part of the observation, right before lunch time, Ms. Reel presented the class with a writing activity. Student refused to do the assignment, stating she could not do it. She stated this 26 times in a 10-minute time span. She wandered around the room and whined and groaned, but returned to her seat upon Ms. Reel's request. Seated, Student continued whining louder, slammed her paper on her desk, kept falling on the desk and slapping it, stomped her feet, pulled her hair, kicked the desk and her chair, shook the chair, and generally did not appear to be aware of anyone else in the room. Student began crying and did not appear to be trying to get her teacher's attention or help. Ms. Reel attempted to calm Student and encourage Student. The rest of the class then left for lunch, but Student refused to join,

remained in the classroom, and continued yelling and kicking her desk. Student eventually became calm and went to lunch.

102. Ms. Sligh continued her observation after the lunch break. Student was calm and attentive, on-task, and participated in the class activities during the remainder of Ms. Sligh's observation.

103. Ms. Sligh concluded that Student met diagnostic criteria for a mood disorder with mood-congruent psychotic features; depressive and manic symptoms; attention deficit hyperactivity disorder; bipolar with psychotic features; anxiety; and was on the autism spectrum.

104. Ms. Sligh applied the Child and Adolescent Level of Care Utilization System, which quantified the clinical severity and service needs of children and adolescents, in developing her recommendations to address Student's educationally related behavior and mental health needs. After assessing and applying the six areas covered by this system, Ms. Sligh determined that Student required intensive outpatient services, with supervision provided by her family, and with continued support through her private behavioral therapy services or through individual and family counseling. Ms. Sligh recommended that Student have a therapeutic support plan that addressed her needs at school. She also recommended ongoing work with Student and her family on independent living skills and coping strategies. Ms. Sligh recommended that Student continue her private behavior therapy and counseling.

105. Ms. Sligh also suggested three behavioral goals for Student. The objective for the first was for Student to build problem solving skills at home and school to improve emotional regulation and reduce or eliminate aggression toward others. The objective of the second goal was for Student to learn to express anger or other distressing emotions in a controlled, respectful verbal manner, and to use healthy physical outlets to reduce emotions at school. The object of the third goal was for

Student to increase her self-advocacy and ability to identify when it was appropriate to be assertive and self-advocate.

January 7, 2015 IEP Team Meeting

106. Student's IEP team met on January 7, 2015, to review the results of the assessments and Student's placement and services. Team members present at the meeting were Parents; Ms. Goodrich; Ms. Reel; Ms. Lillibridge; Dr. Wherry; Ms. Moore; Mr. Davis; Ms. Cummins; Ms. Sligh; District's assistive technology assessor; and Student's private behavioral therapist.

107. Ms. Sligh reviewed her educationally related mental health services assessment. The IEP team, including Parents, agreed that her recommendation for 60 minutes per week of direct mental health services, with an additional 30 minutes per week of collaboration time, was sufficient to meet Student's needs. The team, including Parents, agreed that Ms. Sligh's recommendation for 90 minutes per month of mental health services for Parents was also sufficient to meet Parents' needs, as they related to Student's behavioral and mental health concerns. The team further agreed to adopt the three behavioral goals Ms. Sligh proposed. The team amended Student's IEP to add the mental health services and goals to Student's June 11, 2014 IEP.

108. Student provided no persuasive evidence that those services and goals were not sufficient to meet her needs at that time. Student did not present an expert at hearing to address her contention that District failed to meet her behavioral needs or mental health needs. Student's psychiatrist, psychologists, and applied behavior analysis therapists did not testify at the hearing. As discussed below, Dr. Jill Weckerly, Student's expert, did not address any alleged failure by District to meet Student's mental health needs and offered no criticism of the programming, services, or goals District provided to Student.

109. Mr. Davis reviewed the occupational therapy assessment. Based upon the results of his testing, observations of Student, and interviews with her teachers, he reaffirmed the recommendations in his report that Student qualified for services to address her difficulties with self-regulation, task completion, and written communication. The team agreed that Student required occupational therapy services and that Mr. Davis would continue providing both direct and consultative services to her.

110. However, District did not memorialize the amount of occupational therapy services it was offering to Student or define the new goals as occupational therapy goals. Although not included in Student's IEP, Mr. Davis provided her occupational therapy from the January 11, 2014 IEP team meeting, to the end of the 2014-2015 school year. He met numerous times with Student's teachers to consult with them about Student's sensory issues and how to address them. He provided at least five therapy sessions to Student. He provided Student a sensory diet and sensory items like Velcro and access to a weighted lap pad. Parents were not aware of the extent of the services he provided.

111. To address Student's issues with self-regulation, verbal protesting, and task completion, the IEP team adopted the goals Ms. Sligh had proposed and also developed an additional behavioral goal. The objective of the behavioral goal was for Student to comply with directives from staff without engaging in verbal or physical protests, with up to two prompts. While Student argued that the goals were insufficient, she provided no evidence of what type of additional goals District should have developed, particularly in light of the fact that her deficits in self-regulation were inextricably interrelated to her behavioral challenges. No persuasive evidence existed that the four behavior goals adopted by the IEP team at the January 7, 2015 IEP team meeting did not adequately address those behavioral challenges.

112. The IEP team reviewed Ms. Moore's speech and language assessment. The assessment results showed that Student did not have any speech or language needs. Her articulation was understandable, and she had no expressive or receptive language deficits. The results of the testing, interviews with Student's teachers, and Ms. Moore's observations of Student demonstrated that Student had no pragmatic language needs at the time. She interacted appropriately with peers in class and on the playground, and interacted with her teachers. The IEP team therefore adopted Ms. Moore's recommendation that Student did not require speech and language therapy. However, because Student had autism, and because she had previously presented with some deficits in social skills, the IEP team agreed that Student would benefit from participation in the social skills group that the June 11, 2014 IEP previously offered. Student began participating in this group subsequent to the January 7, 2014 IEP team meeting.

113. Dr. Wherry discussed the results of her functional behavior assessment. Based upon her findings, Dr. Wherry developed a proposed behavior intervention plan to address Student's behavior challenges at school. The plan defined the behaviors impeding Student's learning and described her off-task behavior. Because of the nature and intensity of Student's behaviors Dr. Wherry determined that Student's need for a behavior intervention plan was extreme.

114. Student's escalation in behavior generally occurred when asked to do a non-preferred activity, particularly if it involved a written component. By engaging in the behaviors, Student was able to escape having to do the writing assignment or other academic task that she perceived as being too hard for her. Accordingly, Dr. Wherry developed a functionally equivalent replacement behavior goal to address the behaviors, which, as stated above, the IEP team adopted.

115. Dr. Wherry recommended strategies and reinforcement procedures for Student's teachers and counselors to address Student's behaviors and reinforce her positive behavior. Dr. Wherry recommended additional strategies during the IEP team meeting, based upon suggestions from Mother and other team members.

116. Student's IEP team adopted the behavior intervention plan as an amendment to Student's June 11, 2014 IEP. Student presented no persuasive evidence at hearing that the plan was not sufficient to meet her needs. She presented no expert testimony that the plan was based upon faulty data or failed to contain appropriate strategies to address the behaviors Student demonstrated. None of Student's private mental health or behavior providers testified at the hearing. Dr. Weckerly, Student's psychology and education expert, did not critique either Dr. Wherry's functional behavior assessment or the resulting behavior intervention plan. As discussed below, her report acknowledged that Student's behavioral difficulties were variable depending on the setting she was in. Dr. Weckerly did not make any specific recommendations for mental health services or behavioral interventions. Her recommendations were similar to what District implemented for Student.

117. Student enjoyed the time she spent in the special day class. Her escalating behaviors rarely occurred there. The IEP team, including Mother, determined that to implement the new goals and the behavior intervention plan, and to address Student's escalation in maladaptive behaviors in her general education class, Student's placement would remain 50 percent in general education and 50 percent in the special day class. This was essentially the placement that District had begun to implement in early December, per the email exchange between Mother and Ms. Goodrich. The change was formalized in an IEP amendment dated January 20, 2015.

118. District did not propose a goal to address Student's task avoidance behavior or her inability to complete written assignments, despite the difficulties she

had in these areas that had been noted by Dr. Wherry, Ms. Reel, and Ms. Goodrich, and Mr. Davis's findings that Student's written work product had regressed since June 2014.

Spring Semester 2015

119. Pursuant to the IEP amendments, Student's placement continued divided between Ms. Reel's general education classroom and Ms. Goodrich's special day classroom for the remainder of the 2014-2015 school year.

120. In mid-January 2015, District staff assessed Student using the Measures of Academic Progress. Student scored in the proficient range in both mathematics and language arts.

121. Student's behavior at school was unremarkable from January 2015 to the end of February 2015. Although she had a few episodes of verbally refusing to do work, she was easily redirected. She participated enthusiastically with Mr. Davis in occupational therapy sessions and did her class work.

122. At home, however, Student continued to have behavioral challenges. She continued to act aggressively toward her younger brother by hitting him, kicking him, throwing things at him, screaming at him and scaring him. Parents took Student to the University of California at Los Angeles hospital where Student was hospitalized for psychiatric evaluation for a week. Student returned to school on February 11, 2015.

123. On February 12, 2015, Mother requested that District convene an IEP team meeting to discuss Student's progress and goals. District convened the meeting on February 24, 2015, less than two weeks after Mother made her request.

124. The IEP team reviewed Student's progress since the January 2015 IEP team meetings. At school, Student interacted with others, was demonstrating a higher capacity to reason, and was logically weighing options presented to her. Her executive functioning skills were good as was her vocabulary. Student was doing her work in her special day class, and responded positively to the token economy reward system used

by Ms. Goodrich. In Ms. Reel's general education classroom, Student also responded positively to the reward system used there. Student was more compliant and flexible than she had previously been, even with non-preferred tasks. Student was not roaming around the classroom as she previously had, and was affirmatively asking for strategies to help with her anxiety, such as asking to manipulate putty. Student did not have any hallucinations at school.

125. Student had started complaining about parts of her body hurting when nothing had happened to cause the pain. Teachers and Mother concurred that the pains were psychosomatic. Mother requested that District refrain from sending Student home unless she was exhibiting a physical symptom such as a fever or an injury, although it later became apparent that Student might have had an adverse reaction to newly prescribed medication.

126. Since Student was progressing academically and behaviorally at school, the IEP team did not modify or develop new goals for Student, did not modify her behavior intervention plan, and did not change her placement or services.

127. Student continued to access her curriculum in Ms. Goodrich's class and in Ms. Reel's class. By early March 2015, Mother proposed increasing Student's time in general education, when both teachers believed Student was ready. By early April 2015, Student was reading independently at home and filling out the corresponding worksheet. She was reading more at school and had reached her reading goals. She was expressing more interest in doing her schoolwork and told Mother what she had written at school. Mother believed things were improving for Student.

Educationally Related Mental Health Services

128. North County assigned Tamra Chatfield, a licensed family and marriage therapist with a master's degree in clinical psychology, to provide educationally related mental health services to Student and her family. Her duties were to develop the

treatment plans for the mental health services and deliver the services to students and their families, including the implementation of behavior treatment goals. To accomplish this, Ms. Chatfield also implemented behavior goals developed by school districts for students and assist the student to meet his or her needs at school. She provided therapy in a pull-out model at school and also provided therapy in the student's home where needed. Ms. Chatfield updated her treatment plans every three months. She followed all these procedures with Student and Student's family.

129. In her sessions with Student and Mother, Ms. Chatfield incorporated play therapy and a therapy based on a program called Aim Hi. This program included introducing non-preferred activities to a child, such as homework, and providing strategies to parents to encourage students to engage in non-preferred activities. Ms. Chatfield worked on these strategies with Student and Mother at home and with Student at school. Her sessions also included modeling and reinforcing alternative communication skills. She used a token economy and rewards to get Student to participate in non-preferred activities, such as homework and written assignments. Ms. Chatfield's strategies were successful as Mother had less difficulty with Student doing homework and home reading assignments during the spring 2015 semester, and Student participated more at school in reading and writing assignments.

130. The family counseling Ms. Chatfield provided to Mother was part of wraparound services offered to families through educationally related mental health services. Ms. Chatfield told Mother that if the family needed additional help, Ms. Chatfield would assist with referrals to other resources, or recommend increasing the amount of therapy she provided. The only referral Mother requested was for Student to receive "talk therapy." Ms. Chatfield told Mother that talk therapy was meant to serve adolescents. Student was only seven years old at the time and was not a candidate for

that type of therapy. Mother never requested any other referrals and never asked for additional therapy for Student.

131. As part of her therapy services, Ms. Chatfield consulted with Student's teachers and with Dr. Wherry.

132. Student's IEP provided Mother with 90 minutes a month of family therapy. However, Ms. Chatfield was authorized to provide additional therapy if a family needed it. Mother's needs for assistance prompted Ms. Chatfield to front load the therapy she provided her. Although Mother should have only received five sessions of therapy between the time of Student's January 2015 IEPs, and the end of the 2014-2015 school year, Ms. Chatfield provided her with nine sessions, almost double what the IEP stated. By the end of the school year, Ms. Chatfield had provided Student with nine direct counseling sessions.

133. Student presented no persuasive evidence that the therapy provided to Student or Mother was insufficient to meet Student's needs. None of Student's witnesses addressed what other type of mental health services, if any, District should have provided. Nor did any of Student's witnesses address the need for any increase in the amount of time allotted for the services.

134. Ms. Chatfield completed her first quarterly treatment plan for Student in a report dated May 28, 2015. The treatment plan discussed the interventions and strategies she used with Student and her family. It also addressed Student's progress on goals. Student had made over 50 percent of progress on her goal of decreasing the intensity and frequency of her angry outbursts and aggressive behavior. By the time of Ms. Chatfield's report, Student had gone several months without any angry outbursts or aggressive behavior. Student successfully used calming strategies such as working on an iPad, deep breathing exercises, and being in Ms. Goodrich's classroom to cope with emotional dysregulation.

135. Student made similar progress on her goal of informing an adult when she felt scared, nervous, or needed a break or sensory intervention. Student had increased her communication with teachers and other staff, her family, and peers. Ms. Chatfield observed Student at school and at home, and witnessed Student's increased communication abilities and willingness to self-advocate when she was feeling bad and needed help. Student had increased her ability to complete homework to three times a week, and Ms. Chatfield was working with her to get her to complete it five times a week. Student was showing initiative in completing assignments without prompting. By May 28, 2015, Student demonstrated a decrease in somatic symptoms, attention challenges, irritation and anger, and mania.

136. Student continued to receive private applied behavioral analysis therapy, and continued to see her psychologist and psychiatrist. Mother informed Ms. Chatfield that she did not believe Student required any other interventions at that time.

137. Ms. Chatfield's normal practice was to first input information into a computer program about her sessions with a student and to indicate the student's progress on the program. She would then generate a quarterly treatment plan and report using that information. Her computer-generated information did not correspond to the May 28, 2015 quarterly treatment report she wrote for Student. The computerized information had checked off that Student had not made any progress on her goals. However, at hearing Ms. Chatfield testified that she had pressed the wrong keys when inputting the computer information. Based on her work with Student, including her observations of Student and consultation with Mother, Student's teachers, and Dr. Wherry, her conclusions were that Student had made more than 50 percent worth of progress on each of her treatment goals. Ms. Chatfield was a direct and candid witness, acknowledging when she did not have a specific recollection of facts. She no longer worked for North County Lifeline, and had no reason to have made incorrect evaluations

of Student's progress or to have engaged in hyperbole about her progress. Student provided no persuasive evidence that contradicted Ms. Chatfield's conclusions about Student's progress on her behavioral goals.

THIRD GRADE: 2015-2016 SCHOOL YEAR

June 3, 2015 IEP

138. District convened an annual IEP team meeting for Student on June 3, 2015. The IEP team was comprised of Mother; Dr. Wherry; Ms. Cummins; Ms. Goodrich; Ms. Reel; Mr. Davis; a District counselor; Ms. Chatfield; Parents' advocate; and Student's private behavioral therapist.

139. Student was at grade level in all academic subjects. Mother expressed no concern to the IEP team about Student's educational progress.

140. Student continued to have age-appropriate receptive and expressive language skills, including her ability to articulate clearly. At the time of this meeting, Student was doing well socially and behaviorally. Neither Ms. Reel nor Ms. Goodrich had observed any issues with Student's speech or pragmatic language, or any difficulty interacting with peers. She had friends in class and interacted well with others.

141. Student's fine and gross motor skills were also age appropriate. Her occupational therapy needs were primarily sensory and in the area of self-regulation, related to her behavioral challenges.

142. Student had met her IEP behavior goal. She was compliant with two to three prompts, but still protested having to do non-preferred activities and was not completing all her work. Although Student's behavior outbursts and aggression had almost been eliminated at school by the June 3, 2015 IEP team meeting, her IEP team recognized Student still needed a safe place to go where she could use sensory strategies to calm down when needed. Dr. Wherry therefore updated her behavior

intervention plan to include a goal for Student to recognize when she needed to take a break, and to ask for the break without engaging in verbal or physical protests. Student would go to a safe place, such as the reading area in her classroom, when she felt she needed to take a break. This goal was incorporated into Student's IEP.

143. The IEP team also developed a social/emotional goal. The object of the goal was for Student to demonstrate independently the ability to identify and express when she was feeling upset or anxious, and to use strategies she had been taught to calm down and self-regulate her behavior.

144. Student was successfully participating in the social skills group at school. She was applying skills learned in the group to her behavior at home. The IEP team determined Student did not require a social skills goal at that time.

145. Although Student still resisted doing written work and writing continued to be a non-preferred task that Student consistently protested doing, District did not develop goals to address these areas of deficit.

146. Student worked better when partnered with a peer. As an accommodation, the June 3, 2015 IEP permitted Student to choose to work with another student even when it was not a group assignment. Student's other accommodations were sensory breaks and access to the sensory area of her classroom as needed; access to a computer to complete writing assignments; and extended time to complete work and to turn the work in at a later time.

147. During the 2014-2015 school year, District had begun developing a new special day classroom to address the needs of students with behavioral challenges. District designated it the Intensive Behavior Intervention classroom. District developed it with Student in mind, as well as because there were other children in the district who also had behavioral needs that could be better served in a classroom with a teacher specialized in behavior intervention.

148. Student had been successful academically, behaviorally, and socially in the hybrid program her IEP team developed for the spring 2015 semester, where Student essentially spent 50 percent of her time in Ms. Goodrich's special day class and 50 percent in Ms. Reel's general education class. In spite of Student's success and its acknowledgement that Student would benefit from the new behavior intervention class, District did not offer Student full-time placement in that class or a hybrid placement with half time in general education, and half time in the behavioral intervention classroom. Instead, District offered Student placement in general education for 95 percent of her school day, with 75 minutes a week of specialized academic instruction outside of general education with a special education teacher. The IEP team discussed having Student's placement revised after the start of the 2015-2016 school year, when the general education teacher and new behavior intervention teacher could collaborate and suggest a potential new program for Student.

149. Student continued to have sensory issues and self-regulation issues. District offered Student 270 minutes of consultative occupational therapy services. There is no evidence that the IEP team discussed providing Student with direct occupational therapy services or that District intended to offer direct services. However, Mr. Davis did provide direct occupational therapy services to Student on an ad hoc basis. During the 2015-2016 school year, he had several individual sessions with Student and asked her to join several group sessions he provided to other children in Student's special day class. Student benefited from these services. She usually enjoyed the exercises Mr. Davis had students use during therapy sessions, and engaged with him and the other children during group sessions with minimal prompting.

150. District did not discuss those services at later IEP team meetings held during the 2015-2016 school year, and did not attempt to amend Student's IEP during the course of the school year to include the direct occupational therapy services. Parents

were unaware during the school year the extent to which Mr. Davis was providing the services. At Student's IEP team meeting on May 17, 2016, Mr. Davis acknowledged that Student required both direct and consultative occupational therapy services, which is why he provided her with some direct services even though not on her IEP.

151. Ms. Chatfield reviewed Student's progress on her behavior goals and shared the updates on her treatment plan for Student. Ms. Chatfield continued to provide therapy to Student and Mother throughout the 2015-2016 school year. Between September 16, 2015, and May 4, 2016, Ms. Chatfield provided Student with 29 sessions of mental health therapy. During that same period, she provided Mother with two sessions. However, Student's IEP did not reflect the therapy sessions offered to Student, the sessions offered to Mother, or the mental health goals. District recognized the error a year later at Student's next annual IEP team meeting, and included the mental health services for Student in Student's IEP, although it again neglected to include the services for Parents. Since the mental health services and all mental health goals were not written in the IEP, had Student changed school districts, the new district would not have known she required the services.

152. District did not offer Student extended school year services for summer 2015. Summer school was not necessary because Student had not demonstrated a difficulty in transitioning back to school after the summer break when school started. Her behavioral escalations in class were manifesting weeks into the school year, indicating that summer school attendance would not have had an impact on preventing or lessening the behaviors.

153. Student continued to be eligible for special education as a child with autism. Although District acknowledged that she had social/emotional deficits, and created a goal to address the deficits, it failed to offer Student continued participation in

the social skills group she had attended during the spring 2015 semester. District did not offer any type of service to address Student's social deficits.

Fall 2015 Semester

154. District assigned Student to Stephanie Tressider's⁸ third grade general education class. Ms. Tressider reviewed Student's IEP before the start of the 2015-2016 school year, including Student's goals and behavior intervention plan. She also spoke with Ms. Reel and with Angela Welch, the special education teacher hired by District for the behavior intervention classroom that school year. Ms. Tressider asked for advice from Student's prior teachers as to which strategies had worked with Student.

155. Based upon what she read in Student's IEP and behavior plan, Ms. Tressider expected Student to immediately need intensive behavioral intervention in class. However, Student initially did not present with significant behavioral issues. She sometimes would stare into space, but generally her levels of energy and anxiety were no different from the other children in Ms. Tressider's class.

156. Soon after school started, Student began having crying spells at home in the morning before school, and telling Mother she felt overwhelmed by the amount of homework she had. Mother, Dr. Wherry, and Ms. Tressider agreed to modify Student's math homework so that she only had to do half of the problems. Student's IEP was not modified to reflect this accommodation.

157. District staff maintained almost daily email communication with Mother. During September 2015, Student had no significant issues at school. She appeared happy, was accessing her curriculum, and keeping up with most of her work in class. Ms. Tressider noted daily improvements in Student's approach to school.

⁸ Ms. Tressider's name at the time of the hearing was Stephanie Sheek.

158. Student demonstrated many sensory seeking behaviors at home that did not manifest at school. She also was demonstrating more anxiety at home than at school about class assignments, and demonstrating aggressive behaviors such as spitting, kicking, hitting and growling, that she did not display at school. Mother and Ms. Chatfield asked District to hold an IEP team meeting to discuss the issues at home. District convened the meeting on October 12, 2015. Since Student sometimes responded well to positive reward systems, Ms. Tressider and Mother agreed that rewards Student earned at school could be used at home. Mother also wanted to amend Student's IEP to reflect that she would only have to do half of the assignments required of the other children. Although District put that into practice, it was not reflected on amendments to Student's IEP.

159. Student's behavior at school was unremarkable for the rest of the fall 2015 semester. She was successfully completing work and did not have any behavior issues of note. Her behavior at home improved somewhat after her medication was changed. Mother did not inform District of any escalating behavior at home during most of October 2015, and all of November and December 2015.

160. Although Student's IEP stated that she would receive 75 minutes a week of specialized academic instruction, Student did not spend much time in Ms. Welch's behavior intervention classroom during the fall semester 2015. Ms. Tressider was not aware that Student was supposed to go to Ms. Welch's classroom to receive specialized academic instruction and never sent her there for that purpose. There was no schedule for Student to go to Ms. Welch's classroom and Ms. Welch did not go to Student's general education class to push-in instruction there. Ms. Tressider believed that the purpose of Student going to Ms. Welch's class was for her to take a break when her behavior escalated in the general education classroom and she was not able to calm down. When Student did go to Ms. Welch's class, it was not for the purpose of receiving

the specialized academic instruction required by her IEP. At the time Ms. Welch was introduced to Student at the beginning of the school year, she was told by other District staff that her class would provide a "safe haven" for Student when Student was overwhelmed in Ms. Tressider's general education class. She was not told that she would be providing direct academic instruction or that Student would be in her class during a prescribed duration and frequency.

161. Ms. Welch was not informed that there were specific academic subjects she was charged with teaching to Student, not given specific lesson plans, and not told a specific time or amount of time Student would attend her class. Rather, Student would go to her class for varying amount of times, anywhere from 30 minutes to two hours. Since Student did not have many fluctuations in behavior or mood during the fall 2015 semester, Ms. Tressider did not have much occasion to send her to Ms. Welch's class to deescalate. The times that Student did go to Ms. Welch during that semester, she participated in whatever activity Ms. Welch's students were doing at the time. Ms. Welch did not really consider Student to be part of her class. The weight of the evidence is that Student did not receive specialized academic instruction from Ms. Welch during the 2015-2016 school year.

Spring 2016 Semester

162. District had a two-week winter break the last two weeks of December, 2015. Children returned to school the week of January 4, 2016. That week, Student's maladaptive and escalating behaviors resumed at school.

163. On January 7, 2016, Student hit a peer and threw class reward "dollars" at an adult interpreter. Student refused to take a break to try to use calming strategies. Student had a couple of difficult days after that, and District asked Mother to keep Student out of school on January 15, 2016. On January 28, 2016, Student tried to hit a

peer and ended up smashing another peer's fingers in a desk. District staff removed Student from the classroom and called Mother to take her home.

164. District convened an IEP team meeting for Student on January 29, 2016, to address Student's resurging aggression and escalation of behaviors in class. Mother attended, along with Dr. Wherry, Ms. Tressider, Ms. Welch, Ms. Lillibridge, and Ms. Chatfield. Most of Student's difficulties in her general education class were during what Ms. Tressider called "workshop time." Students were required to choose an academic activity and work independently. Student was very resistive to making a choice and also refused to do activities Ms. Tressider suggested.

165. Student's IEP team determined that she would benefit from increased time in Ms. Welch's behavior intervention classroom. The team developed a new schedule where Student would go to Ms. Welch's classroom briefly in the morning before reporting to her general education classroom. She would return to Ms. Welch's class three days a week for 40 minutes on Mondays, 70 minutes on Wednesdays, and 25 minutes on Thursdays. The modification in placement was a trial to see if increased time in Ms. Welch's class would have a positive effect on Student's behavior. Mother agreed to the modification.

166. On February 2, 2016, Ms. Chatfield was in Student's classroom and witnessed Student having an escalation in behavior when given a challenging computer language arts assignment to complete. School staff took Student to the office and called Mother to take her home.

167. District convened another IEP team meeting on March 8, 2016. Parents attended, as did Ms. Welch, Ms. Tressider, Ms. Lillibridge, Mr. Davis, Dr. Wherry, Ms. Chatfield, and the school vice-principal. Student's reading and writing had improved during the school year. Parents requested an aide for Student in class but the District team members did not believe Student would be as responsive to an aide as she was to

other staff with whom she was familiar. The team determined that Mr. Davis would provide visual activities for Student to use when she was agitated. The team also determined to maintain the modifications to Student's placement, and have her continue her schedule in Ms. Welch's classroom.

168. Although the March 8, 2016 IEP document noted that Student enjoyed being in Ms. Welch's classroom, Ms. Welch had a different perspective. From her observations of Student, it was clear Student clearly did not want to be in her class. Student would sometimes grunt, moan, cry, kick the legs of chairs and tables, and throw things while in Ms. Welch's class.

169. On March 10, 2016, Student's had a tantrum because she did not want to go to Ms. Welch's class as scheduled. Dr. Wherry removed Student from her class and kept Student in her office until the end of the school day.

170. Ms. Welch decided to begin collecting data in Student's general education class and in her behavior intervention class to chart Student's behaviors. She used a form to record Student's on-task and off-task behavior every 10 seconds for 20 minutes at a time. Ms. Welch did not share her observation records with other District staff or Parents.

171. On April 15, 2016, Ms. Welch took data on Student's behavior in general education for 20 minutes starting at 9:00 a.m. Student was off-task the entire 20 minutes. She refused to do her work, grunted, pouted, kicked, and stomped her feet. One of Student's IEP goals was to express her feelings and calm down. Student did neither. She refused to go to Ms. Welch's classroom or other safe place.

172. That same day, after recess, Dr. Wherry and Ms. Welch were able to convince Student to go to Ms. Welch's classroom after much prompting. Ms. Welch took another 20 minutes of behavior data on Student in her classroom starting at 10:00 a.m. Student engaged in the same behavior she had in Ms. Tressider's class earlier that

morning. She grunted, stomped her feet, screamed, and threw a puzzle to the floor. She was off-task the entire 20 minutes. Eventually, she calmed down, cleaned up what she had thrown on the floor, and began doing an arts and crafts activity.

173. On April 21, 2016, Student's school participated in state testing. Student's behavior spiraled downward in her general education classroom because she believed the testing would be too hard for her. Student began grunting, kicking the desk, and refused to leave the general education classroom to go to Ms. Welch's class. Her behavior interfered with the other children's ability to take the tests. Dr. Wherry asked Mother to pick Student up from school. Because of Student's reactions to the testing, Mother informed District that she was withdrawing consent for Student to take state testing.

174. Over the last two weeks of April, and first week of May, 2016, Ms. Welch conducted several behavioral observations of Student. Student was off-task the majority of the time. In her general education classroom, she continued to engage in agitated behavior where she stomped her feet, grunted, and kicked her desk. Ms. Tressider would either call Dr. Wherry to take Student to Ms. Welch's class, or contact Ms. Welch to take Student there.

175. On April 27, 2016, Student was taken to Ms. Welch's class so she would not disturb other students in her general education classroom while they took another state test. Student was upset about having to stay there. She screamed, stomped her feet, ripped up school work, and attempted to leave the classroom several times. Her behavior escalated and deescalated several times over a span of two hours. When she calmed down, Ms. Welch had her do a craft project. Student was directed to return to Ms. Welch's class after recess. Student initially went, but then returned to Ms. Tressider's class. She became disruptive and Ms. Welch came to escort Student back to her classroom. Student would not go. Instead, she remained outside the classroom kicking

things and protesting. She calmed down to go to lunch, and then went back to Ms. Welch's classroom.

176. Student was removed to Ms. Welch's class again on May 6 and May 9, 2016. Ms. Welch was called to take Student to her classroom. Student yelled and protested during the walk to the classroom both days, kicking poles and other things she passed. The following day, Student's disruptive behavior in Ms. Tressider's class resulted in the rest of the students being sent early to recess so that Ms. Lillibridge could calm Student.

177. As stated above, Ms. Welch's classroom was not used as a place for Student to do her core academic subjects. Although Student was supposed to be in Ms. Welch's classroom for a short time in the morning, and then for a specific short amount of times three days a week, District instead used the class as a behavior management tool for Student. District did not follow the schedule laid out at the March 8, 2016 IEP team meeting. Instead, she was sent to Ms. Welch's classroom anytime her behavior escalated in the general education classroom. Student did not get specific specialized academic instruction from Ms. Welch. Sometimes Ms. Welch would give her some math worksheets to do. Sometimes, Student worked on whatever the other children in Ms. Welch's classroom happened to be doing. If Student refused the work, Ms. Welch resorted to giving her an arts and crafts project or let her color, which were preferred activities. Parents did not have a clear picture of when Student would be in Ms. Welch's class and when she would be in Ms. Tressider's class, or what Student would be doing when in the respective classrooms because this changed on a daily basis, propelled by Student's behavior.

178. Ms. Chatfield updated her treatment plan for Student in a report dated May 4, 2016. Student had experienced a sharp increase in her outbursts at school and in her inability to deescalate her behavior. Although Student had increased her ability to

communicate her feelings with school staff, her family, peers, and with Ms. Chatfield, she continued to tantrum at times when asked to do something she did not want to do. Student's somatic symptoms, attention challenges, irritation, anger, and mania had all increased by the end of the 2015-2016 school year.

179. Although demonstrating an increase in some maladaptive behavior, by the end of the school year Student had also showed a positive increase in her ability to communicate her feelings during therapy sessions, identify her emotions, and deescalate her behavior in therapy sessions, or when Ms. Chatfield had been called by school staff to address an outburst Student was having. Ms. Chatfield had provided numerous coping techniques to Student; the challenge was getting Student to use them.

180. Student made some progress on her behavior goals, but the progress was less than during the previous reporting period. Ms. Chatfield recommended continuing Student's behavior goals and continuing the level of therapy provided to Student and Mother. Student provided no persuasive evidence that Ms. Chatfield's recommendations were inappropriate, or that District should have offered another type or amount of mental health services.

MAY 17, 2016 / JUNE 2, 2016 IEPs

Parents' Request for Student's Educational Records

181. District convened Student's annual IEP team meeting on May 17 and June 2, 2016; an addendum IEP was developed on June 6, 2016. District sent Parents a meeting notice on April 28 or 29, 2016, well in advance of the meeting.

182. On May 10, 2016, Mother made a written request to Ms. Welch for Student's records. Mother wanted to review the records to prepare for the IEP team meeting. By this time, Parents were concerned that they were "losing Student" because

of the escalation in her maladaptive behaviors. They were already contemplating removing Student from District and finding another placement for her. Mother needed the records to help her decide what would be in Student's best interest.

183. Ms. Welch did not really know what to do with the request, and did not forward it to any District administrators. Mother made a second written request on May 18, 2016. She sent the second request to all the members of Student's IEP team, including Ms. Cummins. Ms. Cummins immediately copied all the records that were in Student's file and gave them to Mother on May 20, 2016. Ms. Cummins made a copy of all the records she produced. Mother had those records in time for the IEP team meeting held on June 2, 2016.

184. District produced more than 300 pages of additional records on January 13, 2017, a week before the start of this hearing. Some were records that had been kept by teachers, and Ms. Cummins had not been aware of them. Some of the records, such as data on Student's behavior, had not been previously produced to Student. Some records were duplicates of records District had already produced. On January 18, 2017, Ms. Cummins received a box of some 500 pages of records that Ms. Goodrich, who had retired, had kept in her classroom. District did not give these additional records to Student until January 31, 2017, five days after the start of the hearing. Many of the documents were duplicates, but Student's counsel had to painstakingly go through the documents in the middle of the hearing to determine which ones District had produced previously. The records included behavioral data, IEPs, assessments, and assessment protocols.

185. Student's attorneys had to spend numerous hours reviewing the records, determining which were duplicates, in the middle of preparing for hearing and during the hearing itself. Many of the documents directly related to the issues Student had presented in her due process complaint, including the extent of Student's behavior

challenges during the course of her attendance in District. The delay in production of the records left Mother without a full picture of Student's behavioral issues during her years with District and hindered the ability of counsel to present a complete case at hearing.

May 17, 2016 IEP Team Meeting

186. The people who attended and participated at Student's May 17, 2016 IEP team meeting were: Mother; Ms. Tressider; Ms. Welch; Dr. Wherry; Mr. Davis; Ms. Chatfield; and Robin Ross, a program specialist with the San Diego County Office of Education assigned to work at District. A District speech and language pathologist attended part of the meeting. All required IEP team members were present.

187. District provided Mother with her procedural safeguards and discussed the concerns she had about Student. Mother was concerned that Student's behaviors during the last school semester were disruptive to her general education class. She also was concerned that Student's academic progress was declining. District discussed the concerns in depth with Mother and solicited her input about all aspects of Student's IEP. Mother was an active participant throughout the development of this IEP, as she had been during all aspects of Student's education.

188. The IEP team discussed Student's present levels of performance. Student was at grade level in all academic subjects, but her progress was not as good as in previous years, and she was scoring lower on state-wide testing. Student scored below basic in reading on the last administration of the Measures of Academic Progress. Student was choosing to read books below her actual reading level. She would lose interest quickly in what she was reading. She often became frustrated with long passages she had to read.

189. Mother suggested the team develop a reading comprehension goal to address these needs and the District IEP team agreed with the recommendation. District

agreed to review Student's reading comprehension needs and develop a goal to address them.

190. Student had not demonstrated any speech and language difficulties during the school year. Her expressive and receptive language skills continued to be average for her age as was her articulation. Neither of Student's teachers believed that Student had any language deficits, including in pragmatics or social skills. Student had friends in class and interacted well with her peers. However, because Student was on the autism spectrum and because of past social communication deficits, her IEP team agreed that District would re-assess Student in the area of speech and language to determine if there were deficits not easily observable without testing.

191. Mr. Davis reviewed Student's occupational therapy needs. Student's written work had improved considerably throughout the school year. She had no gross or fine motor needs. However, while Student did not seek out sensory stimulation much at school, she continued to have sensory needs. Mr. Davis tried offering Student sensory tools such as a special chair called a disco sit, but Student rejected using it. Student was more responsive to tactile materials Mr. Davis offered her to use, such as Velcro and therapy putty. Student also continued to have emotional and behavioral challenges related to her sensory needs.

192. Ms. Chatfield updated her social-emotional IEP goal for Student. The IEP team substantially adopted the goal. The object of the goal was for Student to demonstrate improved self-regulation skills by using calming strategies to deescalate when she was agitated, upset, or frustrated. The goal additionally called for Student to be able to verbally express her feelings when in an escalated emotional state with minimal verbal promptings. Student was to do this in two out of four opportunities, with her progress documented. Mr. Davis and other school staff would be responsible for

implementing the goal. Ms. Chatfield recommended a goal to address Student's safety at school, but District did not incorporate it into Student's IEP.

193. Although not on Student's June 3, 2015 IEP, Mr. Davis had provided direct occupational therapy services to her. Student had enthusiastically participated in most sessions with him, and would voice her feelings and identify her emotional state when he prompted her. Student's participation increased if presented with a preferred activity or preferred topic to discuss. Student's IEP team, including Mother, determined that Student would benefit from direct occupational therapy sessions in addition to consultative services, particularly to address her need to develop better self-regulation skills. District offered Student nine, 30-minute sessions a year. Student did not present any persuasive evidence that the amount of time offered was insufficient to address her needs.

194. As a result of the educationally related mental health services Student received, she had been able to increase her ability to identify emotions and learned new coping skills and strategies to address anxiety, frustration, and emotional escalation. However, Student was not using those skills. Ms. Tressider was often able to redirect Student when she started to become agitated but once Student's emotional state escalated, school staff had a difficult time calming Student or redirecting her behavior. Once escalated, Student would lose control and start kicking things, yelling and grunting. Student particularly reacted negatively to not being allowed to return to her general education classroom from the behavior intervention classroom when she wanted to go back, when asked to do a non-preferred academic task, or when her teacher could not give her immediate attention. The result of these behaviors was that Student's school work was not completed.

195. Student's IEP team developed two goals to address Student's difficulty completing non-preferred tasks. The first was a task completion goal. The object of the

goal was for Student to complete assigned tasks with verbal and/or visual prompts within the allotted time, with 80 percent accuracy, in four out of five trials. The goal would be measured by teacher observation and data collection. The goal was finalized at the June 2, 2016 IEP team meeting.

196. The second was a compliance goal. The object of the goal was for Student to recognize her need for a break instead of engaging in verbal or physical protests, after no more than two prompts, in three out of five trials. The goal would be measured by staff records. This goal was suggested by Ms. Chatfield in her updated treatment plan and adopted by Student's IEP team.

197. To address Student's behavioral challenges, Ms. Chatfield also updated Student's crisis management goal. The purpose of the goal was for Student to reduce the intensity and frequency of her outbursts and aggressive behaviors in all environments, inside and outside of school. Ms. Chatfield also had a protocol for staff to follow if Student could not deescalate her behavior. Her treatment plan was incorporated into Student's IEP, as were her recommendation for 60 minutes a week of mental health services. Student presented no evidence that the mental health goals or services did not meet her needs. District however, did not include in the IEP document the mental health services for Parents, which Ms. Chatfield recommended in her treatment plan.

198. Dr. Wherry also updated her behavior support plan, based on discussion with the IEP team concerning the behaviors Student demonstrated at school during the school year, what interventions had been at least partially successful, and what ones had not. Student's behavior at school and at home had improved after her medication was changed. Dr. Wherry, with input from the other IEP team members, developed environmental changes, structures, and supports with the object of removing Student's need to engage in the maladaptive behaviors. These supports consisted of cueing

Student to use the coping strategies she had learned; removing the demand of writing and then slowly re-introducing writing demands as Student worked through her anxiety; preparing Student for changes in her schedule; allowing her flexibility with homework and completing assignments and having those be done in smaller increments; and making sure Student knew that she had safe places to go in class when she felt distressed. The team also developed replacement behaviors for Student and teaching strategies to support helping Student learn to deescalate her behavior.

199. Mother fully participated in the discussion and modifications to the support plan. None of Student's witnesses or any of her documentary evidence critiqued the behavior support plan or offered recommendations regarding what other components should have been included.

200. The IEP team then discussed Student's placement. All team members agreed that Student needed to spend time in the behavior intervention classroom, in addition to time in general education.

201. The IEP team also decided that Student would benefit from extended school year attendance because she had difficulty transitioning back to school from breaks. It is unclear what the District team members were basing this decision on since Student had not had difficulty transitioning back to school either at the beginning of first grade, second grade, or third grade. Rather, her difficulty returning to school had only occurred during her third grade year after returning from the winter break. District, nonetheless, offered extended school year attendance in a special day class four hours a day, for the four-week summer session. It also offered corresponding occupational therapy and mental health services for summer session.

202. The IEP team agreed to continue the meeting so that Ms. Tressider could get a baseline for Student's reading comprehension ability and finalize her reading comprehension goal.

June 2, 2016 IEP Team Meeting

203. Student's IEP team met again on June 2, 2016, to complete her IEP. It is unclear who attended the meeting. The IEP meeting notes for that day did not identify who attended. None of District's witnesses testified as to who attended the meeting. Student recorded the meeting, but no one identified the team participants on that recording. Student contended that no general education teacher was at the meeting. There is no evidence that Parents waived the presence of a general education teacher.

204. The team had continued the meeting so that District could determine Student's reading needs and finalize its offer of placement. Student's teachers reviewed her results on the accelerated reading program used in the classroom. The teachers had also administered Student subtests of the Kaufman Test of Educational Achievement. Student's scores were all in the average range, except for her written language score, which was just below average. The team developed a reading comprehension goal to address the needs determined by the test results and Student's reading levels. The object of the goal was for Student to ask and answer questions during discussions of text she had read or topics being discussed, with the purpose of clarifying the information, with Student making at least one comment that contributed to the discussion. Student was to accomplish the goal by her next annual IEP with 80 percent accuracy in three trials, which would be measured using Student's work samples and through charts kept by her teachers.

205. The IEP team had originally determined that Student would spend 360 minutes per week, approximately one and a half hours a day, in the behavior intervention classroom, except when her general education class was having library or computer time, which Student generally enjoyed. The IEP meeting notes for the May 17, 2016 IEP team meeting indicated District's offer of placement to be 360 minutes per

week of specialized academic instruction in a separate classroom. The separate classroom would be the behavior intervention class.

206. Nonetheless, at the June 2, 2016 IEP team meeting, the IEP team discussed Student's need to spend more time in the behavior intervention classroom so that she would not see it as a punishment. Additionally, the team thought it would be more beneficial for her to spend more time in the behavior classroom to address Student's behavior needs. Mother and District team members spent considerable time discussing what Student's placement should be for the following school year.

207. Ultimately, District offered Student placement in the behavior intervention classroom for 75 percent of her school day. That amounted to 330 minutes a day. The IEP noted that Student would spend recesses and lunchtime with her general education class, which would be for 25 percent of her school day. This was a change from the discussion at the May 17, 2016 IEP team meeting. The final offer of placement was memorialized on the Offer of FAPE Services page of the May 17, 2016 IEP, as finalized on June 2, 2016. The offer was not ambiguous. District contemplated that Student's IEP would be reviewed a couple of weeks after she began the 2016-2017 school year to determine Student's needs at the time. If needed, Student's IEP team would modify her placement to have Student spend more time in general education. However, Parents never consented to this IEP so it was never implemented.

208. Mother urged District to provide an aide for Student in the general education classroom. District agreed that a support person would be necessary when and if Student's time in general education was increased to time other than recess and lunch. Mother agreed that Student did not need an aide during those times because she did not have behavioral escalations outside of the classroom. Since Student was not going to be in general education other than for recess and lunch initially upon returning to school, there was no reason to specify an aide on the IEP. Had Student's placement

changed after school began, and an aide or other support person provided, District would have been required to memorialize the change in writing.

209. Over the course of the two IEP team meetings, Mother expressed concern about Student's pragmatic language skills based on difficulties she saw at home, Student's diagnosis of autism, and the fact Student did not seem to care how her behavioral outbursts affected other children at school. Based on Mother's expressed concerns, District offered to do a speech and language assessment. Ultimately, Parents requested that District instead fund an independent speech and language assessment. As discussed below, District agreed to fund it.

210. On June 6, 2016, District amended the IEP to correct the amount of time Student would receive specialized academic instruction during the summer session. Parents only consented to the implementation of extended school year placement and services at that time. Parents did not consent to the remainder of the IEP. Student attended summer school without incident.

EVENTS SUBSEQUENT TO THE MAY 17, 2016 / JUNE 2, 2016 IEP TEAM MEETINGS

Attendance at District in August 2016

211. District's 2016-2017 school year started on August 15, 2016. Parents had not consented to District's May 17, 2016 IEP offer, so Student's June 2015 IEP was her stay put placement. Student was assigned to Ms. McNeilly's fourth grade general education classroom, with the behavior intervention classroom as her safe zone on an as-needed basis.

212. On August 17, 2016, Student refused to get into the car to go to school. She also screamed and hit Mother and Grandmother in the car. Mother emailed Ms. Ross for help, but Ms. Ross did not see the email and therefore did not respond. Mother was not able to get Student to school until 10:40 that morning.

213. On August 22, 2016, Student again refused to get into the car to go to school. However, part of Student's school refusal was based on the fact that Parents had discussed with her the possibility that she would be going to another school and had taken her to visit some private placements. Since the previous spring, Student had been telling people at school that she would eventually be transferring. She had mentally prepared for changing schools and no longer wanted to go to Bonsall Elementary.

214. Ms. McNeilly had a master's degree in education, with a specialization in special education. Her classroom was highly structured, with a specific schedule followed each day. She gave Student time limits to complete assignments, and used a positive reward system to try to have Student complete assignments. Notwithstanding Ms. McNeilly's efforts and strategies, Student only completed some of the assignments. She was sometimes verbally and physically resistant, moaning, groaning, crying, and banging or kicking her desk. When Student engaged in this behavior and Ms. McNeilly could not redirect her, even with the strategies she knew, Ms. McNeilly would send Student to the behavior intervention classroom. She did not observe Student there, but, when Student returned to her class after time in the behavior classroom, she would be calmer, would have stopped crying, and appeared to be in a completely different state of mind. Student told Ms. McNeilly that she preferred to be in the behavior classroom.

215. Thomas Farrell was the teacher for the behavior intervention classroom during the 2016-2017 school year. He was a credentialed special education teacher with prior experience teaching special needs children with behavioral challenges. Parents were not aware that he would be teaching the class during Student's IEP meetings in May and June 2016.

216. For the 2016-2017 school year, District's behavior intervention classroom had nine students in grades kindergarten through fifth grade. In addition to Mr. Farrell, there were two part-time aides and one full-time aide, so there were always at least

three adults in the classroom. One of the adults would be on the playground during breaks as well. The aides assisted in taking behavioral data on the students the full school day. Mr. Farrell would analyze the data to determine if behavior strategies were successful with each child. If not successful, he would modify the strategies.

217. The class day in Mr. Farrell's room started at 8:00 a.m. The children were allowed to choose a computer-based activity for a few minutes. After going over the calendar for the day, the children would choose an academic activity that could also be done on the computer. They then would transition to the class work centers to do an hour of academic work. Mr. Farrell would then rotate the students, with the younger children going to recess while he worked with the older children, and then vice-versa. The children had an hour of math, with a break before going to lunch. After lunch, there was a 10-minute interlude where the students picked an activity, after which the students returned to the work centers for academic assignments. The day ended with physical education and a half hour where the students could pick an activity as a reward if they had earned it with good behavior.

218. Student argued that the time spent on academics was insufficient in the behavior intervention class to have been able to address her academic needs. However, there is no persuasive evidence that the one-on-one and very small group instruction provided was not sufficient to keep Student at grade level. As discussed below, Student transferred to a non-public school with a high teacher to student ratio at the end of August 2016, where much of the class day was spent on non-academic endeavors and the time spent on academics was similar to that scheduled in Mr. Farrell's class. At the time of the hearing in this case, several of Mr. Farrell's students were at grade level. There is no persuasive evidence that Student would not have been able to maintain her academic progress and remain at grade level had Parents consented to her May 17, 2016 IEP.

219. Student was generally in Mr. Farrell's class every other day, and for not more than an hour. If Student had difficulties regulating her behavior in general education, Ms. McNeilly would call Mr. Farrell and tell him that she was sending Student to his class. On two occasions, Student initiated moving to his class because she wanted to be there.

Attendance at Arch Academy

220. Parents withdrew Student from District at the end of August 2016, and enrolled her at Arch Academy, a non-public school certified by the state of California and by the Western Association of Schools and Colleges. Arch began its school year later than did District. Parents notified District of their intent to privately place Student and to seek reimbursement for the placement in a letter dated August 26, 2016.

221. Cheryl Allcock was Head of School at Arch. She is a Licensed Clinical Social Worker. She founded Arch in 1996. California certified it as a non-public school in 2011. As of the time of the hearing, there were about 19 students enrolled, most of whom had IEPs.

222. Arch believed in teaching a concept called "mindfulness," which means to focus on the ability to pay attention without judgment to what is going on in and outside of yourself, so that one may think about a response and replace inappropriate reaction with a more skillful one. Arch incorporated meditation sessions into the school day for its students which used mindfulness techniques. Arch also believed that fitness should be a significant part of a school program. Its students swam in the ocean three days a week, returning to school at around 10:30 in the morning. The other two days they did walking activities. Student enjoyed the swimming, which addressed some of her sensory needs.

223. Although Ms. Allcock was a therapist and the school purported to offer 24 hour mental health wraparound support to families, there was no specific individual counseling offered to Student or Mother.

224. Heather Detering was Student's teacher at Arch for the 2016-2017 school year. She had a special education teaching credential and Arch's Director of Special Education. After students returned to school from their morning swimming and meditation activities, they would have academic instruction. Arch used a block approach to teaching where it would teach one subject at a time for several months but try to incorporate elements of other academic areas into that instruction. For the fall semester of 2016, Ms. Detering's class was working on a science unit that also incorporated English language arts and math. Social skills practices were incorporated into instruction as well. Ms. Detering offered Student sensory breaks on an as-needed basis. Arch did not give Student any homework to do because of her resistance to it.

225. Student was the youngest pupil at Arch, but she made friends with some of the older students and interacted well with her peers. Student's behavior at Arch was similar to what she had engaged in at District. When she first began school there, she resisted doing writing assignments. She had meltdowns, or the beginning of meltdowns. She would tear up papers, throw papers on the ground, flop down, and whine. Although the task avoidance behaviors decreased, Student had an extreme outburst in mid-January 2017. She lost control, and was hitting at people, whining, groaning, and kicking. Staff removed Student from the building to calm her down and left her outside. She did not calm down until Father came to pick her up.

226. However, overall, Student's maladaptive behaviors decreased in the school setting while at Arch, and substantially decreased at home. At school, although Student showed some regression in reading and math, she also produced written work in the form of a semester portfolio project based on the science block that the students

studied the fall semester. Student had been fully resistant to such assignments prior to attending Arch. At home, while she did have instances of outbursts, they were fewer than before, and were milder. She was no longer hitting family members, her incidence of screaming had decreased, and her family life was calmer. Student was less anxious, doing tasks without being asked to do them, and starting to read on her own.

227. Dr. Wherry and Mr. Farrell observed Student at Arch on November 14, 2016. Mr. Davis and Ms. Ross observed her there on December 1, 2016. During Dr. Wherry and Mr. Farrell's observation, Student was permitted to leave an academic activity involving writing in favor of planning a wall mural. Students were using bad language and were off-task, with no intervention from the teaching staff. There was no discernible structure to the classroom. During the observation conducted by Ms. Ross and Mr. Davis, Student was permitted to stop working on academics to join an older girl in painting a mural on the classroom wall. The painting activity required the use of ladders, and it appeared to the District staff that no Arch instructors remained in the room to supervise the students while they were on the ladders. Additionally, they noted that students were permitted to swear and use bad language without correction or consequence. There was no structure to the classroom or in the way instruction was presented. All four District staff who observed Student at Arch concurred that Arch was not an appropriate placement for her because of the lack of structure, as well as because of Arch's block academic instructional model, and the fact Student was allowed to leave uncompleted academic tasks in favor of a preferred art activity.

228. The tuition at Arch was 42,500.00 for the 2016 -2017 school year. Parents paid the tuition in full when Student enrolled. Parents also transported Student to school. The round-trip was either 82.9 miles or 75.2 miles, depending on whether they drove Student to the swimming location or directly to school on non-swim days. As of

December 2, 2016, they had spent 2,338.69 on transportation costs, based upon the Internal Revenue Service rate at the time of 54 cents per mile.

STUDENT'S EXPERTS

Janet Dudley

229. District agreed to fund an independent educational evaluation for Student in speech and language. Parents selected Janet Dudley to do the assessment.

Ms. Dudley was a licensed speech and language pathologist who earned her master's degree in speech language pathology in 1999. She was the co-founder and director of a private agency called Social Communication Specialists, which provides assessments, therapy and other services to people with social cognitive and social communication deficits. Ms. Dudley also worked part-time for a school district providing much of the same services as did her agency.

230. Ms. Dudley assessed Student in September and October 2016, although her assessment report was not finalized and presented to Parents and District until January 2017. For her assessment, Ms. Dudley observed Student at Arch; reviewed Student's 2014 speech and language and psycho educational assessments; reviewed Student's May 2016 IEP offer; and conducted several speech and language tests. She also spoke with Mother and had Mother fill out a developmental history questionnaire. Ms. Dudley did not review Student's behavior plans, prior IEPs, Ms. Sligh's mental health assessment, or Ms. Chatfield's treatment plans.

231. Mother expressed concern about Student's ability to process what others meant when talking to her, particularly when she was anxious. Mother acknowledged that Student made friends easily, although it was generally with younger children. Mother believed Student's social maturity was delayed. Finally, Mother noted that

Student was just beginning to realize that her negative behaviors had an impact on those around her.

232. During Ms. Dudley's observation of Student at Arch, Student responded to having to do a math assignment by whining, going under a table and initially refusing the assignment. She was coaxed to do it by a much older student who was working with her. After 10 minutes, Student did not want to continue doing math but wanted to do art instead. The teacher permitted her to do so. Student worked on the art project with other students. Student engaged with the group, offering them encouragement and support on the art project. At lunch, Student sat with another student at a lunch table. She was conversational with him. After finishing lunch, she watched other students play a board game. She was engaged and connected to the group for the remainder of lunch.

233. Ms. Dudley administered a test called the Test of Problem Solving – 3 to Student. It assessed a student's semantic and linguistic knowledge along with the student's reasoning ability. The test contained six subtests. Student's lowest scores were in problem solving, predicting, and determining causes, where she scored in the seventh, sixth, and fifth percentiles respectively. Student's low score in problem solving indicated she might have difficulty with reading comprehension and math word problems. Her low score in predicting indicated she might have difficulty with predicting the consequences of their actions. Her low score in determining causes indicated she might not be able to give reasons for their behaviors. Student scored in the 21st percentile in making inferences; in the 17th percentile in sequencing; and in the 45th percentile in negative questions. Student's overall composite score on this test was in the low average range.

234. The Social Language Development Test – Elementary was designed to measure a child's social language development. This test consisted of subtests in the

areas of making inferences; interpersonal negotiation; multiple interpretations; and supporting peers. Scaled scores of eight to 12 were in the average range. Student scored below eight in every area, with a low score of four in multiple interpretations. Her composite score on this test of 73 was below average. Student's scores indicated that she might struggle to identify thoughts others had about her and her behavior; might have difficulty negotiating conflicts with peers; could misinterpret nonverbal cues; and might be too critical of her peers.

235. Ms. Dudley used a task called sequencing cards to assess Student's ability to see "the big picture." Student had difficulty placing the cards in the correct order to tell the stories the cards represented. She was given three sets of cards but was only able to sequence one correctly.

236. Ms. Dudley used a testing technique called a Double Interview to determine Student's ability to shift perspective, organize her thoughts into language, and formulate questions. First, Ms. Dudley asked Student a series of questions about her school and what she liked to do for fun. Student was engaged and conversational. When Ms. Dudley switched and asked Student to ask her questions, even the same ones Ms. Dudley had asked of her, Student became uncomfortable, left her seat to sit in Mother's lap, and would not ask any questions despite encouragement from Mother and Ms. Dudley. This response indicated Student might have difficulty with taking the perspective of others, something often associated with her being on the autism spectrum.

237. Ms. Dudley also analyzed Student's social cognition using the ILAUGH Model of Social Cognition. The acronym stands for initiation; listening with one's eyes and brain; abstract and inferential language; understanding the perspective of others; getting the big picture; and, humor and human relatedness. Ms. Dudley believed that although Student initiated interactions with others, it was often in ways unexpected for a

child of her age. She felt that Student did not pick up on subtle cues and non-verbal feedback. Although Student had average expressive and receptive language, she might experience difficulty comprehending implied meanings. Ms. Dudley also felt that Student was inconsistent in her ability to form inferences about what a person might be feeling. Additionally, she felt that Student might have difficulty in social situations. Although Ms. Dudley did not observe Student use humor during her half hour observation, she did observe that Student was pleasant and friendly.

238. Ms. Dudley concluded that Student had difficulty reading situational and social cues; had a weak understanding of her own and others' emotions; had a limited ability to think through social perspective taking; had poor social problem solving skills; had poor self-awareness of how she was being perceived by others; and that Student experienced anxiety relating to how the world works and difficulty regulating her emotions.

239. Based on her conclusions, Ms. Dudley recommended that Student receive interventions in social behavior based upon the Social Thinking approach of Michelle Garcia Winter, focusing on various aspects of social communication. Although her report did not specify the amount of time Student required for these services, at hearing Ms. Dudley opined that Student required two, 30-minute sessions a week of speech and language therapy to address her pragmatic language needs.

240. Ms. Dudley's findings and recommendations concerning Student's social pragmatics needs were in line with what Ms. Pato reported about Student at the end of first grade: that Student did not typically seek the company of other children; that she struggled to keep a conversation going; that she did not notice social cues; and did not show an interest in the ideas of others. Ms. Dudley's findings also emphasized that Student was unable to see the perspective of others, which was demonstrated by the fact that Student had no awareness of the impact her outbursts and aggressive behavior

at school had on her classmates. As discussed below, Ms. Dudley's findings also comported with those of Student's psycho educational expert, Dr. Weckerly.

241. Taken in context of Student's continuing behavior challenges at school that occurred in front of classmates, her diagnosis of autism, and, as discussed below, the similar findings of Student's psycho educational expert, Ms. Dudley's finding that Student required some sort of pragmatic language and/or social skills intervention was persuasive.

Dr. Jill Weckerly

242. Parents contracted with Dr. Jill Weckerly to do a psycho educational assessment of Student. Dr. Weckerly did the assessment over four days in October 2016.

243. Dr. Weckerly had a master's degree in linguistics and two doctorate degrees, one in cognitive science and linguistics and the second in clinical psychology. She was licensed as a psychologist in California, and worked as a psychologist since 1999. She worked part time as a clinical psychologist for the mental health resource center for a school district, where she has worked since 2002. Her duties included diagnosis, assessment, and treatment of children referred to her department, as well as providing counseling to children and their families. Dr. Weckerly also maintained a private practice since 2001 providing assessments, consultation, and individual and family therapy to address a variety of mental health issues and disabling conditions. She also had served as an assistant clinical professor at the University of California at San Diego, had numerous publications, and given numerous presentations on a variety of topics related to her areas of expertise. Dr. Weckerly answered questions with deliberation and insight, acknowledging areas she had not explored or could not address. She was a thoughtful and persuasive witness.

244. Dr. Weckerly's assessment consisted of interviews with Mother and Ms. Detering; a review of Student's records, including the May 17, 2016 IEP, Student's

2014 triennial assessment, Ms. Sligh's mental health assessment, Student's behavior intervention plan; the additional assessments done in 2015; observations of Student; and the administration of various testing instruments.

245. Dr. Weckerly observed Student at Arch on October 11, 2016. When she arrived, Student was working on a science project. Student interacted with her teacher and the other students while working on the project. The class then went to lunch, where Ms. Allcock joined the students to discuss a class trip. Student did not participate much in the discussion, but listened to what was being said. When the students finished eating, they had free time to choose activities. Student cooperatively played a game with another student. Student discussed moves she was doing with another child who joined her group. Other students continued discussing the class trip and Student joined in the conversation at times. When lunch time was over, Student returned to class with her peers without incident.

246. Dr. Weckerly tested Student over the course of two days. During the first day, Student was initially cooperative, but was very fidgety, distractible, and frustrated easily. After 45 minutes, when given a task requiring her to write sentences dictated to her, Student slammed her hands on the table and threw the test booklet away. She thereafter resisted doing the tasks asked of her, even those that were not academic.

247. On the second day of testing, Student completed one task and then became frustrated, and then refused nearly every task Dr. Weckerly presented to her. Student began participating in the tasks only after Mother came into the room and remained for the rest of the testing. Mother and Dr. Weckerly had to constantly remind Student she would receive a reward if she finished the testing.

248. Student initiated conversation with Dr. Weckerly, and had no difficulty understanding questions and directions. However, Student had difficulty organizing and sequencing her thoughts and gave literal interpretations of stimulus items. She was

unable to think of a story when given a line drawing of a complex social scene and instead wrote about a current news event.

249. Dr. Weckerly administered several standardized tests to Student, which assessed a variety of domains. Student's scores were similar to those she had obtained on the similar tests District administered for Student's 2014 triennial assessment, with a couple of notable differences. Student's score in reading on the Kaufman dropped more than one standard deviation between District's 2014 testing and Dr. Weckerly's testing in October 2016, which demonstrated a significant decline in Student's reading comprehension skills.

250. Additionally, Dr. Weckerly did a much more comprehensive assessment in the area of pragmatics than District had in 2014. As with Ms. Dudley's assessment, Student's test results on Dr. Weckerly's assessment demonstrated Student had difficulty in taking cues in the social context, as well as in being able to read body language and facial expressions to translate that into language. Student demonstrated challenges in perspective taking and in executive functions, which encompassed flexibility of thinking. These challenges resulted in Student having difficulty problem solving, planning, and organizing, all of which were skills necessary to live independently.

251. Dr. Weckerly recognized that Student's autism and severe mood disorders were a difficult combination to address. The combination affected Student's cognition and self-regulation, and made her a difficult child to educate. Because of her autism, even though Student had mental health issues, Dr. Weckerly did not believe that a day treatment placement would have been appropriate for Student. Nor did many children with a similar combination of disabilities do well in general education.

252. Dr. Weckerly made several recommendations for meeting Student's educational needs. Student needed a structured, controlled, quiet learning environment to access her curriculum, including individual and small-group instruction, taught by

instructors who were experienced with children with complex needs. District's behavioral intervention classroom met those criteria.

253. Student required continuous access to counseling and interventions to help her develop coping skills. Dr. Weckerly recommended the continuation of the educationally related mental health services District offered in the May 17, 2016 IEP, along with ongoing reevaluation of Student's behavioral needs. District's continued offer of mental health services were in line with these recommendations. Dr. Weckerly did not opine that the amount of individual services District had offered were insufficient. While she felt that wraparound services could be more inclusive than what District offered, there is no evidence that Mother required more services than she was receiving. In any case, Ms. Chatfield had informed Mother that family services could and would be increased as needed. There is no evidence that Mother ever requested more services.

254. Dr. Weckerly opined that Student required social skills interventions, in line with Ms. Dudley's recommendations. Because of her autism, Student had difficulty generalizing instructions or concepts. Her ability to repeat what she was told did not mean she actually understood the nuances. District failed to offer either a social skills group or speech and language therapy in the area of pragmatics in the May 17, 2016 IEP.

255. To address Student's difficulty managing her stress, Dr. Weckerly recommended that Student be permitted to remove herself from a stressful situation to a safe place or a safe person. District had provided that to Student by having her take a break from the general education classroom and going to the behavior intervention classroom. It had also provided her with a safe place within the general education classroom. Since Student's escalation in behavior rarely occurred in the behavior classroom, there is no evidence that she would have needed another safe place to go had she been enrolled full time there.

256. Dr. Weckerly also opined that Student would need help breaking down sequences to understand cause and effect. Student also needed to have tasks broken down, and to have instructions written down. Her other recommendations included modified schedules for Student; that Student's workload and homework be decreased when she had difficulty with regulating her moods; that Student's mood and behavior at home and school be tracked through communication between home and school; and that Student's school day be shortened. District had implemented most of these recommendations during the school years at issue in this case. It continued to offer these types of accommodation in the May 17, 2016 IEP.

257. In addition to her observation of Student at Arch, Dr. Weckerly observed Mr. Farrell's behavior intervention classroom. She was complimentary about the way the class operated and about how Mr. Farrell instructed the students. Dr. Weckerly's criticism of the classroom as it related to Student was not that the classroom was inappropriate at the time the placement was offered. Rather, her concern was that it was not appropriate to have Student return to District in the middle of the school year because of Student's lack of flexibility, and because she had had so many behavior challenges the prior year and might react poorly to having to transition back to District.

258. However, Dr. Weckerly expressed the opinion that Arch was not an appropriate placement for Student. She opined that Student required a quieter setting. She also needed direct mental health services that Arch did not offer. Additionally, Student had no same-age peers at Arch, which would hamper the development of her social skills. Most importantly, Student required a structured environment, and the instructional model at Arch was too fluid and unstructured to meet that need.

259. Dr. Weckerly did not recommend a specific placement that she felt would offer Student a FAPE.

LEGAL CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁹

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 (2006)¹⁰ et seq.; Ed. Code, § 56000, et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

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

⁹Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

¹⁰ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ___ [___ S.Ct. ___, ___ L.Ed.2d ___ (2017 WL 1066260)] (*Endrew F.*), the Court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. The Court re-affirmed its earlier findings in *Rowley* that any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. The Court stated that it would not attempt to elaborate on what "appropriate" progress will look like from case to case. "It

is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." (*Id.* at 12)

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

6. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947.) "First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley, supra*, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.)

7. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in

the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*)). The Ninth Circuit has confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3 (*Park*); *Ford v. Long Beach Unified School Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.) The Ninth Circuit has also found that IDEA procedural error may be held harmless. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 652 (*M.L.*)).

ISSUE 1: 2014-2015 SCHOOL YEAR

Issues 1(a) and 1(c): Placing Student in General Education Without Sufficient Support to Address Her Unique needs; Failing to Provide Appropriate Behavioral Supports

LEGAL AUTHORITY

8. A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, communicative, physical, and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501, abrogated in part on other grounds by *Schaffer v. Weast, supra*, 546 U.S. 49, 56-58.) In addition, educational needs include functional performance. (20 U.S.C. § 1414 (d)(1)(A)(i)(I); Ed. Code § 56345, subd. (a)(1).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467 (*San Diego*)).

9. The IEP must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d

1083, 1089.) A school district is required to provide educational instruction, specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from the instruction. (*Rowley, supra*, 458 U.S. 176, 188-189; *San Diego, supra*, 93 F.3d 1458, 1468.) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *San Diego, supra*, 93 F.3d at pp. 1467-1468.)

10. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

11. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). An IEP is "a snapshot, not a retrospective." (*Ibid.*) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) However, "after-acquired evidence may shed light on the objective reasonableness of a school districts actions at the time the school district rendered its decision." (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1004 [citing *Adams, supra*, 195 F.3d at 1149].)

12. Both federal and state law requires 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 (*Rachel H.*); *Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137.)

13. In *Rachel H.*, *supra*, 14 F.3d at p. 1398, the Ninth Circuit Court of Appeal set forth four factors that must be evaluated and balanced: (1) the educational benefits of full-time placement in a regular classroom; (2) the non-academic benefits of full-time placement in a regular classroom; (3) the effects the presence of the child with a disability has on the teacher and children in a regular classroom; and (4) the cost of placing the child with a disability full-time in a regular classroom. (*Id.*, 14 F.3d at p. 1404.) In *Rachel H.* the Ninth Circuit held that an intellectually disabled student with an IQ of 44 should be placed full-time in a general education second grade class.

ANALYSIS

14. Student contends that the placement offered by District in its June 11, 2014 IEP failed to address Student's mood disorders, anxiety, attention deficit hyperactivity disorder, pervasive developmental disorder, possible schizophrenia, or her academic needs. Student contends that the general education placement District offered was inadequate because of Student's behavior challenges. She contends that District should have offered a different type of placement, although Student does not specify what that placement should have consisted. In the alternative, she asserts District should have assigned a one-on-one aide to assist Student in the classroom. District responds that the IEP was designed to meet all of Student's needs known to it at the time.

15. Student acknowledges that the June 11, 2014 IEP was developed and offered outside of the two-year statute of limitations applicable to due process proceedings. Both federal and state statutes contain a two-year statute of limitations for

special education administrative actions. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2); Ed. Code, § 56505, subd. (l).) There are only two exceptions to the statute of limitations: when the district has either misrepresented or withheld required information from the parents. (20 U.S.C. § 1415 (f)(3)(D); 34 C.F.R. § 300.511(f); Ed. Code, § 56505, subd. (l).) Common law or equitable exceptions to the statute of limitations do not apply to IDEA cases. (*D.K. v. Abington School Dist.* (3rd Cir. 2012) 696 F.3d 233, 248; *P.P. v. West Chester Area School Dist.* (E.D. Pa. 2008) 557 F.Supp.2d 648, 661-662.) Student does not allege an exception to the two-year statute.

16. However, Student contends that the two-year statute of limitations only applies to procedural aspects of an IEP, not to its substantive provisions. Therefore, she contends that whether the IEP as written prior to the statute of limitations was appropriate when Student began school in August 2014, two months after the IEP was offered by District and consented to by Parents, and within the statute of limitations, is a proper issue for this hearing.

17. Student is mistaken. Special education law does not recognize the doctrine of continuing violations as an exemption from the two-year statute of limitations. (71 Fed. Reg. 46697 (Aug. 14, 2006); *J.L. v. Ambridge Area School Dist.* (W.D. Pa. 2008) 622 F.Supp.2d 257, 268-269; *Moyer v. Long Beach Unified School Dist.* (C.D.Cal., Jan. 24, 2013, No. CV 09-04430 MMM AJWx) 2013 WL 271686; *Patrick B. v. Paradise Protective and Agricultural School, Inc.* (M.D.Pa., Aug. 6, 2012, No. 1:11-CV-00927) 2012 WL 3233036, p. 6; *Baker v. Southern York Area School Dist.* (M.D. Pa., Dec. 8, 2009, No. 1:CV-08-1741) 2009 WL 4793954, p. 5; *Evan H. v. Unionville-Chadds Ford School Dist.* (E.D. Pa., Nov. 4, 2008, No. 07-4990) 2008 WL 4791634, p.5.)

18. Student is barred from raising claims based on defects existing in the June 11, 2014 IEP, during the 2014-2015 school year, when that IEP was in effect. She

therefore cannot challenge either the procedural or substantive validity of the IEP in this case.¹¹

19. The issue therefore is whether District became aware of any changes in Student's needs after she started school for the 2014-2015 school year, but failed to respond to those needs by reassessing Student's changed circumstances and/or modifying the June 11, 2014 IEP. The law requires an IEP team to meet at least annually "to determine whether the annual goals for the pupil are being achieved, and revise the individualized education program, as appropriate, to address among other matters the following: (1) Any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate...." (Ed. Code, § 56341.1, subd. (d).) An IEP meeting must be called when the "pupil demonstrates a lack of anticipated progress." (Ed. Code, § 56343, subd. (b).)

¹¹ The Ninth Circuit's recent decision in *Avila v. Spokane School District* (9th Cir. March 30, 2017) __ F.3d __ [2017 WL 1173700] does not change this conclusion. In *Avila*, the court found that the statute of limitations requirements of § 1415(b)(6)(B) and § 1415(f)(3)(C) run backward from when parents knew or should have known about a district's violations. Here, Student has not contended that parents did not know of the violations and therefore could not have filed their due process complaint. Rather, Student argues incorrectly that the substantive portions of her IEP are not subject to the statute of limitations. Further, the Ninth Circuit has held that California's statute of limitations for IDEA cases, Education Code section 56050, subdivision (l), is two years from date of the filing of the complaint. (*M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842, 859.) California enacted its statute of limitations in 1998 (Stats.1998, ch. 691, § 45) and IDEA permits states to have their own statute of limitations. (§ 1415(f)(3)(C).)

20. Although Student had a very challenging year behaviorally in kindergarten, the behaviors did not present substantially in first grade. Other than one behavior incident where Ms. Pato needed assistance, she was able to address Student's resistance to work or other non-compliance by prompting and redirecting her. It is speculation whether this was because of the rapport Student had with Ms. Pato or because of the efficacy of the medications she was taking at the time. Whatever the reason, Student successfully navigated first grade without having significant verbal or physical outbursts because she did not want to do the work assigned. Student progressed academically and socially without an aide or other support in the classroom as a full-time general education Student. Throughout the following two years, Mother acknowledged that Student had few problems in first grade at school.

21. While Student had significant challenges at home, Parents did not inform District of the problems and the extensive efforts Mother had to make to get Student to produce her homework. Likewise, Mother did not show District staff videos she had taken of Student's excessive outbursts at home and in the family car. The child District saw at school at the end of first grade did her classwork without excessive resistance and was at grade level by the end of first grade. Ms. Pato had every expectation that Student would be similarly successful in second grade.

22. Student began second grade during the 2014-2015 school year without incident. Her behavior and presentation at school was unremarkable and she was not distinguishable from her second-grade peers. She initially attended school, did her class work, turned in homework, participated in class, and played with friends at recess and lunch. She demonstrated no need for any additional adult support in her classroom. The general education classroom without an aide was her least restrictive environment as of the time Student began school. She did not require an aide or any other behavioral supports.

23. Student's behavior changed abruptly on September 29, 2014, five weeks after the start of the 2014-2015 school year. Student had a behavioral outburst because she did not want to answer questions to a reading assignment. Student engaged in verbal protests, stomped her feet and wandered around the classroom. She did not stop until her teacher, Ms. Reel, told her that the school principal had been called.

24. Three days later, on October 2, 2014, Student had another loss of control in class because she did not want to complete an assignment. She initially verbally protested, but the verbal protests transitioned into physical protests of hitting and kicking the desk, rolling on the floor, and ripping papers. Ms. Reel had to clear the classroom. She had to call other District staff for assistance.

25. Student calmed down by the end of the school day and went home with Mother. However, her behavior escalated at home to such an extent that Parents took her to Children's Hospital for a psychiatric review. Student ultimately remained hospitalized two weeks.

26. Mother informed District the following day that Parents had to hospitalize Student. Mother also asked for District to convene an emergency IEP team meeting to discuss Student's new behavioral needs. District immediately complied with the request and convened meetings on October 9 and October 20, 2014, the later date after Student had been discharged from the hospital. Student criticizes District's actions because it was Mother rather than District who asked for the IEP team meeting. The criticism is unfounded because District was never given the opportunity to suggest the meeting as Mother requested it in the same email in which she informed District that Student had been hospitalized.

27. Over the following four months, District promptly and appropriately responded to Student's changing behavioral needs. It held an IEP team meeting within days of being informed of Student's hospitalization and held another meeting to discuss

and prepare for her transition back to school. It immediately offered to re-assess Student in several areas, to conduct a functional behavior assessment, and referred Student for an educationally related mental health services assessment. All assessments were completed within statutory timelines and District convened IEP team meetings to discuss the results of each assessment.

28. Pending the results of the assessments, particularly the functional behavior assessment and mental health assessment, District suggested modifying Student's placement by having her go to a special day classroom if her behavior escalated or she needed to take a break from general education. District developed a procedure for Student to request the break. Parents and District agreed that Student required flexibility to be able to go to the special day class on an as-needed basis. Later, Mother and Ms. Goodrich modified the IEP by agreeing to a set schedule for Student to attend the special day class, given Student's behavior needs at the time.

29. District did overreact to Student's behavior when Student had an outburst on December 2, 2014, and District called 911 to help them address Student's out of control behavior. District believed, however, that a mental health professional would be sent. Instead, a deputy showed up at school. Student believes this was an unnecessary and extreme response to the situation. However, it only occurred once, and occurred while District was waiting for the results of the assessments to determine what behavioral interventions, if any, Student required. Those circumstances are insufficient to support a finding that District failed to adequately address Student's behavioral health needs.

30. Based upon Dr. Wherry's functional behavior assessment and the results of the mental health assessments conducted by the mental health agency with which District contracted, District offered Student counseling, social skills group participation, and educationally related mental health services for Student and Parents. It also

continued Student's hybrid placement of part-time in general education and part-time in the special day class, depending on Student's behavioral needs.

31. Student presented no persuasive evidence that the hybrid placement, designed to maintain Student in general education, her then least restrictive environment, did not meet Student's needs. Student contends that the placement was inappropriate because Student was permitted to avoid doing non-preferred academic tasks like writing at times. Her behavior would escalate when asked to do an assignment and District would have her move to the special day class where she often was given something to do that she preferred, like an art project. Student's argument is not persuasive because the evidence she presented supported District's approach. Arch Academy, Parents chosen private placement for Student, similarly permitted Student to avoid non-preferred tasks as a means of either getting her to comply or getting her to deescalate her behavior.

32. More significantly, the strategies District used were similar to those recommended by Dr. Weckerly. She recommended decreasing Student's workload, decreasing homework, and allowing Student to abstain from participating in activities when she demonstrated signs of overload. Likewise, Dr. Weckerly recommended that Student be allowed to remove herself from stressful events or situations to a "safe place" or to a "safe person." This is exactly what District did by creating a hybrid classroom placement and providing Student a means to take a break from the rigors of the general education classroom. It is disingenuous for Student to argue that District failed to address her needs when what it implemented mirrored the suggestions of Student's expert.

33. Student likewise failed to meet her burden of persuasion that District's behavioral interventions during the 2014-2015 school year were not designed to meet Student's needs. First, the interventions were successful. Student did not have any

significant behavioral crises at school during the spring 2015 semester. She progressed academically, behaviorally, and socially. Ms. Chatfield provided mental health services to Student and Mother. While Student did not fully meet her behavior goals, she made significant progress on them.

34. Student offered no specific evidence or suggestions as to what District should have done differently to address her behavior needs subsequent to the assessments. Dr. Weckerly did not critique the educationally related mental health services District had provided or offered in any of Student's IEPs; her only comment on the issue was that the services should continue. Student offered no mental health expert who critiqued District's services or made recommendations as to how those services should have been augmented or modified. Student's applied behavior analysis therapist did not testify. Student's psychiatrist did not testify. None of Student's psychologists testified. There was no mental health expert who contradicted District's testimony, presented through Dr. Wherry, Ms. Chatfield, and other District staff, that District's responses to Student's behavior during the 2014-1015 school year were prompt and appropriate. Student has failed to meet her burden of proof that District's placement or behavior interventions denied her a FAPE during the 2014-2015 school year.

Issue 1(b): Changing Student's Placement Outside the IEP Process Between October 16, 2014, and January 20, 2015

35. Student contends that District improperly changed her placement after she returned to school from her hospitalization in October 2014. She contends that District failed to implement her IEP as written. District contends that any changes were made with Parents' full input and consent.

LEGAL AUTHORITY

36. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a); *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043 (*Doug C.*) [“Parental participation ... is critical to the organization of the IDEA.”].) Parental participation in the IEP process is considered “[A]mong the most important procedural safeguards.” (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882 (*Amanda J.*).

37. There is no statutory requirement that a district must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 820-822 (*Van Duyn*)). Only a *material* failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” (*Ibid.*) “[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of it, may be probative of whether there has been more than a minor shortfall in the services provided.” (*Ibid.*)

ANALYSIS

38. When Student began the 2014-2015 school year, her placement was in Ms. Reel’s general education second grade class for 95 percent of Student’s school day, with specialized academic instruction as needed. On October 9, 2014, in response to Student’s behavioral meltdown at school and her subsequent psychiatric hospitalization, Student’s IEP team met to review what had happened and discuss any changes that

needed to be made in her IEP. The team determined that Student needed to be able to leave the general education classroom when overwhelmed, anxious, or frustrated, and go to a safe place where she could calm down. The team determined that Student would take a break in the special day class. She would have a card that she could show her teacher to let the teacher know she needed to take a break. The team, with Mother's full participation, input, and consent, determined that Student could take breaks when she needed them. Therefore, there was no specific amount of time determined that Student would spend in each classroom. Flexibility was built into the program to meet Student's needs.

39. Student's IEP team met again on October 20, 2014, to plan Student's transition back to school from her hospitalization. The team, including Parents, agreed to implement the following procedures, at least until assessments were completed: front loading writing activities with a sensory break; sensory items to be placed in the reading area in Ms. Reel's classroom; Student would have daily afternoon recess breaks with the special day class; there would be daily communication between District staff and Mother; the social skills sessions would be implemented; Student's appropriate and inappropriate behavior would be documented; Student would be provided with a pass to go to the resource room (also called the Learning Center) for breaks as needed; District staff would encourage Student's general education peers to be supportive of her; and District would provide 25, 30-minute sessions of individual counseling to Student during the school year. The plan, as had been discussed at the October 9, 2014 meeting, was flexible to meet Student's needs as they arose.

40. District implemented the changes to which Mother had agreed. However, Student continued to have behavioral escalations in class. She had several incidents between the time she returned to school and the first week of December 2014. In response, Mother requested that District change Student's placement again by

increasing the amount of time Student would spend in Ms. Goodrich's special day class. District agreed to her request on December 4, 2014. Mother and Ms. Goodrich corresponded about the change and agreed to a concrete schedule where Student would spend specific times of the day and week in Ms. Goodrich's classroom, with the remainder in Ms. Reel's classroom. The agreement was in writing as it was made in email exchanges between Mother and Ms. Goodrich.

41. Under the IDEA, once an IEP is signed by the parties, it is a binding commitment that cannot be unilaterally amended by a school district. If a district seeks changes in the program, it must obtain parental consent or initiate a new IEP process by presenting a new program. The Ninth Circuit recently emphasized the importance of this in *M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. March 27, 2017) ___ F.3d ___, 2017 WL 1131821 (*M.C.*). In *M.C.*, the court found a school district committed procedural violations of the IDEA by denying the student's parents an opportunity to participate in the IEP drafting process by unilaterally revising the IEP, failing to provide a copy of the amended IEP to parents, and by failing to provide parents with an accurate offer of the services provided to the child. (*Id.*, 2017 WL 1131821, at 3-4.) Here, the facts are different because Mother was a full participant and often the instigator of the change. The change occurred after discussion between Mother and District staff. The change was memorialized in writing and Mother received written notice of the change. The changes were made with Mother's full knowledge and consent, and were part of the ongoing process of monitoring and responding to Student's needs. District did not change Student's placement outside of the IEP process during the three months alleged in this issue.

42. Nor did District fail to implement Student's IEP. Student's IEP team made modifications to her program on October 9 and October 20, 2014. District implemented those changes. On December 4, District agreed to modify Student's IEP again.

Ms. Goodrich proposed a new schedule, to which Mother consented, and District materially implemented it. There is no persuasive evidence to the contrary.

Issue 1(d): Failure to Provide Related Services

LEGAL AUTHORITY

43. Related services include speech and language services, occupational therapy services, and other services as may be required to assist a student with a disability to benefit from special education. (20 U.S.C. §1401(26)(A); 34 C.F.R. § 300.34(a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527, cert. den., 513 U.S. 965 (*Union*)). State law adopts this definition of related services. (Ed. Code, § 56363, subd. (a) & (b).) An educational agency satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities and achieve the goals of his IEP. (*Park, supra*, 464 F.3d at p. 1033.)

ANALYSIS

44. Student contends that her June 11, 2014 IEP failed to provide her with a FAPE because it did not include specialized academic instruction for writing, intensive counseling, and occupational therapy to address her need for self-regulation techniques, writing, and keyboarding. District contends it met Student's needs in all areas.

45. As stated above, Student's June 11, 2014 IEP was developed by her IEP team and offered by District outside of the statute of limitations. (*K.P. v. Salinas Union High School Dist.* (N.D. Cal. Apr. 8, 2016, Case No. 5:08-cv-03076-HRL) 2016 WL 1394377, **10-11.) Student has waived any procedural or substantive infirmities with that IEP, including the lack of related services. To the extent that Student asserts that

District failed to meet her changing needs after she started school for the 2014-2015 school year, Student has failed to meet her burden of persuasion in that regard.

46. In response to Student's significant behavioral and emotional upheavals after October 2, 2014, District substantially modified her IEP, adding a substantial amount of services. It eventually provided Student with participation a social skills group to meet her deficits in social cognition and pragmatic language.

47. At Student's October 20, 2014 IEP team meeting, the IEP team agreed to the following modifications in Student's IEP: front loading writing activities with a sensory break; sensory items to be placed in the reading area in Ms. Reel's classroom; Student would have daily afternoon recess breaks with the special day class; there would be daily communication between District staff and Mother; the social skills sessions would be implemented; Student's appropriate and inappropriate behavior would be documented; Student would be provided with a pass to go to the resource room for breaks if needed; District staff would encourage Student's general education peers to be supportive of her; and District would provide 25, 30-minute sessions of individual counseling to Student during the school year. After Student was assessed, District provided her with educationally related mental health services. As stated above, Student failed to demonstrate that those services did not provide her with a FAPE.

48. District also re-evaluated Student's need for direct occupational therapy services. Student's June 11, 2014 IEP only included consultative services. At the time, Student did not demonstrate a need for direct services. Mr. Davis's assessment results showed that she did not have any fine or gross motor needs. Student's hand-writing was legible and grade-appropriate, and she was not demonstrating any significant inability to self-regulate in class. Although she had sensory issues, her sensory needs could be met by consultation between Mr. Davis and school staff, and by the provision of sensory implements for Student to use in class.

49. Mr. Davis's re-assessment of Student painted a different picture of Student. Student still had a variety of sensory-related challenges, including her ability to tolerate sensory input and attend appropriately, but these had increased. She had movement and touch seeking behaviors, was off-task, and had avoidance behaviors, which affected her ability to be successful in class. Additionally, Student's writing skills had regressed. Mr. Davis recommended that Student receive occupational therapy to address these needs. At the January 7, 2015 IEP team meeting, District offered Student direct occupational therapy services to meet those needs.

50. Student contends that District should have offered her speech and language therapy to address her needs in pragmatic language. Student bases her argument on Ms. Dudley's October 2016 assessment results which demonstrated that Student had pragmatic language deficits. Student's argument is unpersuasive for several reasons. First, District had administered a speech and language assessment to Student in spring 2014 as part of her triennial. Student's result on that test did not show any significant pragmatic language issues. District had no reason to be aware that Student required therapy based on the results of its assessment. Ms. Dudley's assessment results a year and a half after District's testing are too remote in time to support a finding that District should have been aware that Student had a need in that area. Secondly, District recognized that Student had social skills needs based on observations by Ms. Pato of Student's peer interactions at school. District addressed those needs by offering and eventually providing Student with access to a social skills group with other girls around her age. Although Ms. Dudley's recommendation for weekly speech therapy in pragmatics by a speech language pathologist might have maximized Student's progress in pragmatic language, District was not legally required to do so. There is no persuasive evidence that participation in a weekly social skills group did not address Student's needs.

51. The related services District offered Student once it became aware of her changing needs after October 2, 2014, were sufficient to provide Student with a FAPE.

Issue 1(e): Extended School Year 2015

LEGAL AUTHORITY

52. In addition to special education instruction and services during the regular school year, school districts must provide extended school year services in the summer if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, title 5, section 3043, provides that extended school year services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Pupils to whom extended school year services must be offered under section 3043:

“ . . . shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil’s educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.”

(See also 34. C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).)

ANALYSIS

53. Student contends that District should have provided her with summer school enrollment because she has a history of difficulties transitioning back to school after school breaks. Although she did not demonstrate academic regression, Student

contends that her behavioral regression over summer should have been addressed through attendance at summer school.

54. The evidence does not support Student's contention. Student did not have significant behavioral issues in first grade. District did not offer her summer school between first and second grade. Student began second grade without incident. It was not until five weeks after school started that Student had a behavioral outburst. She had no initial difficulty transitioning to second grade.

55. Although Student demonstrated some difficulty in second grade transitioning back to school after winter break, this was not an indication that participation in summer school was warranted. As Mother told Student's IEP teams, Student developed a pattern of starting each school year successfully, but later experiencing sharp spikes in her inability to regulate or deescalate her behavior. This would start sometime before Thanksgiving and then become more significant after the winter break. Whether it was too difficult for Student to transition from holiday celebrations to the more mundane schedule at school, or because Student just could no longer maintain control after so many months, the evidence shows that Student had no difficulty transitioning from summer break to the start of school in the fall, until she started fourth grade in August 2016. Other than her difficulties in kindergarten, this was the first time Student had difficulties the first few weeks of the school year. Significantly, she had been offered summer school for summer 2016, yet still experienced the difficulties in transition when school began.

56. The fact that District had previously offered extended school year attendance, or that it offered extended school year again for summer 2016, which was based on Student's needs at that time, is not dispositive of whether Student required summer school in order to receive a FAPE. Because there is no persuasive evidence that she could not transition back to school after a summer break, or that attending summer

school decreased Student's behavioral outbursts, Student has failed to meet her burden of persuasion on this issue.

ISSUE 2: 2015-2016 SCHOOL YEAR

Issue 2(a): Suitability of Student's Placement

57. Student contends that District's offer of placement in a general education classroom for 95 percent of her school day for third grade failed to consider that Student's behavioral issues, including her resistance to written assignments, was inadequate to meet her needs. District contends that, at the time of the June 3, 2015 IEP team meeting convened to develop an IEP for Student for third grade, Student was progressing academically, behaviorally, and socially. District contends that, based on that progress, a general education classroom was Student's least restrictive environment.

58. As stated above, both federal and state law requires a school district to provide special education in the least restrictive environment appropriate to meet the child's needs. This means that a child with special needs must be placed with nondisabled peers to the maximum extent appropriate for that child, in light of that child's academic and social needs, as well as in light of the child's ability to learn in a general education classroom. Additionally, the child's impact on the learning of his or peers is a factor in determining whether the child requires a more restrictive placement.

59. District is correct that Student had made progress. However, its argument that a general education classroom was Student's least restrictive environment fails to acknowledge that the reason Student's behaviors were extinguished and that she was able to make the progress she did was due to the hybrid placement District provided. As Dr. Weckerly's assessment and recommendations demonstrate, Student required a structured environment with access to small group or individualized instruction, with

supports embedded in the classroom. District recognized that need in October 2014, when it first suggested providing Student with regular access to a special day class. It reinforced that Student needed the structure of a special day class for at least part of her day when it increased Student's time in the special day class in December 2014, developing a specific schedule for Student to move between the two classes. The schedule provided Student the structure and consistency that she required.

60. By Student's June 2015 IEP team meeting, District had three years educating her. Her kindergarten year had been fraught with challenges as her behaviors had spiraled out of control, only decreasing when Student was given a behavior support plan and taken out of full-time general education instruction. Because of her successes by the end of her kindergarten year, District placed Student in general education for first grade. It was a successful placement, and District offered a similar placement for second grade.

61. However, Student was not successful in a general education placement in second grade. The behaviors she had presented in kindergarten resurfaced. It was not until District developed a concrete program that split Student's time between general education and special education with a consistent schedule that Student's behavior deescalated. Based on Student's prior history, and on the escalation of her behaviors in second grade that had only diminished after she was placed in a special education class for half of the school day, District should have been aware, at the time of the June 2015 IEP team meeting, that an almost full-time placement in general education was not Student's least restrictive environment.

62. District pointed to the success Student had the first few months of third grade to support that it was correct in offering Student a general education placement at the time of the June 2015 IEP team meeting. However, the inquiry as to whether an IEP offer was appropriate is based on what a school district knew at the time the offer

was made, not on how well or how poorly a student subsequently did in the placement. (*Adams, supra*, 195 F.3d at p. 1149). Here, at the time District developed the IEP, Student's academic and behavioral progress had been dependent on her spending part of her day in a structured special day class with a consistent schedule. Additionally, District knew at the time of this IEP that Student's pattern was to have few challenges in the first weeks or months of school, after which her behavior would deteriorate.

63. Further, Student's behavioral deterioration after returning from winter break in January 2016 required District to again modify her placement and programming. Student again began engaging in cycles of tantrums where she would verbally resist doing non-preferred schoolwork by grunting, moaning, yelling, whining, and crying. The verbal resistance would segue into physical resistance and aggression of stomping her feet, slamming her hands on desks, kicking things, tearing up papers, and throwing the papers on the ground. If taken outside, Student would kick things there as well. District responded to these behaviors by doing what it had the prior year: developing a hybrid program where Student spent part of her day in special education and part of her day in District's new behavior intervention classroom. While District properly changed Student's program when her behaviors resurfaced, Student's position that, by January 2016, District was reacting to her behavior rather than proactively maintaining her in an appropriate placement is well-taken. Had District followed the formula of creating consistent attendance in the special day class that had been successful in second grade, it is likely that Student's behavior would not have escalated as it did by the middle of third grade.

64. For these reasons, Student met her burden of persuasion that District denied her a FAPE in her June 2015 IEP by offering her a placement in a general education classroom for 95 percent of her school day rather than in a more restrictive environment.

Issues 2(b): Failure to Develop Goals in All Areas of Need

LEGAL AUTHORITY

65. Federal and State law specify in detail what an IEP must contain. Among other things, it must include a statement of the student's present levels of academic achievement and functional performance, including the manner in which the student's disability affects his involvement and progress in the general education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general education curriculum; and (2) meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).)

66. The IEP team is charged with developing measurable annual goals that address the student's areas of need and which the student has a reasonable chance of attaining within a year. (*Letter to Butler* (OSERS Mar. 25, 1988) 213 IDELR 118; U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12406, 12471 (1999 regulations).) The purpose of goals is to assist the IEP team in determining whether the student is making progress in an area of need. As such, the IEP must also contain a statement of how the student's goals will be measured and when the parent will receive periodic reports on the student's progress towards his goals. (20 U.S.C. § 1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).)

ANALYSIS

67. Student's June 3, 2015 IEP contained only two goals: recognizing her need to take a break, and independently identifying and expressing how she was feeling. Although Student contends that the first goal was not appropriate because Student did

not have the capacity to recognize independently this need, the evidence is to the contrary. Student was successful at times indicating to her teachers that she wanted or needed a break, either to a safe area within the classroom, or by leaving general education for the behavior intervention classroom. The mental health services Ms. Chatfield provided included working with Student on learning strategies to achieve both goals in the IEP.

68. However, Student's contention that the two goals were insufficient to address all of her unique needs is supported by the evidence. By the time of the June 3, 2015 IEP team meeting, District's IEP team recognized that Student was highly resistant to doing schoolwork that involved any type of writing assignment. Writing was a non-preferred task and being asked to do a writing assignment was one of the primary triggers of the escalations in Student's behavior. Dr. Wherry's functional behavior assessment found that to be true, as did Ms. Sligh's mental health assessment, Ms. Chatfield's treatment plans, and, later, Dr. Weckerly's assessment. All of Student's IEPs since first grade documented this resistance as well, which had become more apparent as Student grew older and school work became more demanding. Yet, District failed to develop a goal that either focused on Student's resistance to writing or focused generally on teaching Student to complete non-preferred tasks.

69. The failure to develop goals in all areas of unique needs is a procedural violation. Therefore, to prove that she was denied a FAPE by District's failure to develop a goal to address Student's resistance to writing, Student must show that the failure impeded her right to a FAPE, significantly impeded her Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to her, or caused her deprivation of educational benefits.

70. In this case, Student has met that burden. The failure to provide her with a goal to decrease her resistance to writing and/or to learn to complete tasks without her

verbal and physical outbursts resulted in a continuance of that behavior. This was most apparent during the spring of 2016, when Student had numerous behavioral outbursts because she did not want to do written work. As a result of many of the behaviors, District removed Student from class, sent her to the behavior intervention classroom, or called Mother to pick her up and take her home. Student lost instruction time because she did not have the tools to become engaged in her work.

71. Student also contends that District should have written goals in the area of reading comprehension and pragmatic language. There is no persuasive evidence that Student required goals in the area of reading comprehension at the time of the June 3, 2015 IEP team meeting because she was at grade level in reading. However, the evidence does support Student's contention that she required a goal in pragmatics or social skills. All four of her IEP goals the previous year addressed Student's social skills deficits. While Student had friends and interacted well with peers on the playground, she continued to have considerable difficulty engaging in behavior in the presence of peers that was socially acceptable. Student had no understanding of how her verbally and physically aggressive behavior in class upset her peers and disrupted their learning. She also continued to have difficulty expressing her emotions and forestalling her outbursts. Student was on the autism spectrum and qualified for special education solely under that classification. As Dr. Weckerly testified, Student's mental health issues and autism were interrelated and both needed to be addressed. For these reasons, Dr. Weckerly and Ms. Dudley's opinions that Student required pragmatic or social skills goals were more persuasive than the opinions of District staff that Student's ability to make friends meant that she did not continue to require goals in those areas.

Issue 2(c): Failure to Make a Specific Offer of FAPE

LEGAL AUTHORITY

72. A district must also make a formal, written offer in the IEP that clearly identifies the proposed program. (*Union, supra*, 15 F.3d at p.1526.) This must include a statement of the special education and related services, and supplementary aids and services, including program modifications or supports, designed to address a child's unique needs. (Ed. Code, § 56345.) In *Union*, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. (*Ibid.*)

73. In *Union*, the school district believed that a specific placement was appropriate for the student in the case. However, it had never made a specific offer of that placement because it believed that the student's parents would never agree to it. The Ninth Circuit found that school districts are required to make specific written offers of placement in a student's IEP and that failure to do so is not just a technical violation:

We find that this formal requirement has an important purpose that is not merely technical, and we therefore believe it should be enforced rigorously. The requirement of a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes many years later about when placements were offered, what placements were offered, and what additional educational assistance was offered to supplement a placement, if any. Furthermore, a formal, specific offer from a school district will greatly assist parents in "present[ing] complaints with respect to any

matter relating to the ... educational placement of the child." 20 U.S.C. § 1415(b)(1)(E).

(*Union, supra*, 15 F.3d. at p. 1526.)

74. As stated above, in *M.C., supra*, the Ninth Circuit reiterated and re-emphasized the importance it places on a district clearly defining what exactly it is offering a child in the IEP. In *M.C.*, the school district made an error on the student's IEP by misstating the amount of services it had agreed to provide. Rather than state that the services would be provided at a rate of 240 minutes per week, the IEP stated that the services would be provided 240 minutes a month. The district realized the mistake and corrected the IEP document to reflect the weekly amount of services. It thereafter provided the services on a weekly basis, but provided more than the 240 minutes indicated in the corrected IEP. However, the district failed to notify the student's parents of the error or the correction it had made, and failed to provide a corrected copy of the IEP to them. The Ninth Circuit, citing to *Union*, found that parents had to be able to use their child's IEP to monitor and enforce the services that their child was supposed to receive. The court found that when a parent is unaware of the services the district has offered, and therefore cannot monitor how the services are provided, there is a denial of FAPE, whether or not the parent had ample opportunity to participate in the process of developing the IEP. (*M.C., supra*, 2017 WL 1131821 at 4 .)

ANALYSIS

75. Student contends that District failed to make a specific, written offer of FAPE in the June 3, 2015 IEP, because although the IEP services page states that Student would be in a general education placement 95 percent of the time, the IEP notes state that the special education teacher and general education teacher would collaborate and develop an appropriate schedule the following school year. However, the statement in

the notes is merely an indication that Student's IEP team, including Parents, intended Student's IEP to be a living, fluid document, subject to change as Student's needs changed. The offer of 95 percent of time in a general education classroom was unambiguous and not contradicted by the statement in the IEP notes, which only referred to something that might happen in the future, but had not yet occurred.

76. Student is correct that District failed to make a formal written offer of occupational therapy services in the June 3, 2015 IEP. Student's IEP team discussed Student's occupational therapy needs at the IEP team meeting. The team, including Mr. Davis, felt that Student required services. However, no direct occupational therapy services were noted in the IEP. Although no direct services were included in the IEP document, Mr. Davis did, in fact, provide both individual and group occupational services to Student on an ad hoc basis because he believed that she benefited from them.

77. The situation with regard to Student's occupational therapy services is similar to the facts in *M.C.* As District here provided services to Student that were not written on her IEP and without informing Parents that it was providing them. Student's parents were unable to monitor the provision of the services because they were unaware that they were being provided. This impeded their ability to participate in the entirety of Student's IEP process, resulting in a denial of FAPE to Student.

78. District likewise failed to include Student's mental health goals and mental health services in the June 3, 2015 IEP document, yet continued to implement the goals and provide the services both to Student and Mother. As with the failure to include the occupational therapy services it provided Student, the failure to include the mental health goals and services agreed to by all IEP team members, including Parents, impeded their ability to participate in Student's full IEP process.

79. Finally, the failure to include these services in Student's IEP created a potential for possible confusion as to what services District was required to provide, particularly had Student moved to another school district and asked it to implement her IEP. Without the occupational therapy and mental health services included within the four corners of the IEP document, Student would have little basis to contend that she was entitled to them.

80. Student has met her burden of persuasion that District's failure to specify the occupational therapy services, mental health services, and mental health goals on the June 3, 2015 IEP denied her a FAPE.

Issue 2(d): Failing to Provide Behavioral Supports to Address Student's Needs

81. Student contends that District failed to provide her with adequate behavioral supports during the 2015-2016 school year, resulting in her loss of educational benefits. District answers that it met its obligations to Student in this area.

82. Student focuses on the deterioration of her behavior when she returned to school after winter break in January 2016. As detailed above, Student's behavioral outbursts returned in full force. District responded by removing Student more often from the general education classroom and, several times, asked Mother to take Student home. Student posits that District should have acceded to Mother's request that it provide Student with a one-on-one aide, which she contends would have addressed her behaviors. Instead, Student asserts that District continued to use strategies that had previously been ineffective and continued to be ineffective in the latter half of third grade.

83. Student is correct that her maladaptive behaviors resumed and worsened by the end of the school year. However, Student offered no evidence of whether a behavioral aide in the classroom would have been effective or whether there were any

other behavioral intervention strategies that District should have attempted. Her assertion that other strategies existed is speculation. None of Student's witnesses, other than Mother, testified that an aide would have been beneficial at the time. None of the mental health professionals who testified – Dr. Wherry, Ms. Chatfield, or Dr. Weckerly – suggested that an aide should have been the next step in seeking to address Student's escalating behavior. Mother does not have expertise as an educator, behaviorist, or mental health professional. While she is probably the person most knowledgeable about Student's behaviors at home, that expertise does not extend to Student's behavior at school. For this reason, Mother's opinion that a classroom aide should have been assigned to Student at this time was not persuasive.

84. Notably, Student offered no expert opinion on what District should have done to address the behaviors. Dr. Weckerly testified that District sent Student home a few times too often, but acknowledged that sending Student home once or twice was appropriate. Her own recommendations included many of the strategies District was already using: removing Student to a more structured special day class environment with a higher adult to student ratio; continued access to educationally related mental health services; removal to a safe place as needed; modification of Student's schedule and workload to lessen the academic demands placed on her; and shortening her school. It is disingenuous to criticize District's attempts to address Student's behaviors when the strategies used were similar to those recommended by Student's expert.

85. It is noteworthy that none of Student's witnesses, including her expert Dr. Weckerly, suggested any particular strategies to use to try to extinguish Student's behaviors. Dr. Weckerly acknowledged that Student's behavioral problems were variable and unpredictable, and therefore difficult to address. Notable too was the absence of any other expert with an opinion as to what District should have attempted in place of the strategies it used. The logical conclusion is that it was not the behavioral

intervention strategies that were insufficient but, as discussed above, the lack of an appropriate placement that was the impetus behind the reemergence of Student's behavioral challenges.

86. For these reasons, Student has failed to carry her burden of persuasion that District failed to address her behavioral needs during the 2015-2016 school year.

Issue 2(e): Failing to Implement Student's June 3, 2015 IEP

87. Student contends that District materially failed to implement the designated education time, behavior strategies, and behavior intervention plan from her June 3, 2015 IEP. District disagrees.

88. As stated above, school districts are required to implement an IEP as written. However, minor deviations from the plan are not actionable; only material deviations rise to the level of a denial of FAPE.

89. Here, Student has met her burden of persuasion that District failed to materially implement several components of her IEP. Both Ms. Tressider, Student's general education teacher in third grade, and Ms. Welch, the special education teacher assigned to the behavior intervention class, testified that they did not follow Student's IEP. The most significant discrepancy was District's failure to follow the time specified in the IEP for Student's attendance in either classroom. Rather, District's approach was to remove Student from general education anytime that Ms. Tressider was unsuccessful re-directing Student's behavior when Student was not able to self-regulate. Student would be sent to Ms. Welch's class to calm down and to avoid disrupting her classmates.

90. Student spent considerable more time in Ms. Welch's classroom than her IEP dictated, particularly during the second semester of the 2015-2016 school year. When she did go, it was because her behavior was disrupting the general education classroom rather than because it was time for Student to receive specialized academic instruction. Student's IEP called for her to receive 75 minutes per week of specialized

academic instruction. Ostensibly, Ms. Welch, as the credentialed special education teacher, would have been the professional designated to provide that type of instruction. Ms. Tressider did not have the appropriate special education credential. However, when Student went to Ms. Welch's classroom, she occasionally joined the other students in whatever they were doing, which was most often a non-academic task; completed her general education work; or, as what happened most often, was given a non-academic task to do, such as coloring. Ms. Welch did not specifically provide Student with specialized academic instruction. And, Student's time in Ms. Welch's classroom did not follow the IEP.

91. *Van Dyne* makes clear that where a district fails to materially implement an IEP, a student is not required to show that her right to an educational benefit was impeded, that she was denied a FAPE, or that her parents' ability to participate in her IEP process was significantly impeded to prevail. It is therefore not necessary to address whether Student continued to make progress despite the failure to implement portions of her IEP. The failure to implement the IEP was material and resulted in a denial of FAPE.

ISSUE 3: FAILURE TO PROVIDE STUDENT'S EDUCATIONAL RECORDS WITHIN FIVE BUSINESS DAYS

Legal Authority

92. The IDEA and state educational statutes grant parents of a child with a disability the right to examine all relevant records in relation to their child's special education identification, evaluation, educational placement and receipt of a FAPE. (20 U.S.C. §1415(b)(1); 34 C.F.R. § 300.501(a); Ed. Code, §§ 56501(b)(3) & 56504.) The purpose of this is to assist parents in making informed decisions about their child's education, including being able to fully participate in all aspects of the IEP process.

93. A school district must permit parents to inspect and review any education records relating to their child that are collected, maintained, or used by the district. (34 C.F.R. §300.613(a).) The district must comply with a request without unnecessary delay. (*Ibid.*) While federal regulations require that educational records be provided within 45 days of request, California law affords parents the right to receive copies of all school records within five business days of the request. (*Ibid.*; Ed. Code, § 56504.) The right to inspect and review education records includes the right to receive an explanation and interpretation of the records; the right to receive copies of the records if failure to provide copies would effectively prevent the parent from exercising the right to inspect and review the records; and the right to have a representative inspect and review the records. (34 C.F.R. §300.613(b).)

94. The IDEA does not have a separate definition of educational records, and adopts the Family Educational Rights and Privacy Act definition of education records by reference. (34 C.F.R. § 300.611 (b).) In general, educational records are defined as those records which are personally identifiable to the student and maintained by an educational agency. (20 U.S.C § 1232g(a)(4)(A); 34 C.F.R. §§ 99.3; Ed. Code, § 49061, subd. (b) [similarly defines pupil record].) The United States Supreme Court, after conducting an analysis of FERPA provisions related to education records, defined the word "maintained" in this context by its ordinary meaning of "preserve" or "retain." (*Owasso Independent School Dist.No.I-011 v. Falvo* (2002) 534 U.S. 426, 434 [122 S. Ct. 934, 151 L.Ed.2d 896].)

95. Education records do not include records "which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).) Federal regulations further clarify that for a record to qualify under the "sole possession of the maker" exclusion, that record must be used only as a personal memory aid. (34 C.F.R.

§ 99.3(b)(1).) The Family Policy Compliance Office within the United States Department of Education, in finding that a district had violated FERPA, determined that this exception was not intended to exclude detailed notes that record direct observations or evaluations of student behavior. (*Letter to Baker*(Office of Innovation and Improvement, Complaint No. 1251, December 28, 2005 [comprehensive notes of observations and evaluations by a speech therapist, though kept in the sole possession of the maker, were not used solely as a memory aid and therefore were educational records subject to disclosure].) "School officials may not unilaterally remove records from the protections of FERPA through administrative decisions about where certain records are maintained or how they are categorized." (*Ibid.*)

96. Test protocols such as test questions, student answers, evaluator calculation or scoring sheets, and administration instructions, to the extent these are personally identifiable to the student, are educational records that must be provided to parents if requested. (*Newport-Mesa Unified School Dist. v. State of Cal. Dept. of Educ.* (C.D.Cal. 2005) 371 F.Supp.2d 1170 at pp. 1175, 1179 [providing parents copies of their children's test protocols constitutes a permissible "fair use" pursuant to federal copyright law]; *Letter to Price* (OSEP Oct. 13, 2010) 57 IDELR 50 [test protocols with a student's personally identifiable information are educational records and if copyright law conflicts with IDEA's requirement to provide educational records, districts should seek ways to facilitate inspection including contacting the copyright holder].) Parents have the right to inspect instructional materials and assessments including teacher's manuals. (Ed. Code, § 49091.10, subd. (a).)

97. The failure to provide a parent with information related to the assessment of his or her child may significantly impede the parent's opportunity to participate in the decision-making process and result in liability. In *Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F. 3d 877, 892-895, the Ninth Circuit held that a

failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents' right to participate in the IEP process, resulting in compensatory education award. In *Lafayette, supra*, at pp. 855-856, a district's failure to provide parents assessment data showing their child's lack of progress in district's response to intervention program left the parents "struggling to decipher his unique deficits, unaware of the extent to which he was not meaningfully benefitting from the [individualized services plan], and thus unable to properly advocate for changes to his IEP." The court concluded that the failure to provide the assessment data prevented the parents from meaningfully participating in the IEP process and denied their child a FAPE.

98. Recently, the Ninth Circuit found that failure to provide parents with a copy of their child's IEP, which the district had unilaterally amended, until a document production between to parents' attorney right before a due process hearing, amounted to a denial of FAPE. The court in *Antelope Valley, supra* at 4 , took umbrage with the fact that the document was buried in the stack of documents produced right before the hearing.

Analysis

99. District scheduled Student's annual IEP team meeting for May 17, 2016. On May 10, 2016, to prepare for the meeting, including deciding whether Parents were going to move Student to another placement outside District, Mother sent Ms. Welch an email requesting Student's records. Ms. Welch was unfamiliar with records requests and failed to respond to the email or to forward it to any District administrator. Mother therefore did not have the records when the IEP team convened on May 17, 2016.

100. The following day, Mother sent a second written request for the records. This time, she copied all members of Student's IEP team. Ms. Cummins immediately retrieved Student's file, copied the records, and produced them to Mother on May 20,

2016. Mother had those records in time for the continued IEP team meeting on June 2, 2016.

101. However, unbeknownst to Ms. Cummins, the records in Student's file were not complete. District staff discovered an additional 343 pages of records months later; District's counsel provided them to Student's attorney on January 13, 2017, two weeks before the trial in this case began. An additional 500 pages of records were discovered in Ms. Goodrich's classroom on January 18, 2017, but not provided to Student's counsel until January 31, 2017, five days after the start of the hearing.

102. The documents produced in two batches in January 2017 included some of Student's report cards, test protocols, assessments, behavior incident reports, and behavior observation notes. All of the above are Student records, which Parents were entitled to review.

103. District's approach at hearing was to try to address each document that was produced untimely in January, and show that Mother's ability to participate in Student's IEP process was not impeded by the untimely production. However, District's approach misses the point. Many of the records produced were undeniably educational records to which Parents were entitled. As Mother persuasively testified, she required the records to have a clear understanding of Student's needs, how she felt the needs should be addressed, and if Parents should consider an alternate placement for Student. Mother had never seen some of the records, such as behavior observation notes taken by Student's teachers and other adults in Student's classes. She was taken aback by the extent of Student's behavior problems documented in the records because she was unaware of some of the information prior to the hearing.

104. Additionally, the lack of the records impacted the ability of Student's attorney to prepare for hearing. The fact that hundreds of pages of records were produced halfway into the hearing made it more challenging to litigate this case.

105. District's assertion that the behavior observation data was not an educational record is misplaced, as is its reliance on the fact that the records were taken at the instigation of the teachers rather than as an IEP requirement. As stated above, the Family Policy Compliance Office has determined that records of direct observations of a student are educational records even if kept in the sole possession of the teacher or other professional.

106. District did not deliberately withhold the records from Parents. The circumstances were outside of Ms. Cummins' personal control. But District was responsible for maintaining its records in a way that would permit Parents to access them in a timely fashion. Although the untimely production of records was not deliberate, it resulted in Parents not having the records when they requested them. Taken as a whole, all these factors substantiate Student's assertion that Parents' ability to participate in Student's IEP process was significantly impeded by District's failure to timely produce the records, and by the fact that a substantial number of the records were not produced until after the hearing had begun.

ISSUES 4 AND 5: WHETHER THE MAY 17, 2016 IEP CONSTITUTED A FAPE

107. In Issue 4, Student disputes the validity of District's May 17, 2016 placement offer. In Issue 5, District contends that its May 17, 2016 IEP offer constituted a FAPE, such that it should be permitted to implement the offer over the lack of parental consent. The issues are interrelated and are analyzed jointly.

108. Student contends that District's May 17, 2016 IEP, developed over two days on May 17 and June 2, 2016, and amended on June 6, 2016, failed to offer her a placement that addressed her behavioral, social, sensory, mental health, and academic needs. Student also contends that District's offer was procedurally defective because it did not offer goals in all her areas of unique need; failed to have a general education teacher in attendance at the June 2 meeting; failed to consider the continuum of

placements; and failed to meet the *Union* requirement of having a clear offer of FAPE written in the IEP document. District contends that the goals, placement, services, and supports of the IEP constituted a FAPE because they met all statutory requirements and constituted an offer of FAPE to Student in the least restrictive environment. District did not address the procedural aspects of its May 17, 2016 offer of FAPE, in its closing brief.

Procedural Requirements

109. In this case, it was District's burden to prove that its May 17, 2016 offer of FAPE met all procedural requirements. It has failed to meet that burden of proof in several regards.

REQUIRED IEP TEAM MEMBERS¹²

110. An IEP team must include at least one parent; a representative of the local educational agency; a regular education teacher of the child if the child is, or may be, participating in the regular education environment; a special education teacher or provider of the child; an individual who can interpret the instructional implications of assessment results, and other individuals who have knowledge or special expertise regarding the pupil, as invited at the discretion of the district, the parent; and when appropriate, the student. (20 U.S.C. § 1414(d)(1)(B)(i), (iv-vi); Ed. Code, § 56341, subds. (b)(1), (5-6).)

111. The Ninth Circuit has held that regular education teachers often play a central role in the education of children with disabilities. (*M.L.*, *supra*, 394 F.3d at p. 643)

¹² Although Student withdrew this issue as part of her case-in-chief, District was required to prove that its May 17, 2016/ June 2, 2016 IEP offer met both procedural and substantive FAPE requirements. The issue of the composition of the IEP team is therefore analyzed here in the context of District's issue for hearing.

The *M.L.* court found that the “plain meaning of the terms used in section 1414(d)(1)(B) compels the conclusion that the requirement that at least one regular education teacher be included on an IEP team, if the student may be participating in a regular classroom, is mandatory - not discretionary.” (*M.L.*, *supra*, 394 F.3d at p. 643.) In the case of *R.B. v. Napa Valley Unified School Dist.* (9th Cir, 2007) 496 F.3d 932, the Ninth Circuit determined that it is only necessary for a general education teacher who has instructed the child in the past or who may instruct the child in the future to be present. (*Id.* at pp. 938-940.)

112. Although Ms. Tressider attended the May 17, 2016 IEP team meeting, there is no evidence that a general education teacher was present when the meeting continued on June 2, 2016, and no evidence that Parents waived having one present. There is no sign-in sheet included in the exhibits for the June 2, 2016 IEP. The meeting notes fail to identify who participated at the meeting. The tape recording of the meeting, which was one of Student’s exhibits, does not include an introduction of people present and there is no point at which those present are identified. District did not elicit testimony at hearing from any witness as to who was present at the meeting and failed to address this issue in its closing brief. Student contends in her closing brief that a general education teacher was not present.

113. It was District’s burden to show that all required IEP team members were present at both meetings, since her IEP was developed over the course of both. In the alternative, it was District’s responsibility to demonstrate that the failure to have the teacher there was only harmless error. District did neither. Student’s May 17, 2016 IEP is therefore procedurally defective in this regard.

OTHER PROCEDURAL REQUIREMENTS

114. There are several other procedural requirements for an IEP. Districts are required to provide parents with a copy of a notice of procedural safeguards upon initial

referral, and thereafter at least once a year, as part of any assessment plan, and at other designated times. (20 U.S.C. § 1415(d)(1); 34 C.F.R. §300.504(a); Ed. Code, § 56321, subd. (a).) District provided Parents with a copy of the procedural safeguards at the beginning of the May 17, 2016 IEP team meeting.

115. Another procedural requirement is that a student's parents have the opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a); *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1043 (*Doug C.*) ["Parental participation ... is critical to the organization of the IDEA."].) Parental participation in the IEP process is considered "[A]mong the most important procedural safeguards." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

116. Districts are prohibited from predetermining its IEP offer. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-858 (*Deal*); *H.B. v. Las Virgenes Unified School Dist.* (July 3, 2007, No. 05-56486, p.2) (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 School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) A school district cannot independently develop an IEP, without meaningful parental participation, and then present the IEP to the parent for ratification. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, superseded on other grounds by statute; *Target Range, supra*, 960 F.2d 1479, 1484.)

117. Additionally, school districts, as part of a special education local plan area, must have available a continuum of program options to meet the instructional and

service needs of special education students. (34 C.F.R. § 300.115(a); Ed. Code, §56360.) In determining placement, a school district must consider a continuum of alternative placements. (34 C.F.R. § 300.116; Ed. Code, § 56342, subd. (b).) A school district is only required to consider those placements in the continuum that may be appropriate for a particular child. There is no requirement that the IEP team members discuss all options, so long as alternative options are available. (*L.S. v. Newark Unified School Dist.*, (N.D.Cal, May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, p. 6.)

118. The May 17, 2016 and June 2, 2016 IEP documents, as well as the tape recording of the IEP team meetings, demonstrate that District complied with these procedural requirements. Student contends that District failed to offer a continuum of placements. However, District discussed a variety of placement options for Student at the meetings. It discussed continuing Student in a primarily general education placement. It discussed having her attend a general education class part time with the remainder of her school day in the behavior intervention classroom. Finally, it discussed and ultimately offered Student placement in the behavior intervention class for the majority of her school day. District was not required to use the term "continuum of placements" in its discussions. Nor was it required to discuss whether all of the possible placements on the continuum should be considered for Student. It was required to offer alternatives, which it did. It was required to consider Parents' suggestions for placement, which it did. It was required to have a continuum of placements available. District met its obligation on this issue.

Required IEP Contents

119. An IEP must also include a statement of the special education and related services and supplementary aids, based on peer-reviewed research to the extent practicable, which will be provided to the student, as well as a statement of program modifications or supports, with a projected start date as well as the anticipated

frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(IV) &(VII); 34 C.F.R. § 300.320(a)(4) and (7); Ed. Code, § 56345, subd. (a)(4)& (7).) Additionally, the IEP must explain the extent to which the student will not participate with non-disabled children in a regular class or other activities; a statement of required services, program modifications or supports that will be provided to the student to allow him to advance appropriately toward attaining the annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities; and a statement of individual accommodations necessary to measure the student's performance on State and district-wide assessments. (20 U.S.C. § 1414(d)(1)(A)(i)(IV)-(VI); 34 C.F.R. § 300.320(a)(4)(5)&(6); Ed. Code, § 56345, subds. (a)(4)-(6).) Student's May 17, 2016 IEP described the placement District was offering, including the amount of time Student would spend outside general education. The IEP described the related services District was offering and the duration and frequency of the services. The IEP also included a description of the classroom accommodations and modifications Student's IEP team believed she needed in order to access her curriculum.

CLEAR WRITTEN OFFER

120. As discussed above, one of the procedural prerequisites is that a school district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union, supra*, 15 F.3d 1519, 1526.) An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decision based on it. (*Ibid.*) In *Union*, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. (*Ibid.*) The IEP is to be read as a whole. There is no requirement that necessary information be included in a particular section of

the IEP if that information is contained elsewhere. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d)(2); Ed. Code, § 56345, subd. (h).)

121. Student contends that District's May 17, 2016 IEP failed to meet this requirement. Student argues that one page of the IEP states that Student will receive 330 minutes of daily specialized academic instruction, while another page states that the offer was 360 minutes a week for that service. Student contends that more confusion was created by the document specifying that Student would spend 75 percent of her time outside of general education.

122. There was no confusion. At the first IEP team meeting on May 17, 2016, District offered Student a primarily general education program with 360 minutes a week of specialized academic instruction. This is reflected in the meeting notes for that date. Student's IEP team reconvened on June 2, 2016. After substantial discussion of Student's needs, District revised its placement offer to one providing Student with 75 percent of her time in the behavior intervention classroom. This is reflected in the meeting notes and confirmed on the placement and services page of the IEP. District's offer was clear.

Failure to Develop Goals in all Areas of Need

123. Student contends that District's May 17, 2016 IEP failed to offer her goals to address all her areas of need. Student contends that the IEP should have included a written language goal. However, Student's principle issue with writing was not that she could not do it, but rather that she did not want to it. Since she did not like to write, she resisted assignments that required it. But writing was not the only area in which Student would become resistant and in which her behavior might escalate. It happened often when Student was asked to do any non-preferred task or when she did not have her teacher's undivided attention. District developed a goal in the area of task completion and continued Student's previous compliance goal. Both goals addressed Student's overall resistance to doing any type of non-preferred task. The object of the goals was

getting Student to complete her work without behavior escalations. Once she was able to do that, her work product would improve. The fact that Student was capable of producing grade level written work was demonstrated by the portfolio project she completed at Arch, despite not having a goal in written language while attending school there. Addressing Student's opposition to doing written work was encompassed in the task completion and compliance. The goals were sufficient to meet Student's needs.

124. Student also contends that District should have written a goal to address her pragmatic language needs. Student had deficits in social pragmatic skills since first grade. Based on these deficits, District had written four social skills goals for Student, and had determined that the deficits would be addressed through Student's participation in a social skills group. District provided the group to Student during the second semester of second grade, and Student benefited from her participation in it.

125. However, District thereafter failed to provide either goals or services to address Student's social pragmatic needs. District argues that Student interacted well with peers, had friends, and played with others on the playground. However, this fails to recognize that Student had a significant inability to understand how her behavior affected those around her. She was oblivious to the negative impact her behavioral outbursts had on her classmates, and had no restraint in engaging in the escalating behavior during class. Both Dr. Weckerly and Ms. Dudley assessed Student's pragmatic language needs in much more depth than had District, and both concluded that Student had substantial pragmatic deficits that could only be ameliorated by goals supported by services in the area of pragmatics. This aligns with the fact that Student was autistic and qualified for special education under that category. Although not all her teachers saw some of Student's social challenges, Mr. Farrell, who was trained as a special education teacher and who had worked many years with children with autism and behavioral challenges, noted immediately that Student distanced herself from peers on the

playground. District's prior offer of social skills goals and participation in a social skills group had met Student's demonstrated pragmatic needs. District should have continued addressing those needs after second grade. Its failure to do so in the May 17, 2016 IEP resulted in a denial of FAPE to Student.

SUBSTANTIVE VALIDITY OF IEP OFFER

Legal Authority

126. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program, not that preferred by the parent. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the child. (*Ibid.*) For a school district's offer of special education services to constitute a FAPE under the IDEA, the offer must be designed to meet the student's unique needs, comport with the his IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Id.* at 1314-1315; *Rowley, supra*, 458 U.S. 176, 203.)

127. The IEP must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) A school district is required to provide educational instruction, specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from the instruction. (*Rowley, supra*, 458 U.S. 176, 188-189; *San Diego, supra*, 93 F.3d 1458, 1468.) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *San Diego, supra*, 93 F.3d 1458, 1467-1468.)

Analysis

128. Student contends that District's May 17, 2016 IEP offer was flawed in several ways. She first contends that the behavior intervention classroom was not an objectively reasonable placement offer because she consistently objected going to the classroom the prior school year, and because the academic level was insufficient to meet her needs. First, a student's dislike of a particular classroom is not a reason to find the placement inappropriate.

129. Secondly, Student's argument that the academic level of the behavior intervention classroom was not challenging enough for her and did not offer sufficient academic instruction to meet her needs is not supported by the evidence. The class consisted of nine students with a minimum ratio of one adult to three students. Instruction was based on a small group or one-to-one model. The fact that academic instruction in the class was less than the amount of time offered in a general education classroom was compensated by the more individualized instruction the students received in the behavior intervention class.

130. Importantly, Dr. Weckerly found that Student required a structured, controlled learning environment with small-group and individualized instruction. She found that Student needed an environment where she could remove herself from stressful events. Student required a modified schedule and a decreased workload, a reduction or elimination of homework, and possibly even a shortened school day. District's offer of placement in its behavior intervention classroom met most if not all of Dr. Weckerly's recommendations.

131. Student contends that the offer was designed to be temporary in nature. However, the fact that District suggested that Student's placement be reviewed a few weeks after the start of the 2016-2017 school year is not an indication that the placement was temporary. Rather, it was District's acknowledgement that Student's

needs were variable and that it was therefore necessary to review her needs periodically to make sure that her needs had not substantially changed.

132. In conclusion, District's offer of placement in the behavior intervention class for 75 percent of Student's school day met most of Dr. Weckerly's recommendations. It was a structured classroom, with adequate adult support, a teacher trained to address Student's behavioral and academic needs, and offered the individual and one-to-one instruction that Student required. Student has failed to demonstrate by a preponderance of the evidence that District's offer of placement in its intensive behavior intervention classroom denied her a FAPE.

Failure to Offer Sufficient Related Services

133. As stated above, a school district is required to offer a student those developmental, corrective, and supportive services that are necessary to assist the student in benefiting from special education. Here, Student contends that District's offer of related services should have included transportation, speech and language therapy for Student's pragmatic deficits, and parent counseling. District contends that its IEP offer met all of Student's needs.

134. Student did not present persuasive evidence that District should have offered Student transportation to and from school as a related service. Although she was showing resistance to going to school or exiting her family's car upon arriving at school, there is no evidence that placement on a special education bus would have ameliorated her school resistance.

135. Student has, however, demonstrated that District should have provided her with related services to address her pragmatic language needs, either through speech and language therapy focused on pragmatic language deficits, or through some other type of social skills therapy, as it had offered during the 2014-2015 school year. Student's inability to perceive the negative affect her maladaptive behaviors had on her

peers prevented her from progressing on her ability to control those behaviors. The lack of services in this area denied Student a FAPE.

136. Likewise, District's failure to provide Parent counseling services as part of the May 17, 2016 IEP offer, equally denied Student a FAPE. Parent counseling was specifically addressed in Ms. Sligh's educationally related mental health assessment where she found it a necessary component of Student's educationally related mental health services. Ms. Chatfield included the services in each of her treatment plans, recommending that Parents receive a minimum of 90 minutes a month of counseling. District presented no evidence that either Mother's or Student's mental health needs no longer required the service. Although District included in its May 17, 2016 IEP offer the 60 minutes a week of mental health services recommended for Student, it inexplicably failed to include the services for Parents in Student's IEP. The failure to provide the service denied Student a FAPE.

137. In conclusion, although District's offer of placement in its intensive behavioral intervention classroom was appropriate for Student, its May 17, 2016 IEP/June 2, 2016 IEP had several procedural and substantive flaws that prevent it from being a complete offer of FAPE. District therefore has failed to meet its burden of proof as to the issue it presented for hearing. District may not implement its May 17, 2016 and June 2, 2016 IEP offers without the consent of Parents.

REMEDIES

Legal Authority

138. ALJs have broad latitude to fashion appropriate equitable remedies for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [105 S.Ct. 1996, 85 L.Ed.2d 385 (*Burlington*)]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

139. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington, supra*, 471 U.S. at pp. 369-370 [reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE].)

140. The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement found to be reimbursable where it had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade, and where expert testimony showed that the student had made substantial progress]; *C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155 [a private placement need not provide all services that a disabled student needs to permit full reimbursement].)

141. In *S.L. v. Upland Unified Sch. Dist.* (9th Cir. 2014) 747 F.3d 1155, 1159-1160 (*S.L.*), the Ninth Circuit reiterated its position that for purposes of reimbursement to a parent for a private placement when a district has denied a student a FAPE, the placement need not be "perfect." In *S.L.*, parents had privately placed the student at a parochial school. The school did not have special education teachers or special education classrooms, and did not provide related services, all of which the student required to receive a FAPE. However, the general education classroom at the parochial school did provide the student with access to the state-approved curriculum, as well as permitted her parents to place a privately funded aide in the classroom. The student

became more socially involved with peers as the school year progressed, and the student made some educational progress. The student benefited from her education while at the parochial school. The court therefore found that in spite of the flaws in the parochial school's program as it related to the student's special education needs, parents were entitled to reimbursement for the cost of the student's tuition. (*Ibid.*)

Analysis

142. Student has requested three remedies should she prevail on some or all of her issues. Student requests reimbursement for tuition and transportation costs Parents expended placing Student at Arch Academy for the 2016-2017 school year. Student requests reimbursement for the cost of Dr. Weckerly's assessment. And, Student requests that the ALJ order training for District personnel. District, in response, contends that Arch was so inappropriate for Student that reimbursement of tuition is unwarranted even if Student prevails on any of her issues.

143. This decision has found that District denied Student a FAPE in the following respects: 1) failing to offer her an appropriate placement for the 2015-2016 school year; 2) failing to offer her goals in all areas of need in the 2015-2016 school year; 3) not making a specific, written offer of FAPE in the June 2, 2015 IEP; 4) materially failing to implement some aspects of Student's IEPs; 5) failing timely to provide Student's educational records; and 6) failing to procedurally and substantively provide Student a FAPE because of flaws in the May 17, 2016 and June 2, 2016 IEP offers. Student is entitled to a remedy for those violations.

144. District contends that Arch failed to provide Student with appropriate academic instruction. It also contends that Student failed to progress academically since attending school there, that Arch placed Student in unsafe situations, and that it placed an emphasis on physical education to the detriment of the academic program Student required.

145. District is correct that the program and instructional methodology at Arch had questionable aspects. Having a nine-year-old girl spend several hours a day swimming large distances in the ocean raises substantial concerns. So, too, did District's observations at Arch during which students were left unattended to climb on ladders to paint murals on walls, as does the unstructured nature of instruction. However, these flaws, while certainly bringing into question the propriety of Arch as a possible prospective placement for Student, do not invalidate the totality of the education Student received there. Arch is an accredited non-public school. It employs general education and special education teachers who have California teaching credentials. While Student may have regressed in some academic areas, she progressed in her ability to produce written assignments, an ability that she never accomplished at District. Although not necessary for Student to receive a FAPE, Student benefited significantly from Arch's swimming program because it addressed her sensory needs. Finally, Student benefited from her relationship with her classmates at Arch, in spite of their differences in age. Student's placement at Arch therefore meets the requirements for purposes of reimbursement.¹³

146. The issue therefore is the extent to which Parents are entitled to reimbursement. Although Student failed to meet her burden of persuasion as to any of the subparts of issue 1, Student has prevailed as to many of the subparts of issue 2, fully prevailed on issue 3, and prevailed in part on issues 4 and 5. Based on the extent of her success at hearing, including that District's May 17, 2016 IEP offer failed in several ways

¹³ Student has not requested an order that District prospectively fund her attendance at Arch.

to offer her a FAPE, it is equitable to order District to reimburse Parents for the cost of tuition at Arch for the 2016-2017 school year, as well as for the cost of transportation for one round-trip to and from the school.

147. Student has also requested reimbursement for the cost of Dr. Weckerly's assessment. Student has failed to persuasively demonstrate that her request is a proper remedy for the FAPE violations determined in this decision. Student did not allege – and has not proven – that any of District's assessments were invalid. There is no correlation between Student's contracting with Dr. Weckerly after she filed for due process and the underlying allegations in Student's complaint. Student has failed to meet her burden of proof that an order requiring District to reimburse Parents for the cost of Dr. Weckerly's assessment is warranted.

148. District also requests that the ALJ order training of District employees in response to findings of procedural violations. The IDEA does not require compensatory education services to be awarded directly to a student, so school district 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 violations that may benefit other pupils. (*Ibid.*) (*Student v. Reed Union School District* (2008) Cal. Offc. Admin. Hrngs. Case No. 2008080580, p. 8. [requiring training on predetermination and parental participation in IEP's]; *Student v. San Diego Unified Sch. Dist.* (Cal. SEA 2005) 42 IDELR 249 [105 LRP 5069] [requiring training regarding pupil's medical condition and unique needs].)

149. However, in this case, Student has failed to demonstrate by a preponderance of the evidence that an order for teacher training is necessary. The

findings in this case should be sufficient to put District on notice of how and why it committed procedural violations, and what it should avoid doing to prevent similar violations from occurring in the future.

ORDER

1. Within 45 calendar days of this decision, District will reimburse Parents in the amount of 42,500 .00 for the cost of tuition at Arch for the 2016-2017 school year, as well as reimburse them in the amount of 2,338.69 for the cost of transporting Student to and from Arch from Student's home, for one round-trip per day, from the start of the 2016-2017 school year through December 2, 2016. The total amount of reimbursement is 44,838.69. The documentary evidence of payment Parents provided at hearing, supported by Mother's testimony, is sufficient evidence of costs incurred by Parents and no further documentation is required.

2. Within 20 calendar days of the end of Arch's 2016-2017 school year, Parents will provide District with a log of their costs in transporting Student to and from Arch for one round-trip, from December 3, 2016, through the end of the school year. Parents will support the log by including evidence of Student's daily attendance at Arch during that time.

3. Within 45 calendar days of receipt of Student's mileage log and attendance log, District will reimburse Parents for their additional costs of transporting Student to and from Arch.

4. District's request for an order permitting it to implement its May 17, 2016 and June 2, 2016 IEP offer without consent of Parents, is denied.

5. All other requests for relief by either party is 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. District prevailed fully on issues 1(a), (b), (c), (d), (e), 2(d), and 4. Student prevailed fully on issues 2(a), 3, and 5. The parties both prevailed on aspects of issues 2(b), 2(c), and 2(e).

RIGHT TO APPEAL

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

Dated: April 11, 2017

/s/

DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings