

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

BUENA PARK SCHOOL DISTRICT.

OAH Case No. 2016090918

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on September 19, 2016, naming Buena Park School District. OAH continued the matter for good cause on October 31, 2016.

Administrative Law Judge Robert G. Martin heard this matter in Buena Park, California on February 7-9, 2017. A Romanian language interpreter was provided throughout the hearing.

Jessica Villegas and Damian Frago, Attorneys at Law, represented Student. Student's mother attended the hearing on behalf of Student. Student's father attended the hearing on February 7, 2017. Student did not attend the hearing.

Karen Gilyard and Meagan Kinsey, Attorneys at Law, represented District. District Director of Special Services Michele Mukanos attended the hearing on behalf of District.

At the parties' request, OAH continued the matter to March 13, 2017 for written closing arguments. Following the publication of the United States Supreme Court decision in *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1* (2017) 137 S.Ct. 988 (*Endrew*), OAH on March 23, 2017 further continued the matter to April 13, 2017 to provide the parties the opportunity to submit supplemental written closing

argument on the legal effect, if any, of *Andrew* on this matter. The record closed on March 13, 2017, upon timely receipt of supplemental closing briefs from the parties.

## ISSUES<sup>1</sup>

1. Was Student's due process complaint filed within the statute of limitations based upon the date Parent's first received copies of (a) Student's October 11, 2013 multidisciplinary assessment; and (b) District's February 26, 2014, occupational therapy assessment in their native language in June 2015?
2. Did District's (a) October 11, 2013 multidisciplinary assessment; and (b) District's February 26, 2014, occupational therapy assessment fully and appropriately assess Student in all areas of suspected disability?
3. Did District deny Student a free appropriate public education by failing to provide for appropriate in-home instruction and related services in Student's January 30, 2014 individualized educational program?
4. Did District deny Student a FAPE from March 2014 until the filing of the complaint on September 19, 2016, by unilaterally determining Student would receive five hours of instruction in-home instruction per week and denying Parent's meaningful participation in the IEP process for home instruction?

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

## SUMMARY OF DECISION

This decision finds that the two-year statute of limitations applicable to special education matters limits Student's claims to those arising within two years prior to the filing of the complaint; that is, from September 19, 2014 to September 19, 2016.

Student was not entitled to an exception from the statute of limitations. Student demonstrated that District withheld information it was required to give Parents when it failed to provide Parents Romanian-language translations of District's October 11, 2013 multidisciplinary assessment and February 26, 2014, occupational therapy assessment. However, Student did not show that District's failure to provide Romanian translations of its October 11, 2013 multidisciplinary assessment and February 26, 2014 occupational therapy assessment caused Parent's failure to request a hearing or file a complaint within two years from the time Parents knew or had reason to know that District's assessments were not appropriate and that Student was not receiving a FAPE. Therefore, Student's Issues 2 and 3 are time-barred.

Issue 4 is partially time-barred and is limited to the period from September 19, 2014 to September 19, 2016. Within the two years prior to the filing of the complaint, District denied Student a FAPE by unilaterally determining Student would receive five hours of academic instruction in-home, with no special education services. District failed to hold an IEP team meeting to consider Student's home schooling needs, thereby denying Parent's meaningful participation in the IEP process. District also refused to revise Student's existing January 30, 2014 IEP that offered Student placement and services in a special day class, and failed either to: (i) file a due process complaint to obtain a decision that District could implement the IEP over Parents objection; or (ii) revise the IEP to provide Student special education instruction and services in-home instead of in a District special day class.

As a remedy, this decision awards Student specialized academic instruction and speech and language services.

## FACTUAL FINDINGS<sup>2</sup>

1. Student, at the time of filing, was ten years old. Student was born with Down syndrome, and at all times relevant to this decision he resided with his Parents in District. District first found him eligible for special education on April 23, 2009, under the primary category of intellectual disability and a secondary category of speech and language impairment. At all relevant times, District knew that Parents' native language was Romanian, and that both Parents understood conversational English, and read and wrote some English. However, Parents did not understand technical or complicated documents in English.

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<sup>2</sup> Relevant facts concerning District's October 11, 2013 multidisciplinary assessment and District's February 26, 2014 occupational therapy assessment of Student are taken from the findings of fact in OAH's decision in Case No. 2015010467 issued July 24, 2015, and offered and admitted as Student's exhibit. That District-filed case involved the same parties, and the issues of whether District's October 11, 2013 multidisciplinary assessment and District's February 26, 2014 occupational therapy assessment were appropriate such that Student was not entitled to independent educational evaluations at public expense. Collateral estoppel, or issue preclusion, precludes relitigation of factual or legal issues that have been argued and decided in prior proceedings. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335.) It applies to determinations made in quasi-judicial administrative settings. (See *Pacific Lumber Co. v. State Resources Control Board* (2006) 37 Cal.4th 921, 944 (citations omitted).)

## 2013-2014 REGULAR SCHOOL YEAR

2. Student disenrolled from District in September 2010 and returned in September 2013. District placed Student in second grade in a special day class for students with mild to moderate disabilities at Pendleton Elementary School.

### Multidisciplinary Assessment Dated October 11, 2013

3. On September 13, 2013, District school psychologist Melody Anton prepared, and Mother signed, an assessment plan to determine Student's continuing eligibility for special education and his current educational needs. The assessment plan was in English. The proposed assessments included academic achievement, health, intellectual development, language/speech communication development, social/emotional, and adaptive behavior. The assessment plan stated Student's primary language was Romanian and identified Student as an English language learner.

4. District conducted a multidisciplinary assessment with contributions from Ms. Anton, Student's special education teacher Esther Kang, speech/language specialist Hanna Baldelli, District nurse and coordinator of health services Kathleen Tedone, and Parents. Ms. Anton prepared the October 11, 2013 multidisciplinary assessment report (Assessment Report).

5. Ms. Anton's assessment included classroom observations, standardized and informal testing, Parent and teacher input, and her review of school records and the reports prepared by other assessors. Ms. Anton also considered a Health and Developmental History Update form Mother completed and provided to Ms. Anton on September 13, 2013. Mother indicated on the form that Student's "first language" was "English and Romansh" and that adults in the home spoke both languages.

6. Ms. Anton observed Student during testing and in class. Student's ability to engage in conversation was extremely low. In class, he spoke only occasionally, but could say, "I like pizza," and pretend to eat a triangular-shaped yarn-threading board as

if it were a slice of pizza. He complied with teacher requests and was on task around 85 percent of the time, with constant teacher prompts and assistance. During testing, Student responded promptly, but carefully, to Ms. Anton's questions. As tests increased in difficulty, Student attempted to complete them, and did not give up easily. Ms. Anton administered the Wechsler Non-Verbal Scale of Ability to Student to test his non-verbal general thinking and reasoning skills. Student's cognitive ability was in the extremely low range.

7. Ms. Kang taught Student in his special day class. She assessed him in the area of academics. Ms. Kang's assessment included review of school records, classroom observation, and review of standardized and informal testing.

8. Ms. Kang observed that Student was "very sweet" in her class. He liked to play with animal toys and math blocks. Student was not potty-trained, and he required assistance to go to the library, health office, cafeteria, and the playground. He had difficulty expressing his wants and needs. Student required one-on-one help in all academic areas. With many verbal prompts, he could identify most of the letters of the alphabet, but was unable to write his name independently. He could state his first and last name when prompted. Student stayed in his seat for no more than five minutes. He wandered the room, and during transition times and in small group center times sometimes touched other students or grabbed them to give kisses. He recognized colors when given crayons but was not able to use crayons appropriately, breaking them instead of drawing with them.

9. Ms. Kang administered the Woodcock-Johnson Test of Achievement - Third Edition; Kaufman Test of Educational Achievement, 2nd Edition; and the Slosson Oral Reading Test with the assistance of a Romanian interpreter. She also assessed Student based on the Brigance Diagnostic Comprehensive Inventory of Basic Skills, Slosson Oral Reading Test, informal and teacher-made tests, Student's work samples,

and her observations of Student during testing and in her class. Ms. Kang concluded Student's academic skills were in the extremely low range and below kindergarten level.

10. Ms. Baldelli assessed Student in speech and language. She reviewed Student's records and previous assessments, observed Student in the classroom, conducted an oral and motor exam, interviewed Student's teacher, reviewed Student's Health Update, and conducted informal and clinical observations of Student's verbal pragmatics, articulation, voice, and fluency and used a variety of assessment tools. Ms. Baldelli used a Romanian interpreter during her assessment. She selected assessment tools based upon Student's language classification, chronological age, and developmental age, including the Comprehensive Assessment for Spoken Language, Goldman-Fristoe Test of Articulation-2, and the Pre-school Language Scale-4. Ms. Baldelli concluded Student's expressive and receptive language skills were below normal limits. Student had severe delays in all areas of speech and language but that his delays were consistent with his developmental level. Ms. Baldelli recommended that District provide Student speech and language services.

11. Ms. Anton, Ms. Kang, Ms. Baldelli and Ms. Tedone recommended that Student qualified for special education under the eligibility category of intellectual disability. They concluded he did not meet the eligibility standards for a secondary eligibility of speech/language impairment but that the IEP team should consider his needs in that area.

12. District sent a draft of the multidisciplinary assessment report, in English, home with Student. Mother received it on October 10, 2013. District did not provide a Romanian language copy until June 2015.

October 11, 2013 IEP Team Meeting

13. District held an interim IEP team meeting on October 11, 2013 to review Student's multidisciplinary assessment and determine Student's eligibility for special

education. District also designated the meeting as Student's annual IEP. Ms. Anton, Ms. Tedone, Ms. Baldelli, Ms. Kang, Parents, North Orange County SELPA Program Coordinator Laura Beach, a general education teacher, the school principal and both Parents attended the meeting. The IEP document stated Romanian was Student's native language. District did not provide Parents a Romanian translation of the IEP until June 2015.

14. After discussing the multidisciplinary assessment, the IEP team agreed Student was eligible for special education under the category of intellectual disability. The District team members discussed several placement options with Parents and decided that that Student needed to be placed in a special day class for Students with moderate to severe disabilities to address his needs. District offered Student placement in the only such District special day class with space available, which was located at Emery Elementary School. District also offered Student twice-weekly 30-minute speech and language sessions in a group setting. The Emery special day class taught both functional and academic skills, and was directed towards higher functioning students with moderate to severe disabilities. District also offered Student extended school year instruction, with 30 minutes per week of group speech and language services. District arranged for Parents to visit the recommended special day class on October 17, 2013. Parents did not agree to the IEP, wishing to see the Emery classroom first, and the IEP team agreed to reconvene, if needed, after the visit.

15. Parents visited the Emery elementary school special day class and concluded that it did not offer enough structure or academic instruction for Student. Parents wrote a letter to District on November 15, 2013, stating that they preferred Student's then-current class at Pendleton. They informed District that they had tried to communicate with the school, but "if effective communication is not possible" they would need someone to advocate for their son. They reported they received the Assessment Report the day before the meeting, did not have enough time to read the



27-page report, the IEP team meeting was too short, and they were unable to ask many of the questions they had.

16. On November 21, 2013, District gave Parents notice the October 11, 2013 IEP team meeting would reconvene on December 10, 2013. Mother signed and returned the notice. Mother checked the box to indicate she required an interpreter and handwrote "Romania" on the line for language.

#### December 10, 2013 IEP Meeting

17. The IEP team meeting reconvened on December 10, 2013. Both Parents attended. District did not provide an interpreter. The IEP notes stated that a copy of Parent's Rights was provided to Parents in their native language, Romanian, but this was not correct.

18. The IEP team continued to discuss District's recommended placement. District agreed to Parents' request for an occupational therapy assessment and to reconvene an IEP team meeting to determine whether Student required occupational therapy. Parents later signed an occupational therapy assessment plan on January 10, 2014. The assessment plan was in English. It stated that Student's primary language was Romanian. Mother wrote "English" under the portion of the form that stated Romanian as Student's primary language. Mother intended to indicate that Student spoke both English and Romanian.

19. Student remained in his special day class at Pendleton. Parents were concerned that Student was not being supervised adequately and suffered injuries as a result, including scratches and a bump on the head on January 17, 2014 that District reported to Parents. Parents also believed that Student was beaten in January 2014 while at Pendleton.

## January 30, 2014 IEP Meeting

20. In January 2014, Ms. Beach took Mother to visit several schools to see the range of programs offered by District. They visited an inclusion program at Corey Elementary School, in which special education students attended school in a general education classroom, supported by special education teachers providing inclusion services to assist the students in the general education environment. Mother and Ms. Beach also visited a special day class at Gilbert Elementary School for children with moderate to severe disabilities. That mild-moderate class was structured towards more severely disabled students than the Emery program that Parents had seen previously, and focused on functional skills. Mother agreed with Ms. Beach that the Gilbert program appeared suitable for Student.

21. On January 30, 2014, the IEP team met to discuss transitioning Student from Pendleton to the special day class at Gilbert Elementary School. Mother attended the IEP team meeting, as did Ms. Anton, and Ms. Beach, and Gilbert Principal Jason Kuncewicki, Gilbert speech and language specialist Annette Aylsworth, Gilbert special education teacher Margaret Garcia, District school psychologist Judy Lemen, and Jacquelyn Wingo from the Orange County Regional Center. There was no interpreter. District offered Student placement in the special day class in first grade at Gilbert, with 1,880 minutes per week of specialized academic instruction, and four 15-minute sessions per week of group speech and language. District also offered Student 900 minutes per week of specialized academic instruction during the extended school year, with one 30-minute group speech and language session per week. The IEP team discussed no alternatives to placement in the Gilbert special day class. Mother signed consent to all parts of the IEP. The IEP was not provided to Parents in Romanian until July 2015.

22. Student began attending the Gilbert special day class in February 2014. He attended school at Gilbert for approximately three weeks before Parents removed him

from class. From February 2014 to the filing of the complaint, Student did not return to attend school in a District class.

23. Student's January 30, 2014 IEP remained Student's last agreed-upon and implemented IEP as of the filing of the complaint.

#### February 2014 Occupational Therapy Assessment

24. Occupational therapist Lisa Colburn conducted a School-Based Occupational Therapy Evaluation<sup>3</sup> in February 2014 before Student was removed from Gilbert, and prepared a report dated February 26, 2014.

25. Ms. Colburn was first employed as an occupational therapist by Long Beach Unified School District in September 2010, and was, at the time of hearing, employed as an occupational therapist by West Orange County Consortium for Special Education. She held a bachelor of arts in psychology and a master of science in occupational therapy.

26. Ms. Colburn was familiar with Student. She provided weekly occupational therapy sessions in Student's classroom. Ms. Colburn observed Student in the classroom and during testing. She obtained information from Student's teachers, reviewed Student's records, and administered a variety of assessment tools. Ms. Colburn was qualified to administer and interpret the results of her testing. She administered the Bruininks-Oseretsky Test of Motor Proficiency, 2nd Ed., Sensory Processing Measure - Classroom Form, School Function Assessment, and Benbow Observation of Hand Skills.

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<sup>3</sup> The terms "evaluation" and "assessment" have the same legal meaning in this Decision and are used interchangeably, consistent with the terminology used by the parties, the witnesses and documentary evidence. (See 20 U.S.C. § 1414(b); Ed. Code, § 56302.5.)

27. Ms. Colburn prepared a six-page, single spaced report in English, containing numerous anatomical and medical descriptors, other highly specialized vocabulary, technical explanations of test results and comparisons of raw scores, T-Scores, and performance levels on school form scales. She concluded that Student's sensory profile, fine motor skills, and visual perception were sufficient for Student to participate in the classroom and to make progress on his goals in class, without need for occupational therapy services. She recommended that environmental supports and support staff address areas of concern with respect to auditory and tactile processing.

#### March 6, 2014 IEP Team Meeting and Assessment Plan

28. The IEP team met on March 6, 2014, to review the occupational therapy assessment. Mother attended the meeting. District did not provide an interpreter. District gave Mother a copy of Ms. Colburn's Occupational Therapy assessment report in English at the meeting. District did not provide a Romanian language copy of the assessment until June 2015.

29. Ms. Colburn summarized the report. Mother explained that her own observations of Student's ability to eat independently and his sensitivity to loud noises were different from Ms. Colburn's observations. Mother requested a change in placement from the special day class at Gilbert to a full inclusion program at Corey and requested an increase in speech and language services.

30. District offered to reassess Student to obtain current information to determine whether the change in placement and services requested was appropriate. District gave Mother an assessment plan, in English, to reassess Student in the areas of academic achievement and language/speech communication. Mother took the assessment plan home. Parents did not consent to the assessment plan.

March 10, 2014: District Places Student on Home/Hospital Instruction

31. On March 7, 2014, Parents sent District a letter requesting that District transfer Student to the Corey Elementary School inclusion program. Parents wrote that Student was scared by one of the other student's screaming; that he was modeling bad habits of other students, such as placing toys in his mouth; and that he had been sick for the prior two weeks.

32. On or about March 10, 2014, Mother took Student to see physician Marita Fortades to have him checked for possible ear infections. Dr. Fortades did not find that Student had any ear infections. Mother told Dr. Fortades that she did not like Student's school placement, and Dr. Fortades told Mother that the doctor could recommend that Student be schooled at home.

33. On March 10, 2014, Mother gave District a note from Dr. Fortades stating, "I recommend home schooling [for Student] for 3 months."

34. District Director of Special Education Michele Mukanos and District nurse and health services coordinator Ms. Tedone explained District's practice as of March 2014 when a physician recommended that a special education student be educated at home instead of attending school. District would have Ms. Tedone obtain the parents' permission to contact student's physician. The nurse would then call the physician to confirm the medical disability leading to the physician's recommendation, and whether the medical disability requiring student to stay at home was temporary or permanent. If the physician indicated that the disability was temporary, Ms. Tedone would ask for the expected start and end dates of the student's need to remain at home. If the physician indicated that the disability was permanent, Ms. Tedone would request a written report containing additional information regarding the student. The nurse would then forward the results of her contact with the physician to District's special education department to determine how to respond to the recommendation for home instruction. If District determined that the medical disability requiring the student to remain at home was

temporary, District classified the student as needing “home/hospital instruction” on a temporary basis. District would provide the student one hour per day of academic instruction that District believed was required by law, but no additional special education services. If District determined that that the disability was permanent, District classified the student as potentially needing “home instruction” on an ongoing basis, and would provide the student’s IEP team the information provided by the physician. The IEP team would then decide on a case-by-case basis what special education services, if any, would be provided to the student in the home setting.

35. In this case, District did not follow the above practice. As discussed in more detail below, Parents submitted a total of six physician prescriptions for home schooling – three from Dr. Fortades and three from pediatrician Julie Chen – between March 2014 and August 2016. District had no records of contacts between Ms. Tedone and either physician. Ms. Tedone recalled having a single physician contact about one prescription, but could not recall when or which physician. Her conclusion after speaking with the physician was that Student required home schooling based on a long-term disability. However, this information was either not transmitted to District’s special education department, or was not acted upon by Student’s IEP team, which never considered or offered Student home instruction as opposed to home/hospital instruction. Alternatively, in the five instances where Ms. Tedone did not contact the physician, Parents were not asked for permission to contact the physician, and District did not contact the physician. District did not advise Parents or the physician that the doctor would need to provide District additional information beyond the doctor’s prescription for District to consider home instruction for Student.

36. Based on the three-month duration of home schooling Dr. Fortades recommended, District placed Student on home/hospital instruction beginning on April 9, 2014 until June 10, 2014. District arranged to provide Student one hour per day of academic instruction, but no speech and language as called for in Student’s IEP, or other

services. Student's IEP team was not involved in this decision, and Student's IEP was not amended to reflect the changed placement.

37. District understood that it was not providing a FAPE to Student after Student left Gilbert and began receiving home/hospital instruction. District continued to offer Student placement in the Gilbert special day class that it believed would be a FAPE if accepted by Student. District also repeatedly offered to conduct District reassessments of Student to determine whether a change in placement from Gilbert was appropriate.

May 5, 2014 Letter from Parents Regarding Student's Placement and Services

38. On May 5, 2014, Parents wrote District to ask that Student's IEP be updated to reflect his home instruction. Parents requested that Student's IEP be updated to show home instruction as his placement through July 9, 2014 (three months after District began providing Student daily academic instruction at home). They requested that the IEP be updated to show that Student would receive one hour per day of academic instruction, and 60minutes per week of speech and language services at home. Parents also requested that Student be provided accommodations consisting of:(i) a daily written communication log from the teacher and speech therapist regarding Student's educational progress and performance; (ii) a daily log of dates and times the home instruction teacher and speech therapist worked with Student; (iii) positive reinforcement to increase Student's attention and motivation to work; and (iv) a five-minute break every 20 minutes to accommodate Student's short attention span. Parents also requested that District provide Student 225 minutes of compensatory speech and language services, an amount equal to the amount of speech and language services called for in Student's IEP but not provided since April 9, 2014.

39. Parents asked that Student's IEP team discuss placing Student in the inclusion program at Corey Elementary after his home instruction for the 2013-2014 school year ended.

May 12, 2014 IEP Team Meeting

40. At Parents' request, Student's IEP team met on May 12, 2014. Mother attended the meeting. District provided a Romanian interpreter. The team discussed the issues raised in Parents' May 5, 2014 letter. Mother reiterated that Parents believed that a District inclusion program was the most appropriate placement for Student. District agreed that Student needed to be in school, and stated that District would consider a change of placement if Parents would consent to a District assessment of Student. Parent stated that she disagreed with District's February 2014 occupational therapy assessment and believed Student needed a private occupational therapy evaluation. District responded that the IEP team needed an updated assessment to make placement decisions, and if Parents agreed to the new assessment, the IEP team would discuss an outside assessment after District completed its assessment. District did not agree to any of Parents' requests in Parents' May 5, 2014 letter. District did not advise Mother that District needed additional information from Dr. Fortades to consider changing Student's IEP placement to home instruction. Mother stated that Parents would need to hire an attorney if District would not provide Student a FAPE.

May 21, 2014 Letter from Student's Attorney Requesting Independent Multidisciplinary Assessment

41. On May 21, 2014, an attorney wrote District stating that Mother disagreed with District's October 2013 multidisciplinary assessment and requested an independent multidisciplinary assessment of Student. Alternatively, Mother would agree to have District assess Student in 10 separate areas including comprehensive pre-academic and academic evaluation; learning potential and developmental evaluation; language skills;



auditory skills; visual skills; fine motor skills; gross motor skills; social emotional behavior; functional behavior; eyesight; assistive technology; and recreation skills. The letter contained a detailed description of the assessment tools, methods, and subtests to be used in each category, the conditions under which Student would be assessed and the information to be included in an assessment plan.

42. District responded by a letter sent directly to Parents on May 27, 2014, and enclosed a revised District assessment plan. The revised assessment plan included assessments for academic achievement, health, intellectual development, language/speech communication, social/emotional development, adaptive behavior, and occupational therapy. The assessment plan was in English. A Romanian translation, and an English copy, of Parents' Rights and Procedural Safeguards were enclosed.

#### 2014 EXTENDED SCHOOL YEAR

43. Contrary to Student's last agreed upon January 30, 2014 IEP, District did not provide Student any instruction or services during the 2014 extended school year.

#### 2014-2015 REGULAR SCHOOL YEAR

44. Parents gave District prescriptions from Dr. Fortades on August 11, 2014 and November 13, 2014 stating that Student needed home schooling for three months and six months, respectively.

45. District either did not call Dr. Fortades to request information to determine whether Student's IEP placement should be changed to home instruction, or did call but failed to notify the IEP team that information provided by Dr. Fortades indicated that Student required home schooling to address a long-term disability that might make Student eligible for home instruction as an IEP placement.

46. Based on the duration of home schooling Dr. Fortades prescribed, District placed Student on home/hospital instruction for the entire 2014-2015 regular school

year, and provided Student one hour per day of home/hospital academic instruction. District did not provide student speech and language services or any other service.

#### NOVEMBER 12, 2014 IEP TEAM MEETING

48. After District and Student's counsel negotiated the scope of District's proposed assessments during summer and fall 2014, Father consented to a District assessment plan dated October 30, 2014.

49. Student's IEP team met on November 12, 2104. A Romanian interpreter translated the meeting. Father withdrew his consent to the October 30, 2014 assessment plan. Father stated that District's first assessment was not appropriate, and Parents disagreed with the proposed placement in the Gilbert moderate-severe special day class. District's school psychologist asked if Parents might be confused about what constituted an evaluation, and described how a comprehensive evaluation included input from many specialists, and included information about thinking and reasoning, language, behavior, and socialization. Parents stated that the were requesting an independent assessment. Ms. Beach told Parents they had a right to request an independent educational evaluation after Parents did not agree with one that was completed by the District. Parents also requested an independent occupational therapy evaluation.

#### District's January 2015 Due Process Request to Determine The Appropriateness of District's Multidisciplinary Assessment and Occupational Therapy Assessment

50. District wrote to Parents on November 26, 2014, asking Parents to clarify the type of independent educational evaluation they wanted. Parents did not respond.

51. On January 13, 2015, District filed a due process hearing request in OAH Case No. 2015010467, naming Student and requesting, among other things, a determination that its October 11, 2013 multidisciplinary and February 26, 2014

occupational therapy assessments were appropriate, and that Student therefore was not entitled to independent educational evaluations in those areas at public expense.

52. In its decision issued July 24, 2015, OAH held that District's October 11, 2013 multidisciplinary and February 26, 2014 occupational therapy assessments were not appropriate because: (i) the assessment plans were not in Parents' native language as required under title 34 Code of Federal Regulations part 300.503(c)(1), which deprived Parents of the full understanding of the extent of the assessments; and (ii) District did not provide the assessment reports in a language Parents could understand, or translate or interpret the reports at the IEP meetings where the assessments were discussed, as required under Education Code section 56341.5 subdivision (i). District offered no evidence that it was not feasible for District to translate the assessment plans and reports into Romanian or have someone interpret them for Parents before asking them to consent to the plans or discuss the reports at IEP team meetings.

53. The decision found that the mechanics of District's multidisciplinary and occupational therapy assessments were appropriate. District assessors had the necessary qualifications and experience to conduct and interpret the assessments each performed. Each assessor used a variety of assessment tools including observation across educational settings, health and educational records review, Student classroom and clinical observation, Parent and teacher input, as well as informal and standardized testing. They gathered relevant functional, developmental, and academic information. District assessors used assessment instruments designed to provide cognitive information, and to consider behavioral and developmental factors. The assessment instruments were technically sound, used for valid and reliable purposes, and were not racially or culturally discriminatory. The assessors were trained and knowledgeable and administered tests according to the proper instructions. The two language-based academic assessments and the speech and language assessment were administered in English and in Student's primary language of Romanian.

54. The decision held that the nature of the complaint filed by District did not give OAH jurisdiction to make any orders other than denying District's requested relief.

#### Student's March 2015 Due Process Hearing Request

55. Following District's filing of its complaint, Student on March 3, 2015 filed a due process hearing request in OAH Case No. 2015030183 naming District. Student contended that District denied Student a FAPE by, among other things: (i) failing to offer an appropriate placement in any of Student's IEP's since October, 2013; (ii) offering Student a predetermined placement at his January 30, 2014 IEP; (iii) failing to provide speech and language services during his home hospitalization period from April 2014 to the time of this filing; and (iv) failing to respond to parents' request of an independent occupational therapy assessment by either approving the request or filing for due process within a reasonable time after parent's request for an independent assessment.

56. At Student's request, OAH dismissed Student's complaint prior to hearing and without prejudice, on March 19, 2015.

#### May 26, 2015 IEP Team Meeting

57. At Parents' request, an IEP team meeting was scheduled for May 26, 2015. District members arrived for the meeting. Mother arrived for the meeting, but cancelled it because she did not like the Romanian interpreter. The meeting was not held.

#### June 2015: District Provides Parents Assessments in Romanian

58. In June 2015, District provided Parents Romanian translations of District's October 11, 2013 multidisciplinary assessment and February 26, 2014, occupational therapy assessment.

## 2015 EXTENDED SCHOOL YEAR

59. District did not provide Student any instruction or services during the 2015 extended school year.

## 2015-2016 REGULAR SCHOOL YEAR

60. On September 16, 2015, Parents gave District a three-month home school prescription for Student from pediatrician Julie Chen and an authorization for Dr. Chen to disclose Student's medical record to District. The prescription listed attention deficit hyperactivity disorder, Down syndrome, breathing difficulty, and heart problems as reasons for the prescription. Parents gave District a similar six-month home school prescription on January 5, 2016. District either did not call Dr. Chen to request information to determine whether Student's IEP placement should be changed to home instruction, or did call but failed to notify the IEP team that information provided by Dr. Chen indicated that Student required home schooling to address a long-term disability that might make Student eligible for home instruction as an IEP placement.

61. Based on the duration of home schooling Dr. Chen prescribed, District placed Student on home/hospital instruction for the entire 2015-2016 regular school year, and provided Student one hour per day of home/hospital academic instruction. District did not provide Student speech and language services or any other service.

### IEP Team Meetings During the 2015-2016 School Year

62. District scheduled at least three IEP team meetings during the 2015-2016 regular school year, but none were held.

63. Parents cancelled a September 10, 2015 IEP team meeting on September 9, 2015, indicating that they needed a new date, a different Romanian interpreter from the one scheduled for the meeting, and the presence of a nurse and a representative from Regional Center of Orange County.

64. Parents arrived for an October 15, 2015 meeting, but cancelled it because the interpreter was prepared to participate by telephone, and Parents wanted the interpreter to be present. Parents also wanted Student's then-unavailable Regional Center caseworker to attend.

65. Parents arrived for a November 10, 2015 meeting, but left when they learned that the Romanian interpreter was the same person they had objected to at the May 26, 2015 IEP team meeting. District members of Student's IEP team continued the meeting. Student's home/hospital instructor, District special education teacher Robert Ungs, had found that Student had met most of his goals from his January 30, 2014 IEP. Mr. Ungs conducted some informal assessments of Student and tried to develop new instructional goals for Student that built on his previous January 30, 2014 IEP goals. With Mr. Ungs' help, the District members of Student's IEP team revised Student's IEP goals to reflect his present levels of performance.

66. Student's November 10, 2015 IEP continued to offer Student placement in first grade at Gilbert, with 1,880 minutes per week of specialized academic instruction in the Gilbert moderate/sever special day class, and four 15-minute sessions per week of group speech and language. District also offered Student extended school year instruction. Parents did not consent to the November 10, 2015 IEP.

#### May 26, 2016 Parent Letter to District

67. On May 26, 2016, Parents wrote Ms. Mukanos requesting a meeting with her and a Romanian translator to discuss issues including Student's placement. Parents indicated that if District did not respond they would place Student in private school.

#### 2016 EXTENDED SCHOOL YEAR

68. District did not provide Student any instruction or services during the 2016 extended school year.

## 2016 SCHOOL YEAR THROUGH FILING OF THE COMPLAINT

69. On August 9, 2016, District sent Parents notice that Student was scheduled to attend the Gilbert special day class for the 2016-2017 school year, and that August 9, 2016 was the first day of school. Student did not appear for class at Gilbert.

70. On August 15, 2016, District received a request for Student's records from Inspire Charter School - South, a public school. District called Inspire and was told Student had enrolled in Inspire. Parents did not dis-enroll Student from District.

71. On August 30, 2016, Parents requested home schooling for Student based on a prescription from Dr. Chen.

72. On September 1, 2016, District wrote Parents that they needed to provide District proof that Student had disenrolled from Inspire before District would process Parents' request for home schooling.

73. Student filed the complaint in this matter on September 19, 2016.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>4</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)<sup>5</sup> 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 free appropriate public

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<sup>4</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>5</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

education (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 individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

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.) In *Endrew F. v. Douglas County School District* (201727) 580 U.S. \_\_, \_\_ [137 S.Ct. 988], the Court considered the meaning of the phrase “some educational benefit” for a child not being educated in a general education classroom. The Court rejected the contention that the IDEA was satisfied by a program providing “merely more than *de minimis*” progress. “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” (*Id.*, 137 S. Ct. at p. 1001.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) 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, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (j).) 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].) Student filed the complaint in this matter, and therefore had the burden of persuasion.

## ISSUE 1: STATUTE OF LIMITATIONS

5. Student contended that the usual two-year statute of limitations applicable in special education matters should not start to run until June 2015 with respect to any of the issues in Student's complaint, because District withheld until then Romanian language translations of District's October 11, 2013 multidisciplinary assessment and February 26, 2014, occupational therapy assessment that District was required to provide. Student contended that until Parents received the translated assessments, they were unaware that District had failed to offer Student a FAPE, particularly with respect to Student's placement. District contended that Parents were aware of the facts underlying Student's claim that the multidisciplinary assessment and occupational therapy assessment were not appropriate within two years of the date of each assessment, as evidenced by Parents objections to the assessments, and objections to the assessments raised by Student's counsel within the two-year period.

### Applicable Law

6. The statute of limitations for special education due process claims requires a party to file a request for a due process hearing within two years from the date the party knew or had reason to know of the facts underlying the basis for the request. (Ed. Code, § 56505, subd. (l); 20 U.S.C. § 1415(f)(3)(c).) The statute does not apply to claims filed by a parent, where the parent was prevented from requesting the due process hearing due to either of the following: (1) specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or (2) the withholding of information by the local educational agency from the parent that was required to be provided to the parent. (Ed. Code, § 56505(l); 20 U.S.C. § 1415(f)(3)(d).)

7. A parent cannot invoke an exception to the two-year statute of limitations simply by demonstrating specific misrepresentations or withholding of information; the

parent must additionally show that the misrepresentations or withholding caused parent's failure to request a hearing or file a complaint on time. *M.M. v. Lafayette School Dist.* (9th Cir. 2014) 767 F.3d 842, 859 (parents did not demonstrate that District's improper withholding of data concerning student caused parents to fail to file a timely complaint.) Where the evidence shows, for example, that parents were already fully aware of their procedural options, they cannot excuse a late filing by pointing to the school's failure to formally notify them of those safeguards. (*D.K. v. Abington School Dist.* (3d Cir. 2012) 696 F.3d 233, 246–47.)

8. Thus, where a district withholds required information, the statute of limitations begins to run on the earlier of the date when parent knew of the facts underlying the basis for a due process request, or the date on which the district provided the required information.

9. A district must provide written prior notice to the parents of a child whenever it proposes to initiate the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. §§ 1415(b)(3), and (c).) The written notice must be given to parents of a child with a disability in written language understandable to the general public, and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. (34 C.F.R. § 300.503(c)(1).)

10. Education Code section 56329 subdivision (a)(1) requires the district to schedule an IEP team meeting upon completion of an assessment to discuss the assessment, the educational recommendations, and the reason for the recommendations. An assessment report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).) This rule enables parents to understand their child's needs so that they can give informed consent for their child's IEP. "Consent," as defined in Section 300.9 subpart (a) of title 34 of the Code of Federal Regulations, means the parent has been fully informed, in

parent's native language, of all information relevant to the activity for which consent is sought.

11. A district must "take any action necessary to ensure that the parent or guardian understands the proceedings at [an IEP team] meeting, including arranging for an interpreter for parents or guardians . . . whose native language is other than English." (Ed.Code, § 56341.5, subd.(i); 34 C.F.R. § 300.322(e).) The Supreme Court has recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley*, *supra*, 458 U.S. at pp. 205-06.)

#### Analysis

12. Student demonstrated that District withheld information it was required to provide to Parents when it failed to provide Parents Romanian-language translations of District's October 11, 2013 multidisciplinary assessment and February 26, 2014 occupational therapy assessment. District knew that Parents' native language was Romanian, and that both Parents understood conversational English, and read and wrote some English. However, Parents did not understand technical or complicated documents in English. District knew or should have known that by failing to provide Romanian translations of Student's assessments until June 2015, it was effectively withholding from Parents at least some of the information contained in the assessments.

13. Student did not show that District's failure to provide Romanian translations of its October 11, 2013 multidisciplinary assessment and February 26, 2014 occupational therapy assessment caused Parent's failure to request a hearing or file a complaint on time. Parents told the District by May 2014 that they disagreed with both assessments. Mother stated at Student's May 12, 2014 IEP team meeting that she disagreed with District's February 2014 occupational therapy assessment, believed Student needed a private occupational therapy evaluation, and that Parents would need to hire an attorney if District would not provide Student a FAPE.

14. By May 21, 2014, Parents had hired an attorney to advise them on the District's assessments. That day, the attorney wrote District stating that Mother disagreed with District's October 2013 multidisciplinary assessment and requested an independent multidisciplinary assessment of Student, or, alternatively, a District assessment based on negotiated terms and conditions.

15. Thus, by May 2014, Parents knew or had reason to know that District's assessments might not be appropriate and that Student was might not be receiving a FAPE. Thereafter, by filing a complaint on March 3, 2015 that named District and asserted substantially the same issues as presented in this matter, Parents demonstrated clearly that District's failure to provide them a Romanian translation of the assessments did not cause them to fail to request a hearing within the two-year statute of limitations period.

16. Student is not entitled to relief from the two-year statute of limitations period based on District's failure to provide Romanian translations of its October 11, 2013 multidisciplinary assessment and February 26, 2014 occupational therapy assessment.

## ISSUE 2: APPROPRIATENESS OF DISTRICT ASSESSMENTS

17. Student contended that District's October 11, 2013 multidisciplinary assessment and February 26, 2014 occupational therapy assessment did not appropriately assess Student in all areas of disability because, as previously determined by OAH in Case No. 2015010467, the assessment plans were not in Parents' native language as required, and District did not provide the assessment reports in a language Parents could understand, or translate or interpret the reports at the IEP meetings where the assessments were discussed, as required. District contended that the assessments met the technical requirements of the Education Code, but for the failure to provide

Romanian translations, and in any event, Student's claims regarding the assessments were barred by the two-year statute of limitations.

#### Applicable Law and Analysis

18. Paragraphs 6 through 16, above are incorporated here by reference.

19. The two-year statute of limitations in Education Code, section 56505, subdivision (l) required Student to file a request for a due process hearing by October 2015 to challenge the appropriateness of District's October 11, 2013 multidisciplinary assessment, and by February 2016 to challenge the appropriateness of District's February 26, 2014 occupational therapy assessment. As discussed above, Parents were not entitled to an exception to this requirement based on District's failure to provide Romanian-language translations of the assessments until June 2015. By May 2014, Parents knew or had reason to know that District's assessments might not be appropriate and that Student might not be receiving a FAPE. Thereafter, by filing a complaint on March 3, 2015 that named District and asserted substantially the same issues as presented in this matter, Parents demonstrated clearly that District's failure to provide them a Romanian translation of the assessments did not cause them to fail to request a hearing within the two-year statute of limitations period. However, Student filed the complaint in this matter on September 19, 2016, more than two years from the date Student knew or had reason to know that District's assessments were not appropriate.

20. Therefore, Student's claims regarding the appropriateness of District's October 11, 2013 multidisciplinary assessment and District's February 26, 2014 occupational therapy assessment are barred by the statute of limitations.

### ISSUE 3: DISTRICT'S FAILURE TO PROVIDE A FAPE IN STUDENT'S JANUARY 30, 2014 IEP

21. Student contended that District's January 30, 2014 IEP denied Student a FAPE because it failed to provide Student appropriate home instruction and related services. District contended that the IEP's offer of placement in the Gilbert Elementary mild/moderate special day class, with speech and language services and extended school year instruction was a FAPE, and in any event, Student's claims regarding the January 30, 2014 IEP were barred by the two-year statute of limitations.

#### Applicable Law and Analysis

22. Paragraphs 6 through 16, above are incorporated here by reference.

23. The two-year statute of limitations in Education Code, section 56505, subdivision (l) required Student to file a request for a due process hearing by January 2016 to challenge the appropriateness of District's January 30, 2014 IEP. As discussed above, Parents were not entitled to an exception to this requirement based on District's failure to provide Romanian-language translations of the assessments until June 2015. Student filed the complaint in this matter on September 19, 2016, more than two years from the date Student knew or had reason to know that District's January 30, 2014 IEP denied Student a FAPE.

24. Student's claims that District's January 30, 2014 IEP denied Student a FAPE are barred by the statute of limitations.

### ISSUE 4: DISTRICT'S UNILATERAL DECISION TO PROVIDE STUDENT ONLY HOME/HOSPITAL ACADEMIC INSTRUCTION FROM MARCH 2014

25. Student contended that District denied Student a FAPE by unilaterally deciding, without appropriate involvement of Parents or Student's IEP team, that Student would receive five hours per week of home/hospital instruction, only, from

March 2014 until the filing of the complaint, with no other services or extended school year instruction. District contended that it placed Student on home/hospital due to a temporary disability and was not obligated to provide Student anything more than five hours per week of academic instruction, and that the IEP team did not consider a change of placement for Student because Parents did not consent to additional District assessments or provide a report from Student's physician regarding his need for home instruction.

#### Applicable Law and Analysis Regarding Statute of Limitations

26. Paragraphs 6 through 16, above are incorporated here by reference.

27. Student's claims regarding District's failure unilateral decisions, and denial of parental participation, are limited by the statute of limitations to claims from September 19, 2014 to September 19, 2016.

#### Applicable Law Regarding Home Instruction For A Special Education Student

28. California law distinguishes between individual academic instruction provided to a general education student who is at home or in hospital due to a temporary disability, and special education and related services provided in the home or hospital for a special education student with an IEP.

29. Under Education Code section 48206.3, a district is required to provide "individual instruction" to a general education student with a "temporary disability" that makes attendance in the regular day classes or alternative education program in which the pupil is enrolled impossible or inadvisable. (Ed. Code, § 48206.3, subd. (a).) A "temporary disability" is a physical, mental, or emotional disability incurred while a pupil is enrolled in regular day classes or an alternative education program – that is, by a student not in special education -- and after which the pupil can reasonably be expected to return to regular day classes or the alternative education program without special



intervention. (*Id.*, subd. (b)(2).) A temporary disability specifically does not include a disability for which a pupil is identified as an individual with exceptional needs. (*Ibid.*)

30. "Individual instruction" means instruction provided to a student in the student's home, in a hospital or other residential health facility, excluding state hospitals, or under other circumstances provided for by regulation. (Ed. Code, § 48206.3, subd. (b)(1).) For purposes of computing a district's average daily attendance used to calculate state funding to the district, one hour of individual instruction counts as one day of attendance. (*Id.*, subd. (c)(1); Ed. Code, § 42238.5.) No student can be credited with more than five days of attendance per week. (Cal. Ed. Code Sec. 48206.3(c).) Individual instruction of temporarily disabled general education students is therefore generally limited to five hours per week.

31. Different rules apply to special education students. When a student with exceptional needs experiences an acute health problem which results in non-attendance at school for more than five consecutive days, the school district must inform the parents of the availability of individual instruction to be delivered in the student's home, in a hospital, or in other residential health facilities, other than a state hospital. The district also must assure that an IEP team meeting is convened to determine appropriate educational services for the student. (Cal. Code Regs., tit. 5, sections 3051.17, subd. (c).)

32. When developing the pupil's IEP, the IEP team must consider: (1) the strengths of the pupil, (2) the concerns of the parents for enhancing the education of the pupil, (3) the results of the initial assessment or most recent assessment of the pupil, and (4) the academic, developmental, and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).) The district must ensure that a continuum of program options is available for special education students. (34 C.F.R. § 300.115(a); Ed. Code, § 56360.) In increasing order of restrictiveness, this continuum of program options must include, but is not limited to, (a) regular education programs; (b) a resource specialist program; (c) designated instructional services; (d) special day classes; (e) nonpublic, nonsectarian

school services; (f) state special schools; (g) instruction in nonclassroom settings; (h) itinerant instruction; and (i) instruction using telecommunication, and instruction, in the home, in hospitals, and in other institutions. (Ed. Code §§ 56360, 56361; 34 C.F.R. § 300.115.) A district is only required to consider those placements in the continuum that may be appropriate for the particular child. There is no requirement that the IEP team members discuss all options, so long as alternative options are available. (See *L.S. v. Newark Unified School District*, (N.D. Cal., May 22, 2006, No. C 05-03241 JSW) [2006 WL 1390661, p. 6].)

33. A district may only provide special education and related services in the highly restrictive home or hospital environment to students who have been identified as individuals with exceptional needs . . . and for whom the IEP team recommends such instruction or services. (Cal. Code Regs., tit. 5, §3051.4, subd. (a).) An IEP team considering placement for home instruction of a special education student must have the assessment information, a medical report from the attending physician or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. The report must include a projected calendar date for the pupil's return to school. (Cal. Code Regs., tit. 5 § 3051.4, subd.(d).)

34. Although development of an IEP is a team decision, if the team members do not agree, it is the district that is ultimately responsible for ensuring that the IEP includes the services that the child needs to receive a FAPE. (*Letter to Richards*, 55 IDELR 107 (OSEP 2010).) The district that has an affirmative duty to review and revise an eligible child's IEP. (*Anchorage School District v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055; 20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a).) Nothing in the IDEA makes these duties contingent upon parental cooperation with, or acquiescence in, the district's preferred course of action. (*Anchorage, supra*, at 680 F.3d at p. 1055.) School districts "cannot excuse their failure to satisfy the IDEA's procedural requirements by blaming the

parents." (*Id.*, citing *W.G. v. Board of Trustees of Target Range School District, No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485.)

#### Applicable Law Regarding Parental Participation and District Predetermination

35. The parents of a child with a disability must be afforded an opportunity to participate in IEP team meetings. (34 C.F.R. § 300.501(a) & (b) (2006); Ed. Code, §§ 56500.4, 56341, subd. (b), 56341.5, subds. (a) & (b).) The parents have meaningfully participated in the development of an IEP when they are informed of their child's problems, attend the IEP team meeting, express their disagreement with the IEP team's conclusions, and request revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) Parents who have an opportunity to discuss a proposed IEP, and whose concerns are considered by the IEP team, have participated in the IEP development process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

36. Parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkleman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904].) Parental participation in the IEP process is also "(a)mong the most important procedural safeguards." (*Amanda J. ex rel Annette J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 882.)

37. Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed. Appx.342, 344.) The school district must consider parents' requests with an open mind to provide the parents meaningful participation in the IEP process. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) "A school district violates IDEA procedures if it independently develops

an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) School officials and staff can meet to review and discuss a child's evaluation and programming in advance of an IEP team meeting, and may arrive at an IEP team meeting with a pre-written offer, but may not take a "take it or leave it" position. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10, citing *Ms. S v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, superseded on other grounds by 20 U.S.C. § 1414(d)(1)(B) (*Vashon Island*.) The IDEA does not require a school district to accept parents' choice of program, but it must consider suitable alternatives. (See *Blackmon v. Springfield R-XII Sch. Dist.* (8th Cir. 1999) 198 F.3d 648, 658.)

38. In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation 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, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)

#### Applicable Law Regarding District Obligation To File Due Process Hearing Request To Implement An IEP Over Parents' Objection

39. When a parent refuses to consent to special education and services offered by district in a child's IEP, after having consented in the past, California law requires that the district resolve the impasse by filing a request for a due process hearing to obtain an order allowing the district to implement its IEP over the parent's objection. (Ed. Code, § 56346, subd. (d).) If a parent consents to some but not all of a proposed program, the district must implement only those portions to which the parent has agreed so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (e).) If the local educational agency believes that the components of the IEP

to which the parent will not consent are necessary to provide the student a FAPE, it must seek an order from an ALJ to that effect in accordance with title 20 United States Code section 1415(f). (Ed. Code, § 56346, subd. (f).) The goal of the statute requiring school districts to initiate a due process hearing to resolve such disputes is to ensure that the conflict "is resolved promptly so that necessary components of the IEP are implemented as soon as possible." (*I.R. v. Los Angeles Unified Sch. Dist.* (9th Cir. 2015) 805 F.3d 1164, 1169.)

### Analysis

40. District admitted that it did not provide Student a FAPE once Student began receiving his schooling at home, but contends it was not obligated to do so because District understood that Student was receiving his home schooling based on a temporary disability, and therefore was entitled only to the one hour per day of individual instruction that District provided. This argument fails for several reasons.

41. First, the law does not allow a district to stop providing a FAPE to a child with a disability requiring special education, just because the child has acquired an additional, medical disability. When District learned that Student was experiencing an acute health problem which resulted in his non-attendance at school for more than five consecutive days, District was required to inform Parents of the availability of home instruction for Student under his IEP, and assure that an IEP team meeting convened to determine appropriate educational services for Student. District received six physician prescriptions indicating that Student was experiencing medical problems resulting in five or more days of missed school, beginning with Dr. Fortades' March 10, 2014 prescription recommending three months of home schooling for Student, and continuing with further such medical prescriptions on August 11, 2014, November 13, 2014, September 16, 2015, January 5, 2016, and August 30, 2016. The latter four of these prescriptions were provided within the statute of limitations.

42. On each occasion, District failed to inform Parents of the availability of home instruction at home for Student under his IEP, or to assure that Student's IEP team met to determine appropriate educational services for Student. District never informed Parents, or Student's physicians, that District needed assessment information, a medical report from the attending physician stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement, to consider individual instruction at home for Student.

43. On each occasion, District unilaterally determined, with no Parent input and no IEP meeting to determine appropriate services, that District was not obligated to implement Student's January 30, 2014 IEP in the home environment, and that Student was entitled to five hours per week individual academic instruction only, based on a temporary disability. District also unilaterally determined that Student was not entitled to any change to the placement and services in his IEP to include them in an appropriate home instruction program.

44. District also determined that it would not change Student's January 30, 2014 IEP without further District assessments, and never gave Parents an opportunity to object or consent to District's individual instruction in the home as part of Student's IEP. District ignored Parent's May 5, 2014, request that it update Student's IEP to reflect his home instruction, to include one hour per day of home instruction and 60minutes per week of speech and language services, and to provide Student accommodations.

45. Notwithstanding District's unsuccessful attempts to convene IEP meetings on May 26, 2015, September 10, 2015, October 15, 2015 and November 10, 2015, its recourse was not to unilaterally and without parental consent implement an entirely different program from Student's last agreed-upon and implemented IEP. Rather, District should have filed for due process, as the law requires. Its failure to do so, and rather its decision to institute an entirely new program without the input of an IEP team

that included parents, violated the IDEA's most fundamental tenets of parental participation and consent.

46. District's argument also fails because, on the one occasion when District nurse and coordinator of health services Ms. Tedone contacted the physician who had prescribed schooling at home for Student, her understanding from the physician was that Student needed to stay at home based on a long-term, not short-term, disability. Thus, even under District's own construction of the law, District had no reasonable basis for believing that Student was entitled only to individual instruction at home based on a temporary disability.

47. If District had convened an IEP team meeting to determine appropriate educational services to be provided in Student's home, several outcomes were possible. Student's IEP team might have changed Student's IEP placement from the Gilbert special day class to Student's home, and made arrangements to provide Student speech and language services in the home or elsewhere, if it was feasible for Student to travel. Alternatively, District might have concluded that home instruction was not the appropriate least restrictive environment for Student, based on the physician's report and other information such as Parents' repeatedly stated willingness to remove Student from home schooling to place him in a District inclusion classroom. In that case, District could have reached an agreement with Parents to return Student to school, or could have resolved an impasse with Parents by filing a request for a due process hearing to obtain an order allowing the district to implement its January 30, 2014 IEP over Parents' objection.

48. District could not, however, knowingly and unilaterally decide, and without parental participation or consent, fail to provide Student a FAPE from March 2014 to September 2016 based on a belief that Student was not attending school as a result of a temporary medical disability. In doing so, District deprived Student of speech and language services and extended school year instruction that Student's IEP team had

found necessary to enable Student to make progress appropriate in light of his circumstances. Student prevailed on Issue 4 in this case, and is entitled to relief.

## REMEDIES

1. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at pp. 1496-1497.) The conduct of both parties must be reviewed and considered to determine whether equitable relief is appropriate. (*Id.* at p. 1496.)

2. An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524, citing *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1497.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex rel. Reid*, 401 F.3d at 524.)

3. As a result of District’s failure to provide Student a FAPE, Student was denied the services called for in Student’s January 30, 2014 IEP but not provided to Student; that is: (i) 1,880 minutes per week of specialized academic instruction in the Gilbert special day class; (ii) one hour per week of group speech and language services from September 19, 2014 through the filing of the complaint during each regular school year; (iii) four weeks of extended school year specialized academic instruction of 900 minutes per week each summer in 2015 and 2016; and (iv) 30minutes per week of group speech and language services for four weeks each summer in 2015 and 2016.



4. No remedy is ordered for the 1,880 minutes per week of regular school year specialized academic instruction in the Gilbert special day class that was offered in the last agreed upon IEP, because Student offered no evidence that the five hours per day of home/hospital academic instruction provided by District during the regular school year was an inadequate amount of academic instruction.

5. Student is entitled to a remedy to compensate for District's failure to provide Student any speech and language services during the relevant portion of the 2014-2015 and 2015-2016 regular and extended school years, or specialized academic instruction during the 2015 and 2016 extended school years, contrary to Student's January 30, 2014 IEP. Student offered no evidence regarding the type, amount, duration, and need for any compensatory education for Student other than the instruction and services specified in the IEP. For the period from September 19, 2014 to the filing of the complaint, the amounts specified in the IEP but not provided were: (i) 76.6 hours of group speech and language services; and (ii) 40 hours of specialized academic instruction by a certified special education teacher<sup>6</sup>.

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<sup>6</sup> District failed to provide copies of its school calendar for the years at issue, as ordered in the Order Following Prehearing Conference in this matter. Based on the August 9, 2016 start date for the 2016-2017 regular school year, and the requirement of Education Code, section 46200 that the state withhold some of a district's apportionment if it provides fewer than 180 weeks of instruction per year, the days in each relevant school year are found to be 150 days from September 19, 2014 through the end of the 2014-2015 regular school year (based on an estimated August 12, 2014 start date), 180 days for the 2015-2016 school year, and 33 days from August 9, 2016 to the filing of the complaint, for a total of 363 days, or 72.6 five-day school weeks.

For the period from September 19, 2014 to the filing of the complaint, Student is entitled to 76.6 hours of group speech and language services (60 minutes per week

## ORDER

1. District shall provide Student compensatory education consisting of 76.6 hours of group speech and language services, and 40 hours of specialized academic instruction.
2. Speech and language services shall be provided by a licensed speech therapist experienced in working with children with Down syndrome.
3. Specialized academic instruction shall be provided by a credentialed, special education teacher or teachers. District, in its sole discretion, may provide the compensatory education using a teacher or teachers working for District, or a teacher or teachers working for a non-public agency, or any combination of such individuals.
4. Within 30 days of the effective date of this Decision, District shall contact Parents to begin the arrangements for the compensatory education. The compensatory education shall be provided on dates and times agreeable to District and Parents. District, in its sole discretion, may choose the location where this compensatory education shall be provided. If the location is anywhere other than Student's home, District shall provide transportation for Student to and from the location.
5. Any compensatory education hours not used by the end of the 2019 extended school year shall be forfeited.

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times 72.6 regular school year weeks, plus 30 minutes per week times eight extended school year weeks total in 2015 and 2016). Student is also entitled to 40 hours of specialized academic instruction by a certified special education teacher (5 hours per week times eight extended school year weeks).

## 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. Here, Student prevailed on Issue 4, and District prevailed on Issues 1-3.

## 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 24, 2017

\_\_\_\_\_/s/\_\_\_\_\_  
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ROBERT G. MARTIN

Administrative Law Judge

Office of Administrative Hearings