

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

v.

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

OAH Case No. 2016101114

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT,

OAH Case No. 2016090853

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

Newport-Mesa Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings on September 19, 2016. Parents on behalf of Student filed a complaint with OAH on October 19, 2016, naming Newport-Mesa Unified School District. The parties made a joint motion to consolidate the cases at a prehearing conference on December 5, 2016. Consolidation was granted and the matter continued for good cause on December 5, 2016.

Administrative Law Judge Chris Butchko heard this matter in Costa Mesa, California, on March 7, 8, 9, 13, 14, 16, and 17, 2017.

Timothy Adams, Attorney at Law, and Lauren-Ashley Caron, Attorney at Law, of Timothy A. Adams and Associates, represented Student. Student's parents attended all days of hearing.

Alefia Mithaiwala, Attorney at Law, of Harbottle Law Group, represented District. Maureen Cottrell, Director of Special Education, Resolutions, attended all days of hearing on behalf of District.

On March 17, 2017, OAH granted the parties' request for a continuance to allow the parties to file closing briefs. Upon timely receipt of the written closing arguments on April 4, 2017, the record was closed and the matter submitted for decision.

ISSUES

District's issue was:

1. Was the June 2016 multidisciplinary triennial assessment and report appropriately conducted?¹

Student's issues were:

2. Did District fail to make an appropriate offer of placement, services, and goals in the individualized educational program developed at the April 22, 2015 IEP team meeting that would address Student's social-emotional, academic and safety needs, thereby denying Student a free and appropriate public education?
3. Did District fail to make an appropriate offer of placement and services in the IEP developed at the June 3, 2016 and October 7, 2016 IEP team meetings

¹ At the commencement of the hearing, Student withdrew his challenge to District's speech and language assessment. Accordingly, that issue in District's due process hearing request is not discussed.

that would address his social-emotional, academic and safety needs, thereby denying Student a FAPE?

4. Did District fail to address bullying of Student in the 2014-2015 and 2015-2016 school years, thereby denying Student a FAPE?

No issues were tried by consent.

SUMMARY OF DECISION

District did not establish that its multidisciplinary triennial assessment and report was appropriately conducted. The assessor failed to review available information material to Student's mental state. Student did not establish that the offer of placement and services at the April 22, 2015, IEP team meeting was inadequate to meet his individual needs. However, Student did prove that the 2016 IEP team meetings did not produce an offer of FAPE to Student and that District did not adequately address bullying issues concerning Student in the 2014-2015 and 2015-2016 school years.

FACTUAL FINDINGS

BACKGROUND

1. Student is a 14-year-old male who moved into District in the 2012-2013 school year and began attending public school in District in the 2013-2014 school year when he entered as a fourth grader. Student had twice been retained in grade before attending school in District. At the time of hearing, Student was attending seventh grade at the Prentice School, a state-certified non-public school.

2. Approximately one week after he was born, Student suffered cardiac arrest due to a congenital defect in his heart valves and suffered a lack of oxygen to his brain.

As a consequence, his basal ganglia²were damaged. Student was developmentally delayed, undersized, and had impairments in speech and language, executive functioning, processing, and impulse control. Student's cardiac issues have been a life-long concern. Student's health is followed by a cardiologist, a psychiatrist, and an endocrinologist.

3. Student was found eligible for special education services by a previous district of attendance while in preschool. A psycho educational assessment by that district dated March 23, 2011, found that Student met the eligibility criteria for specific learning disability. The report stated that there was a discrepancy between his intellectual ability and academic achievement in written and spoken language and that he had an attention processing disorder. Additionally, Student was found eligible for services by his prior district due to speech and language impairment.

4. Student was assessed by District when he was in third grade, prior to his entry into District. A multi-disciplinary assessment was completed on April 25, 2013. The report recommended to the IEP team that he be found eligible for special education services under the categories of other health impairment, due to attention deficit/hyperactivity disorder, and speech and language impairment. Those eligibilities have remained the same through his time in District. Student has never been found to meet the criteria for specific learning disability by District.

5. District found in 2013 that Student did not meet the eligibility criteria for specific learning disability. District administered the Wechsler Intelligence Scale for Children, Fourth Edition, and found that Student had a low-average full scale IQ of 80.

² The basal ganglia are clusters of neurons in the brain involved in the processing of information. Damage to the basal ganglia can affect movement, memory, reasoning, and motivation.

Student's working memory score was a 59, but his perceptual reasoning score was 98 and his verbal reasoning score was 89. His other composite score was an 83, in processing speed. Because there was "significant scatter" between the scores, the assessor derived a General Ability Index score of 93, which reflected Student's general cognitive ability with reduced emphasis on working memory and processing speed. In such circumstances, Student's overall intellectual functioning was in the average range. Since Student's low-average full-scale IQ was not significantly discrepant from his performance scores on the Wechsler, which placed him in the low average to average range on nearly all subtests, he was not found to have a specific learning disability.

6. Following agreement by the team on the IEP's placement and services, Student was placed in a fourth grade general education class for the 2013-2014 school year, with pull-out specialized academic support and speech and language services.

2014-2015 SCHOOL YEAR AT MARINERS ELEMENTARY

7. Student attended fifth grade at Mariners Elementary in the 2014-2015 school year. Student experienced significant academic, social, and health-related issues.

8. Student continued to have difficulty with academics. Student struggled with reading, writing, and mathematics. His ability to sustain attention was poor, and he had great difficulty completing his homework. Student's grades reported him at the beginner and early intermediate level, reflecting grades of one and two on a five-point scale.

9. Student had experienced some difficulties with peer relations in fourth grade, which worsened in fifth grade. Student had two friends in fifth grade: one in his class, and the other in another class. Both of these students were also receiving special education services.

10. Student's academic support teacher for fourth, fifth, and sixth grade was Andrea VanderWal. Ms. VanderWal was aware that Student was on medication

prescribed by his psychiatrist intended to help him with focus, attention, and behavior and that he had a complicated medical background which included a heart condition and damage to his brain. If Student were behaving in an unusual manner, Ms. VanderWal would reach out to Parent or the school nurse to find out if Student's medication had changed or if he had not taken it.

11. When Student was in fourth grade, Parent wrote to Ms. VanderWal about a student who was telling other children not to sit with or play with Student. Parent told her that Student felt "very alone" and broke down at home. Ms. VanderWal responded by noting that Student had been "playing rough and causing trouble" on the playground. She promised to consult staff and figure out a way to resolve the situation. She did not take formal action because Parent had asked her to keep the matter confidential.

12. Ms. VanderWal had conversations with the school psychologist about Student's need for counselling or a safe space at school in the fourth, fifth, and sixth grades. Sometimes Student would stay with her during recess rather than go into the yard, but she did not recall that it was because he was anxious about facing other students.

13. In September 2014, Ms. VanderWal emailed Parent because she was concerned that Student seemed "busy" and "rattled." Parent responded that Student was sleeping poorly and stressed. That same day, Parent sent Ms. VanderWal an email asking to add "tier 1 counseling" to Student's services and asking if it was necessary to call an IEP team meeting to do so. Parent believed Student needed someone to talk to and a safe space at school. Ms. VanderWal did not recall receiving that email. Ms. VanderWal knew that it was not necessary to have Tier 1 counselling written into an IEP, as Tier 1 counselling was casual, unscheduled time with a counselor available to any student on a drop-in basis.

14. Ms. VanderWal saw Student as a child who would be sad “fleetingly,” but whose main problems were frustration, impulsivity, and self-doubt. She saw Student make negative statements about himself, saying that he was not good enough, not smart enough, and that he was never going to be able to “get” his schoolwork. In a short time, however, he could switch to a bright smile and be vibrantly happy. Ms. VanderWal thought he was happy much more often than he was sad.

15. Student’s fifth grade general education teacher was Janet Phillips. Ms. Phillips was also aware of Student’s medical history and on-going health challenges. She was also aware that Student was being prescribed psychotropic drugs by his psychiatrist to help him function at school. In her class, Student displayed problems with recall, short-term memory, and impulsivity. His impulsivity would manifest in blurting out comments in class, being physical in others’ personal space, and grabbing objects from students. In general, she found that he did not get along with other children. Academically, he had difficulty retaining information, and she would have to sit with him and reteach him things he had learned the day before in a one-on-one setting.

16. Ms. Phillips also saw that Student had social struggles. Student wanted to make friends and would be jovial, but would impose in others’ personal space and mimic other children’s poor behavior. Student was not teased in her class, but there would be “some eye rolling” when he would blurt out or attempt to be funny. There were days when Ms. Phillips believed Student was sad or upset, but she could not get him to talk about what was bothering him. Those withdrawn days were not his normal behavior, as he was usually “a big bright spot” with a lot of personality. Ms. Phillips recalled that there were a couple of occasions that year when Parent told Ms. Phillips that there were difficulties with other students, but Ms. Phillips did not recall the details. One incident Ms. Phillips did recall was initiated by Student and he was disciplined for knocking balls out of other children’s hands.

17. On February 2, 2015, Student went to the nurse's office and told her that other children were picking on him and he was sad. The nurse called Parent, who asked that the school psychologist come talk to Student. The psychologist, Ms. McCarthy, came and talked with him, and Student returned to class.

18. On April 27, 2015, Parent emailed Ms. Phillips to thank her for letting Student sit with her during recess. Parent explained that Student was having a "great deal of anxiety" because of something on the playground "with a couple of boys." Ms. Phillips replied that she tried to get Student to talk about it, but he only said he wanted to go home. She acknowledged his feelings but told him to let go of his thoughts. He listened to a book on tape for 30 minutes and his mood improved. Parent wrote back to thank Ms. Phillips, noting that Student was being triggered by something on the playground but that Parent knew it might be something Student had done or was not understanding that was causing his anxiety.

19. Shortly afterward, Student was disciplined on May 2, 2015, for "pinching and pulling" another student. The report stated that Student acted to defend his friend. Student was directed to write a letter of apology, attend a conference with Parent and an administrator, and perform two acts of service at the school.

20. On another occasion about a month later, Parent emailed Ms. Phillips to tell her that Student was upset and seemed to be struggling socially. Ms. Phillips replied that Student was trying very hard to appear "cool," repeating comments by other students, acting rambunctious and rude, and sometimes being uncooperative, argumentative, or disrespectful to her. Parent stopped a new medication Student had begun and Ms. Phillips convened a meeting with Student and Parents to discuss his behavior. Student's behavior improved.

21. Ms. Phillips would mediate disputes between Student and others in the classroom. Student had more incidents than the others in her class. Ms. Phillips did not recall Parent ever telling her that Student was being bullied.

APRIL 22, 2015 IEP TEAM MEETING

22. An annual IEP team meeting was held on April 22, 2015. Both Parents, Ms. VanderWal, and Ms. Phillips attended. Also in attendance were Pam Coughlin, an administrator, Natalie Gudelman, a speech and language pathologist, and Claudine Stack, an inclusion specialist. No school psychologist or other mental health professional was invited to or attended the meeting. A health/medical report was given, although no nurse was noted in attendance. The report noted that Student had taken Inderal, "Kapray," Strattera, and Namenda prescribed by his psychiatrist Dr. IhabSoliman for inattention and impulsivity.³

23. Student was reported to have met his prior IEP's goals, including specifically academic goals in reading fluency, essay composition, addition/subtraction of decimals, comparing fractions, and performing word problems. Student achieved his communication goals in articulation in speech, use of expressive language, staying on topic in conversation, and self-correction of social behavior. Student also met his behavior goal in self-control, which was to refrain from blurting out and raise his hand when needing assistance in answering questions in 60 percent of charted opportunities in two of three trials.

³ Inderal is a cardiac drug with an off-label use to treat aggressive behavior and panic attacks. Kapvay (reported in the IEP as Kapray) and Strattera are drugs used to treat ADHD. Namenda is used to treat Alzheimer's-related dementia and has been used off-label to treat ADHD and obsessive-compulsive disorder in children.

24. New goal levels were set in reading fluency and composition, and new goals were introduced in comprehension and vocabulary. New goals were set for Student in mathematics in writing expressions, decimal operations, and integer plotting. A new goal level was set in use of expressive language and a new goal established in understanding multiple meanings of words. No goals were set in articulation, staying on topic, social thinking, or self-control. The report noted that Student's articulation was age-appropriate and that he had increased his ability to conform behavior to social expectations. It was also noted that Student still "often makes off-topic comments or becomes tangential." Regarding Student's self-control, the IEP report noted that Student "definitely has behavioral challenges in the classroom, but they are addressed by the supports in place."

25. Student's services consisted of the continuation of his pull-out specialized academic instruction and his group speech and language services at their prior levels. Student would be in general education for 65 percent of his school day. Student was provided with some accommodations and allowed modified assignments. Parent requested that Tier 1 counselling services be written into Student's IEP, and District did so, noting that the counselling should address his coping skills. No specifics were given regarding the frequency, location, duration, and person responsible for counselling services. Information available to the IEP team at this meeting did not indicate sufficiently significant behavior, socialization or mood issues to require a higher level of intervention.

26. During the discussion of Student's strengths, Ms. Phillips noted that Student learned best in a small-group environment. Parents' input was recorded as stating that "they would definitely like to continue with Tier 1 counselling support" and informing the team that Student was starting on a new medication to "decrease

impulsivity and increase language processing." Parents consented to the IEP on April 22, 2015.

SUMMER OF 2015

27. From June to August 2015, Student attended an eight-week social skills class run by the University of California at Irvine Child Development School. The program sent Parent a letter dated August 11, 2015, noting that Student made improvements over the course of the class but that he still needed to work on ignoring distractions, regulating his behavior, and "keeping his hands to himself when he gets frustrated." The report also said that Student would benefit from repeating the class or enrolling in a day treatment program. Parent provided this letter to District at the start of the 2015-2016 school year.

2015-2016 SCHOOL YEAR AT MARINERS ELEMENTARY

28. Student had an increasingly difficult time in sixth grade. Parent met with Matt Evans, Student's general education teacher, and Laura Sacks, the school principal, early in the year to introduce them to Student's challenges.

29. Mr. Evans found that Student had a tough time with his peers. Student was generally by himself at school. Student's two friends were not at Mariner's at the start of the year. One had moved away and the other was undergoing treatment for health problems. Mr. Evans did not recall ever being told by Student that other kids were bullying him, but he did recall being emailed by Parent in October that Student was having difficulty with a classmate.

30. In December Mr. Evans had an email exchange with Parent regarding Student's difficulties in physical education class. Student was having problems following directions and adhering to rules in class. Mr. Evans noted that it was unfortunate that Student was struggling socially and did not want to go to school. He offered to give

Student more personal attention to try to motivate him, and Mr. Evans stayed in during lunch time one day and watched videos with Student. At the end of it, Mr. Evans told Student that it was understandable if he was afraid to speak up, but if kids were threatening to beat him up it would not be tattling to tell someone. Mr. Evans brought up the idea of bullying with Student because bullying was a concern to Parent.

31. Mr. Evans came up with a plan to have Student mentor children in the kindergarten yard during recess, and put that into action after the winter break. Student did well and appeared to enjoy the experience. Although one of Student's friends had returned to school by mid-year, he was leaving at winter break to be homeschooled. Mr. Evans thought it would be "a blow" to Student to lose his friend. He told Parent about his plan, who thought it was a good idea because Student was having "a really hard year with his peers."

32. Student told Parent that he did not want to attend school because he had no friends and the other kids would mock him or be mean to him. Student would resist going to school. Student told Parent that he would hide in the restroom or go to the nurse's office when he could not take the stress any longer.

33. Visit logs from the nurse's office reported that Student visited there four times in the 2015-2016 school year and 15 times the previous year. One visit in 2015-2016 was reported as caused by injuries received on the playground from being hit multiple times by a soccer ball and the rest were for illness or discomfort. The previous year, eight visits were for illness, six for injury, and one because Student was feeling sad after being picked on.

34. Student had told Parent that he had been picked on by a group of boys, two of whom were in his class. He said they would block the entrance to the classroom and make fun of him. He told Parent that he would be tripped or stomped on at the

playing fields at school. In addition, Parent overheard children she knew from Student's school making fun of him at an event at a local beach club.

35. One time, Parent saw Student being trodden on after falling while playing flag football at school. Parent took Student to Mr. Evans's class and reported what had happened, but was unaware if there was any follow-up.

36. Parent emailed Wendy Maraffi, the school psychologist at Mariners, on February 4, 2016, requesting a meeting to discuss Student. Parent believed that Ms. Maraffi had been giving counselling to Student, but Ms. Maraffi had only seen him when she rendered push-in services in his communication group and from observing his academic support class. Ms. Maraffi was aware that Student was seeing a psychiatrist and had knowledge of his disabling conditions, but had never spoken to Parent about Student. She met with Student on one occasion, after the February 23, 2016 incident. Student was not receiving counselling.

37. Ms. Maraffi was one of several staff at Mariners that Student could reach out to for support. No staff at Mariners had ever raised any concerns with her about Student needing psychological services because of an educationally-related condition. Parent asked Ms. Maraffi to check on his inclusion at the school playground. Ms. Maraffi attempted an observation, but Student was not there that day. She did not have another opportunity to observe Student prior to his departure from Mariners.

THE FEBRUARY 23, 2016 INCIDENT

38. At some time in January or early February, Student threw a ball at Classmate A and struck him in the head. No disciplinary record was made of this event. Classmate A was one of the three identified persons that Student had told Parent was harassing him and that Parent identified to school staff as a child with whom Student had been having difficulties.

39. On February 23, 2016, Student was playing during lunch period. Student again threw a ball that hit Classmate A in the head. After lunch period, Classmate A went to Mr. Evans and told him about it.

40. That afternoon, Classmate A's parent wrote to Mr. Evans asking that Student be moved out of the class. He stated that he had been patient with Student but "can no longer can [sic] keep quiet on this." He asked what was being done about Student's repeated behavior. Later that day, Classmate A's parent emailed Principal Sacks complaining about Student's actions. Principal Sacks agreed to meet with them the next morning.

41. The next day, Mr. Evans prepared an office referral describing the incident and sent an email to Parent and Principal Sacks. He told them that a second incident had happened with Student and Classmate A and that there had to be consequences for Student. He wrote that he would meet with Ms. VanderWal and Ms. Maraffi to discuss an appropriate consequence. Principal Sacks replied that she had just met with Classmate A's parents, who informed her that Student had "repeatedly tripped, hit, kicked, or otherwise been inappropriately physical" with Classmate A and other students. She instructed Mr. Evans to conduct an investigation and directed Mr. Evans to tell Student "you know it was not an accident and give him another chance to tell his side of the story" and to discreetly interview other witnesses.

42. Principal Sacks had not had staff undergo any specific training on bullying for the 2015-2016 school year, but she was very clear about having staff report anything that happened. She believed that it was highly important to keep reports of bullying because that was the way to stop bullying. Reporting bullying let the child who was doing the bullying know that the adults were "on watch," and that is what curbs the behavior. Students were told that they should report anything that goes on at campus.

43. Mr. Evans then confronted Student, who admitted that he threw a ball that hit Classmate A but said it was an accident. Mr. Evans asked another student about the event. That student said it was not an accident and that Student laughed after Classmate A was hit. Mr. Evans reported this to Principal Sacks, and his report was entered into the school's computerized discipline database. Student eventually told Mr. Evans that he intentionally threw the ball at Classmate A.

44. Parent spoke with Ms. VanderWal on February 25, 2016. Ms. VanderWal wrote to Principal Sacks and other Mariners' personnel informing them that Parent was concerned that she and others had spoken several times about bullying and safety concerns at the school without anything having been done in response. Parent reported that Student did not feel safe in returning to school and that Parent wanted to explore all options for changes in support, site, placement, or program for Student.

45. Upon being notified of Parent's email, Principal Sacks responded to her staff, asking the team to search their records for any reports of bullying by Student. No records were returned reporting bullying of or by Student.

46. On February 29, 2016, Parents' legal counsel sent a letter notifying District pursuant to 34 C.F.R. § 300.148 that Parents did not believe that District had offered Student FAPE and that they were reserving their right to privately place Student to address his educational needs. Student began attending the Prentice School on March 4, 2016. On March 18, 2016, Parents' counsel informed District that Parents would be seeking reimbursement for Student's private placement and related expenses.

STUDENT'S PSYCHIATRIC TREATMENT

47. From the time Student was in first grade and throughout his time in District, he was being treated by Dr. Ihab Soliman, a psychiatrist. Dr. Soliman graduated from medical school in Alexandria, Egypt, in 1987. He completed residency in Adult Psychiatry at Loma Linda University in 1991 and a fellowship in Child and Adolescent

Psychiatry in 1994. He was Board Certified in Psychiatry and in Child and Adolescent Psychiatry. He was licensed as a physician in the state of California.

48. Dr. Soliman had a private clinical practice specializing in the treatment of attention deficit hyperactivity disorder. He also saw patients with anxiety, Tourette's syndrome, and mood disorders. He had treated approximately 300-400 elementary school-aged students.

49. Student was referred to Dr. Soliman after Student's pediatrician was unable to treat Student's ADHD with standard treatment and medications. Damage of the type done to Student's basal ganglia by oxygen deprivation can cause problems with mood regulation, anxiety, motor control, and learning/processing ability. Student's ADHD was atypical because it was combined with unusual impulsivity, emotional dysregulation, and an unusual reactivity to medication. Because Student's condition was complex and would respond adversely to normal medications, Dr. Soliman was continually adjusting Student's medication. He would try new drugs in new combinations and would try drugs in "off-label" usages. These combinations of drugs sometimes had unpredictable effects on Student. Student had a genetic test done in fall of 2016 that gave Dr. Soliman information about Student's metabolism of medication that has enabled him to adjust Student's medication to be more effective.

50. Parent and Dr. Soliman were in regular contact about Student's reactions to his medications and his mental state. On April 27, 2015, Parent wrote to him that although there were no problems with Student's new medication, his anxiety was "still extremely high.... He almost had a panic attack before school... [and] he becomes short of breath and cries before anything he feels is going to be difficult." Dr. Soliman was adjusting Student's medication frequently, and through fifth and sixth grade he would see Student as often as every three weeks, where in the past it had been three months between visits.

51. Dr. Soliman monitored Student's emotional state as part of his treatment. Student expressed concerns about failing academically, about not being believed, and about being bullied. Student's emotional state became a particular concern for Dr. Soliman starting around the second half of fifth grade.

52. Dr. Soliman saw Student's mental state deteriorating and Student becoming angrier. On occasion, Student would become so emotional that he would run out of Dr. Soliman's office. Student told Dr. Soliman more than once that he was considering killing himself. Dr. Soliman believed that Student was not serious about the threat and had no plan to harm himself, but considered it a serious matter. By sixth grade, Dr. Soliman believed that Student was progressively descending into hopelessness because no one was helping him with bullying and saw a bad sign in the fact that Student did not "regroup" over winter break. Student's impulsivity made his ideation more troubling to Dr. Soliman.

53. Dr. Soliman was available to talk with representatives of District about his diagnosis and treatment of Student. He noted in Student's chart that Parent gave him a release to talk with District, but was never contacted.

54. After the February 23, 2016, playground incident, Dr. Soliman told Parent that Mariners was a not a good place for Student. He believed that it was a chaotic and unhealthy environment. Student told Dr. Soliman that he got hit by Classmate A and was punished for retaliating.

55. In Dr. Soliman's opinion, once Student began attending Prentice, Student's treatment concerns were refocused on his ability to sustain attention. Emotional concerns became secondary to Student's attention issues. Dr. Soliman found that Student's anxiety and mood symptoms had improved, which he attributed to Student's change in educational setting.

THE PSYCHO EDUCATIONAL ASSESSMENT

56. After Parents withdrew Student from Mariners, District scheduled an IEP team meeting for March 1, 2016. Before that date, Parents retained counsel and requested that the meeting be rescheduled. Student was due to have a new comprehensive assessment for his triennial review. In response to events and to Parents' request that Student be evaluated for educationally-related mental health services, District decided to generate a new assessment plan and new dates were proposed by District for the IEP team meeting. Ultimately the meeting was delayed until the completion of the assessment. A 'meet and adjourn' IEP meeting was held on April 22, 2016, and the team met again on June 3, 2016, to review the assessment.

57. Ivette Perez was District's school psychologist who completed its June 3, 2016 psycho educational evaluation. Her report is part of a multidisciplinary assessment, but is the only part of the assessment at issue. Ms. Perez received a bachelor of arts degree in psychology from California State University, Long Beach, in 2002 and a master of science degree in school psychology from National University in 2005. She also obtained a pupil personnel services credential and a school psychology credential after study at National University in the same year.

58. Ms. Perez had worked as a school psychology intern for the Anaheim City and Los Alamitos Unified school districts. She had worked for District as a school psychologist since 2005 and was promoted to lead school psychologist in 2013.

59. Ms. Perez had conducted between 20 and 30 student evaluations per year. Ms. Perez was knowledgeable about and trained in administering standardized assessment instruments. She was qualified to administer the assessment based on her education, training, credentials, and experience.

60. Ms. Perez assessed Student through the use of records review, caregiver interviews, direct observation, and standardized testing. Before conducting the

assessment, Ms. Perez reviewed Student's educational records, including prior assessment reports, to understand Student's case history.

61. Ms. Perez reviewed Student's health history report and a health screening prepared by District's nurse, Jeri Ann Enciso. The report detailed Student's cardiac issues, the damage to his brain, and his growth issues. The report noted that Student had been treated and counseled by a psychiatrist for ADHD, anxiety, and depression. The report also noted that Student had recently discontinued taking the medication Namenda and was now taking Eveko for inattention as well as the antidepressant Seroquel.

62. Ms. Perez interviewed Student, Parent, Mr. Evans, Ms. VanderWal, and two of Student's teachers from the Prentice School. Student stated that when he was at Mariners he did not have any friends and his peers were mean to him, but that he did not care whether he stayed at the Prentice School or transitioned to middle school back at District. He did not report any current physical symptoms of anxiety and did not report any past symptoms of depression such as feelings of hopelessness, sadness, thoughts of death, or sleep disturbances.

63. Parent described Student as struggling across a wide variety of areas in social-emotional functioning. Parent stated that he suffered from anxiety and depression, and would have difficulty sleeping, wake up crying, and refuse to go to school. Parent believed that Student was immature and was excluded socially. Parent saw Student as having difficulty with expressive language, memory, and hyperactivity.

64. Ms. Perez's interview of Mr. Evans disclosed that Student was generally happy, although he would engage in negative self-talk after conflicts with peers and would cry on occasion, although infrequently. Mr. Evans did not see symptoms of anxiety in Student, although Parent reported that Student was anxious about school. Mr. Evans reported Student had difficulty in reading, math, and writing and with attention,

memory, and expressive language. Student's peer relationships were hindered by his impulsivity, which would make him act without thinking.

65. Ms. VanderWal gave Ms. Perez a similar report. Ms. VanderWal noted that after Student's last friend left the school, Student's difficulties with his peers became more evident and Student suffered "increased nervousness about his social deficits." She found that Student had difficulty reading but could confidently ask and answer questions after reading and discussing a story or text in a small group. She found that he could do math with supports, but his short-term and working memory was a concern.

66. The teachers from the Prentice School interviewed by Ms. Perez gave reports that echoed his experiences at Mariners. They reported that Student would invade others' personal space, that he would engage in negative self-talk, and would cry when he became overwhelmed. They also stated that Student missed social cues and had high levels of impulsivity and anxiety. At the time those teachers were interviewed and rating scales obtained by Ms. Perez, Student had been in their classes only a brief time. Student entered the Prentice School in early March and Ms. Perez visited there April 18-20, 2016. Three months passed between the time Student started at the Prentice School and when Ms. Perez completed her report.

67. Ms. Perez observed Student in the classroom in the Prentice School on three occasions for a total of at least 140 minutes. She also observed him in unstructured time on the playground on two occasions for a total of more than 35 minutes. She observed him blurt out comments, require redirection to attend to work, and fail to follow directions. He did appear to socialize readily in unstructured time.

68. For the psycho educational assessment, Ms. Perez employed the following tools: the Kauffman Assessment Battery for Children, Second Edition; the Cognitive Assessment System, Second Edition; the Behavior Assessment System for Children, Third Edition; the Test of Problem Solving: Adolescent-2; the Wechsler Individual Achievement

Test, Third Edition; the Test of Auditory Processing Skills; the Beery-Buktenica Developmental Test of Visual-Motor Integration, Sixth Edition; the Connors Third Edition; the Multidimensional Anxiety Scale for Children, Second Edition; the Children's Depression Inventory, Second Edition; and the Emotional Disturbance Decision Tree.

69. Ms. Perez established rapport with Student and administered the testing according to the instructions. With the exception of an interruption during the delayed recall testing section in the Kauffman Assessment Battery, there were no breaks of the standardization of administration. The remainder of assessments were compiled through questionnaires and rating scales given to parents, teachers, and caregivers. All of these were administered in compliance with the standardized instructions.

70. Because of the interruption during administration of the Kauffman Assessment Battery, Ms. Perez believed she could not obtain a reliable full scale index score for Student. As a consequence, she could not use the score from that test in assessing whether Student had a specific learning disability. In the completed sections of the assessment, Student was classified as average in two domains and below average in two others. Instead, Ms. Perez used Student's score on the Cognitive Assessment System test, where Student scored a 61, which was in the "very poor" range, the bottom ranking category. That test consisted of subparts testing planning, memory, integrating separate stimuli, attention, and serial ordering of things. Student did particularly poorly in the attention and serial ordering sections.

71. Ms. Perez had two teachers from the Prentice School, Mr. Evans, and Parent fill out ratings scales for the Behavior Assessment System for Children. Parent, Mr. Evans, and one teacher reported that Student displayed clinically significant levels of depression and anxiety. Ms. Perez asked Mr. Evans about his high ratings and he told her he was relaying concerns Parent has expressed to him. He stated that he had not

observed Student to suffer anxiety or depression, and Ms. Perez discounted his rating scales. She did not ask him to complete new rating scales reporting his own impressions.

72. Student reported on the Children's Depression Inventory that he thought about killing himself but would not do it. Ms. Perez was surprised by that, and asked Student about the answer. He said that he sometimes felt sad and that he no longer wanted to be around. She was concerned by that, but felt that he had answered in a very mature way and his demeanor indicated that this was not something that was a strong concern for him.

73. After consideration of the information she collected, Ms. Perez prepared a written report. The report, dated June 3, 2016, recounted her assessment protocol and provided her professional opinion regarding whether Student met the state standards for four categories of disability. She found that Student did not meet the standard for emotional disturbance or specific learning disability, but that he did qualify under other health impairment and speech and language impairment.

74. According to Ms. Perez, Student did not qualify under emotional disturbance because his learning difficulties could be explained by "deficits in his intellectual profile," he was able to build and maintain satisfactory relationships with teachers, he did not demonstrate inappropriate types of behaviors or feelings under normal circumstances, he did not have general pervasive mood of unhappiness or depression, he did not have physical symptoms or fears associated with personal or school problems, he was not schizophrenic, and his behavioral difficulties were not evident to a marked degree.

75. Ms. Perez did not find that Student suffered from a specific learning disability through severe discrepancy analysis because his index score on the Cognitive Assessment System did not show a discrepancy between ability and achievement. His "very poor" 61 from the Cognitive Assessment System matched, in her opinion, his

“significantly despressed scores” in areas of achievement. Similarly, under non-severe discrepancy analysis, she found he also did not qualify because “a clear pattern of strengths and weaknesses could not be established” due to significant variability in testing results.

76. Ms. Perez’s report was provided to Parents and given to the IEP team. The report was reviewed by the team during the June 3, 2016 IEP meeting. Ms. Perez was present at and participated in this IEP team meeting.

77. Ms. Perez did not contact Dr. Soliman for information about Student's history, his current mental and emotional state, and his on-going treatment. Ms. Perez’s efforts to talk to Dr. Soliman consisted of directing the school nurse to get a permission release from Parent. When she did not receive the release, Ms. Perez did not follow up with Parent or the school nurse. The failure to obtain information from Dr. Soliman resulted in the psycho educational assessment reporting an incomplete and likely inaccurate depiction of Student. Parent was deprived of corroboration of her opinions of Student's needs and required services, and Ms. Perez did not have to reconcile the intensity of Student's psychiatric treatment with the contrary sunny depictions of Student's mood and behavior reported by teacher. The conclusions of the psycho educational assessment were rendered unreliable and suspect by the failure to obtain information from Dr. Soliman.

THE OCTOBER 7, 2016 OFFER OF FAPE

78. Following the pro forma meeting on April 22, 2016, the IEP team met to consider the multidisciplinary assessment on June 3, 2016. Ms. Perez and other staff presented their findings from the assessment, and the principal from the Prentice School

gave a report. The meeting was adjourned at 3:27 p.m.⁴and was resumed on October 7, 2016.

79. On August 10, 2016, Parents requested from District independent evaluations in speech and language and in psycho educational functioning. District denied the request by letter dated September 6, 2016.

80. At the reconvened meeting on October 7, 2016, the team reviewed Student's progress on his goals and discussed new goals. The team then discussed placement in the least restrictive environment. Placement in a specialized academic instruction class at Ensign Middle School was discussed. District staff stated that Student could get small group instruction and modified curriculum there, and Ensign's assistant principal stated that there was a "community of kindness" push at the school and that staff were very proactive in addressing issues. Placement at the Prentice School was also discussed, and Parent was asked why it was their preferred placement. Parent noted that the children that Student had issues with would also be at Ensign and the "struggling" kids like Student would be targeted at Ensign.

81. District offered Student four periods of specialized academic instruction in English, math, science, and history in a mild/moderate class setting at Ensign. In addition, the offer of FAPE included 30 minutes of group service twice per week and 20 minutes of consultation services per month in speech and language, educationally-related mental health services Tier 2 counselling for 30 minutes per week, and one hour of consultation with a District Specialist per month. Parents declined the offer of FAPE.

⁴ The record does not report at what time the meeting began. The May 9, 2016, IEP meeting notice stated that it would run from 1:30 p.m. to 3:30 p.m.

STUDENT'S EXPENDITURES

82. Student received academic tutoring from the Activ8 Learning Center from December 2, 2015 through May 25, 2016. Parents incurred tutoring costs for 14 sessions at \$60 per session and two sessions at \$70 per session.

83. Student's tuition costs at the Prentice School were \$7,404 for the 2015-2016 school year. For 2016-2017, Student's costs have been \$2,403.34 per month for tuition at Prentice, along with a one-time registration fee of \$225.

84. Student paid Dr. Perry Passaro \$4,125 for an independent educational consultation.

CREDIBILITY

85. Parent's testimony was colored to an understandable degree by concern for Student. Some of Parent's testimony conflicted with the record and the testimony of teachers at both Mariners and at Prentice. For example, Parent believed that Student had such severe difficulty expressing himself at all times that he could not tell his side of the story to defend himself from accusations of wrongdoing such as the February 23, 2016 incident. The other witnesses did not find that level of inarticulateness and some found that he spoke confidently and volubly when discussing something he knew or understood. For that reason, Parent's testimony regarding Student was difficult to fully credit without some corroboration.

86. District witnesses, with three exceptions, appeared forthright and credible in testimony. Mr. Evans was guarded in his testimony, indicating through demeanor that he was weighing his words carefully rather than replying naturally. To a greater extent, the same was true of Ms. Perez and Dr. Sacks, both of whom gave the impression that they were internally monitoring their responses. Both had to be directed at times to respond to the clear intent of the question or counseled to avoid off-topic responses.

Their behavior gave the impression that they were being less than candid in their responses and detracted from their credibility.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁵

1. This hearing was held under the 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)⁶ 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 and appropriate public education 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. (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

⁵Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶All subsequent references to the Code of Federal Regulations are to the 2006 version.

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.)

4. The Ninth Circuit Court of Appeals had held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the Rowley standard and could have expressly changed it if it

desired to do so.]) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit” or “meaningful educational benefit,” all of these phrases were applied to define the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.)

5. The Supreme Court’s recent decision in *Endrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S. ___, 137 S.Ct. 988 (2017 WL 1066260) reaffirmed that 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. The Ninth Circuit further refined the standard in *M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir 2017) __ F.3d __ (2017 WL 1131821), stating that that an IEP should be reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so as to enable progress commensurate with non-disabled peers, taking into account the child’s potential.

6. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (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).) 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] (*Schaffer*); see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

DISTRICT'S ISSUE (ISSUE 1): APPROPRIATENESS OF THE JUNE 3, 2016
MULTIDISCIPLINARY ASSESSMENT

7. District contends that the psycho educational section of the June 3, 2016 Multidisciplinary Assessment was appropriately administered by a qualified assessor and met all statutory requirements. For that reason, District asserts that it is not obligated to fund an independent psycho educational assessment of Student.

8. Under certain conditions, a student is entitled to obtain an independent educational evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329]; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) "Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an independent educational evaluation, the student must disagree with an evaluation obtained by the public agency and request an independent educational evaluation. (34 C.F.R. § 300.502(b)(1), (b)(2).)

9. When a student requests an independent educational evaluation, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

10. Based upon the foregoing authority, District timely filed a request for due process hearing to show that its assessments were appropriate. Parent sent a letter to District on August 10, 2016, requesting independent psycho educational and academic evaluations. On September 6, 2016, District responded to this request by a letter constituting prior written notice and filed a due process hearing request on September

19, 2016. District's filing to defend its assessments within 40 days of Student's request for independent educational evaluations does not constitute an undue delay.

REQUIREMENT FOR ASSESSMENTS

11. Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.)⁷ Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).) The instant matter involves reassessment of Student, as he had been previously assessed and found eligible for special education.

12. Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v); Ed. Code, § 56320, subd. (b)(2), (3).) In California, a test must be selected and administered to produce results "that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure..." (Ed. Code, § 56320, subd. (d).) A district must ensure that a child is assessed "in all areas related to" a suspected disability. (Ed. Code § 56320, subd.(c), (f).)

13. Assessments must be conducted by individuals who are both "knowledgeable of [the student's] disability" and "competent to perform the assessment, as determined by the school district, county office, or special education

⁷ An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

local plan area.” (Ed. Code, §§ 56320, subd. (g), 56322; see, 20 U.S.C. § 1414(b)(3)(A)(iv).)

A psychological assessment must be performed by a credentialed school psychologist. (Ed. Code, § 56324, subd. (a).) School districts are required to ensure that the assessment tools and strategies provide relevant information that directly assists persons in determining the educational needs of a child. (34 C.F.R. § 300.304(C)(1)-(7).)

14. The IDEA also provides that as part of any reevaluation, the IEP team and other qualified professionals as appropriate shall review existing evaluation data on the child including evaluations and information provided by the parents of the child; current classroom-based, local or State assessments, and classroom-based observations, and observations by teachers and related service providers to determine eligibility, needs, program and services. (20 U.S.C. § 1414(c)(1)(A); 34 C.F.R. § 300.305(a)(1).) Assessments must also include educationally relevant health, developmental, and medical findings and other relevant material about pupil. (Ed. Code § 56327; (Cal. Code Regs. tit. 5 § 3030.)

15. Tests and assessment materials must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(a)(3)(A)(i)-(iii); Ed. Code, § 56320, subd. (a).)

16. An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code, § 56327, subds. (a), (b).)

17. District established that Ms. Perez was qualified to administer the psycho educational assessment by virtue of her education and experience. She was a credentialed school psychologist and had performed assessments of many students. Although Student's expert Dr. Passaro stated his opinion that assessments related to educationally-related mental health services should be conducted by persons with clinical training, there is no such requirement in the law.

18. Ms. Perez used a wide variety of instruments and did not rely on any one procedure as the sole criteria for determining Student's eligibility for services. The test instruments she used were employed for valid and reliable purposes and were administered according to their instructions. Ms. Perez chose not to use the results of the Kauffman Assessment Battery's delayed recall test because interruptions broke the standardization of the test.

19. Student contends that this led her into an error, as she chose to use Student's very low Cognitive Assessment System score as an signifier of Student's overall ability because she could not use the Kauffman's Mental Processing Index score in determining whether Student met the eligibility criteria for specific learning disability under the severe discrepancy model. To determine eligibility under that model, the assessor compares a cognitive ability score to a student's level of achievement. Student's particular areas of cognitive weakness comprised a greater part of the Cognitive Assessment System than they did of the Kauffman Assessment Battery. When that low score was compared to Student's levels of achievement, no discrepancy was found.

20. Student contends that Ms. Perez should have used scores from previous testing, such as the average range General Ability Index score of 93 from his last triennial assessment, as his measure of cognitive ability. Student cites no authority or protocol allowing an assessor to substitute an older score for current results. Further, Student chooses the 2013 General Ability score from the Wechsler test rather than its full scale IQ score of 80, and does not explain why the higher score is more reliable. Ms. Perez had a current test result which she believed was appropriate for her purpose and used it. The test may not have been well-matched to the subject's particular set of abilities, but that does not make the resulting assessment inappropriate.

21. A more significant problem is raised by Student's objection that Ms. Perez did not consult with Dr. Soliman in preparing her assessment. The IDEA requires assessors to consider educationally relevant health and medical information to provide relevant information that directly assists persons in determining the student's educational needs. Ms. Perez did not obtain information from Dr. Soliman despite being aware of the high relevance of his information to Student's academic needs and performance.

22. District has been aware that Student has been under the care of Dr. Soliman since before the time Student entered Mariners Elementary. Student's medical history was disclosed to District, and all of Student's teachers had been aware that Student had been prescribed drugs that sometimes had powerful effects on his ability to access his education and attend to class. Ms. VanderWal, Ms. Phillips, and Mr. Evans had all checked with Parent on Student's medication status if he was acting in an unusual way.

23. Ms. Perez was aware that Student was being treated by Dr. Soliman for anxiety and depression as well as ADHD, and knew that drugs such as Eveko, Namenda, and Seroquel had been prescribed. Seroquel, for instance, is used to treat schizophrenia and major depressive disorders, and Namenda is a treatment for Alzheimers. Ms. Perez also knew that Parent reported that Student had high levels of anxiety, depression, and social difficulties. Consciously or not, Ms. Perez discounted Parent's reports of Student's struggles. She disregarded Mr. Evans' written responses to her scales and questionnaires when he stated that his answers reflected input from Parent and relied upon his oral report to her. Ms. Perez could have lifted any uncertainty she had about the severity of Student's mental afflictions by contacting Dr. Soliman.

24. Difficulty in contacting Dr. Soliman does not excuse the lack of effort made. According to Ms. Perez's testimony, she asked the school nurse to obtain

permission from Parent to talk with Dr. Soliman. Dr. Soliman testified that he noted permission to talk with District on Student's chart, but was never contacted. It is unclear in the record whether the school nurse or Parent was responsible for the failure to return a permission slip, but Ms. Perez did not take any action to follow up. A professional should be expected to conduct sufficient inquiry to determine whether or not further inquiry is merited.

25. Dr. Soliman had relevant and material information otherwise unavailable to the team about Student's mental state, since he had been counselling him. Ms. Perez was surprised that Student had expressed suicidal ideation; it would have provided insight to her to hear how Dr. Soliman viewed Student's talk. On many issues relevant to the educationally-related decisions for which Ms. Perez provided her professional opinion about Student's mental health to the IEP team, Dr. Soliman had factual insight, professional expertise, and a long-standing relationship with the student in question. It is difficult to imagine how his information could have been more consequential and District's failure to consult with him less excusable. (See *L.J. v. Pittsburg Unified Sch. Dist.* (9th Cir. 2016) 850 F.3d 996, 1006-1008, discussion as to importance of knowing impact of potentially emotionally disturbed student's medication and treatment.)

26. District's assessment failed to gather significant relevant material about Student. Without that information, the assessment cannot be said to have provided relevant information to assist the IEP team in determining Student's educational needs. Accordingly, the psycho educational assessment that is contained within District's June 3, 2016, Multidisciplinary Assessment was not appropriately done. District is therefore obligated to provide funding for an independent psycho educational assessment.

STUDENT'S ISSUES (ISSUE 2): PLACEMENT, SERVICES, AND GOALS IN THE APRIL 22, 2015 IEP

27. Student asserts that District's offer of placement, services, and goals following the April 22, 2015 IEP team meeting was insufficient to meet his unique needs.

28. The legal analysis of whether a school district offered a pupil a FAPE consists of two parts. First, whether the local educational agency complied with the procedures set forth in the IDEA, and, second, whether the IEP developed through those procedures was substantively appropriate. (*Rowley*, supra, 458 U.S. at pp. 206-207.) Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23*, (*Target Range*) (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

'SNAPSHOT RULE'

29. An IEP for a disabled child is measured at the time that it was created. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Dept. of Educ., State of Hawaii* (D. Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439.) Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801.) In reviewing the sufficiency of an IEP's offer of FAPE, the snapshot rule looks at what is reasonable given the information available to the team at the time.

30. At the beginning of his fifth grade year, Student had a lengthy record of struggles with academics. He had been twice retained in grade, and his disabilities

required him to work much harder than neuro typical students to keep up with grade requirements. Student has difficulties with memory, processing, reading, writing, mathematics, focus, attention, and behavior. Despite those challenges, he made progress in school and was a welcome, albeit occasionally disruptive, presence in his teachers' classrooms. When time came to create his IEP for sixth grade, Parents wanted to help him make improved progress.

31. Student's goals were reviewed and new ones set. Some of the previous goals were dismissed without being reset at higher levels because Student had achieved age-appropriate mastery or his challenges were addressed by supports already in place. Student was offered the same placement in general education with pull-out services for small group instruction. In addition, Student was given some minor accommodations and had Tier 1 counselling services written into his IEP.

32. Student contends that the IEP failed to offer him a FAPE on two⁸ grounds. First, Student was not offered sufficient small group instruction. Secondly, he was offered Tier 1 counselling without any specificity given as to the type, duration, or frequency of the counselling and the offer was made without the presence of a psychologist at the IEP team meeting.

33. A higher level of small group instruction was necessary, Student argues, because his difficulties with memory and processing required that instruction be

⁸ Student argues in pages six and seven of his closing brief that Ms. Perez should have contacted Dr. Soliman for his input on Student's condition prior to the April 2015 IEP offer. Ms. Perez did not conduct an assessment that year, and did not need to conduct an assessment, absent cause, until the triennial assessment. Student does not argue that cause existed to conduct the assessment early, so this argument will be considered in the following section.

reinforced and delivered as near to a one-on-one basis as possible. He cites the opinions of Ms. VanderWal and Ms. Phillips that Student learned best in small groups and with re-teaching. Further, small group instruction limited the number of peers with whom he had difficulty interacting. Student is undoubtedly correct that he would learn more in such an environment, but that is broadly true for all students. Student was already receiving small group teaching through the specialized academic instruction offered in his IEP and occasional one-on-one instruction. Student advanced academically in fifth grade. He has not shown that the failure to provide more small-group and one-on-one instruction denied him FAPE.

34. The difference in perception of Student by Parent and District staff could not be much greater. Parent sees Student as sad, isolated, and victimized by bullies. His teachers see him as “happy-go-lucky” and perhaps too boisterous and uncontrolled at play. In the 2015-2016 school year, each had reason to hold to their view. Parent saw Student upset at home, slipping into school refusal, buffeted by the effects of his medication, and grimly holding to the two friends he had. District saw only the hyperactive child who would blurt out answers and off-topic comments in class and knock others about in recess.

35. Ms. VanderWal heard from Parent that Student felt alone at school, but saw him playing roughly at recess. She knew that Student would be fleetingly sad and harbored negativity and self-doubt, but believed he was usually upbeat. Ms. Phillips saw that Student had social challenges, but she saw him in a general education setting where there was less tolerance for blurting out and invading personal space. She knew he could be sad and withdrawn, but saw him as a bright and happy presence. Parent told Ms. Phillips that Student was having playground conflict with some boys and she sat with him once during recess, but it seemed a transitory thing to Ms. Phillips.

36. Student contends that these teachers should have referred Student for counselling services or pushed to have a psychologist at the April 2015 IEP team meeting. The failure to have a psychologist present, he argues, denied Parent the opportunity to participate in the planning of Student's academic program. Such argument is hyperbole. Having a psychologist present at the IEP Team meeting would not have changed much. Parent succeeded in having Tier 1 counselling added to Student's IEP. Ms. VanderWal and Ms. Phillips would not have been any more disposed to push for more counselling or smaller group instruction for Student because a psychologist was present.

37. At most, Parent's argument is that a psychologist at the meeting would have said that Tier 1 counselling is available to all students, and that Parent then could have sought a higher level of intervention. Given that Student's teachers did not see a need for counselling at that time, it is unlikely Parent would have succeeded. Similarly, Student's argument that he was denied FAPE because the type, duration, or frequency of the Tier 1 counselling was not specified presents a procedural violation on which he cannot prevail. The failure to specify terms for a support available on an as-needed basis does not meet the Target Range test for denial of FAPE. Student did not establish that he required regularly scheduled counselling visits to receive a FAPE, instead of receiving counselling when needed based on issues that Student was having at any particular time. Based upon what the IEP team members knew at the time, Student's needs were adequately served by the offer of FAPE extended at the IEP team meeting.

38. The April 22, 2015 IEP offered Student appropriate placement, services, and goals.

ISSUE 3: PLACEMENT AND SERVICES⁹ IN THE OCTOBER 7, 2016 IEP

39. Student contends that the offer of FAPE made following the October 7, 2016 IEP team meeting was inappropriate and deficient. He argues that it did not address his difficulties with peers, his behavioral needs, or his poor academic progress, and that the IEP team was misled by an inadequate psycho educational assessment.

40. As noted above, there are two parts to weighing whether a school district offered a pupil a FAPE. First, it must be determined whether the local educational agency complied with the procedures set forth in the IDEA, and then whether the IEP developed through those procedures was substantively appropriate. (*Rowley, supra*, 458 U.S. at pp. 206-207.) A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist., et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

41. As noted in District's Issue 1, above, the psycho educational assessment was inappropriate because it failed to obtain available necessary information from Student's treating psychiatrist on Student's mental state, levels of disability, treatment, and psycho educational functioning. Holding an IEP team meeting without that information significantly impeded Parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child by preventing them from discussing Student's educational needs on an equal footing.

⁹ Student's closing brief also argues that the goals set in this IEP were inadequate or improper. As that allegation was neither in Student's complaint nor in the Prehearing Conference Order, it is not considered here. There was no agreement, express or implied, to try the issue by consent of the parties. (*M.C. v. Antelope Valley, supra*, at *3; § 1415(c)(2)(E).)

42. District presented an assessment of Student prepared by a professional which purported to be a full and accurate depiction of Student's psycho educational needs and abilities. It was not. As a lay person, Parent could not effectively rebut District's assessment. The IEP team was denied context with which to weigh Parent's depiction of Student versus the image of him presented by school staff. In preparing the report, Ms. Perez weighted it heavily with opinions held by people who had known him only briefly, such as the Prentice school teachers and Mr. Evans, Student's 6th grade teacher. The fact that Ms. Perez disregarded Mr. Evan's written input on the rating scales because they contained too much of Parent's input highlights her report's failure to obtain necessary background information. Dr. Soliman's input would have corroborated Parent's statements and given the IEP team a longer and more detailed view of Student's deficits, needs, and abilities. Dr. Soliman's input would have armed Parent with clinical information about the severity of Student's mental and emotional state, the impact of his medications on his moods and ability to access his education, and his history of conflicts with his classmates. Proceeding without it deprived Parent of information needed to support her views and participate as an equal member of the IEP team.

43. The IEP team did not have sufficient or proper information which impeded Student's right to a FAPE and, further, significantly impeded the Parents' opportunity to participate in the decision-making process regarding the provision of FAPE. As a result, Student was denied FAPE.

44. Although neither the necessary information nor the knowledge that it existed was before the IEP team, the 'snapshot' rule does not apply. Clearly, District should not be immunized for its decisions by its failure to gather required information for the IEP team. The intent of the 'snapshot' rule was to protect an IEP team's decision from being second guessed based on later acquired information that it did not have or

be expected to have. In this case, District failed to have the required information based on its failure to properly assess. (*Timothy O. v. Paso Robles Unified Sch. Dist.* (9th Cir. 2016) 822 F.3d 1105, 1119-1121.) Most significantly, the snapshot rule does not apply because finding a procedural violation that significantly impeded parental permission eliminates the need to weigh the merits of the IEP team's decision.

45. Similarly, having found that Student was denied a FAPE by the failure to appropriately assess Student, there is no need to review Student's other contentions of deficiency in the IEP. The IEP developed at the June 3 and October 7, 2016, IEP team meetings denied Student FAPE.

STUDENT'S ISSUE 4: FAILURE TO RESPOND TO BULLYING

46. Student asserts that he was bullied through fifth and sixth grades but District failed to respond or act to protect him. As a consequence, Student claims that his fears affected his academic performance and he was denied FAPE.

BULLYING

47. If the bullying of a student with a disability deprives the student of meaningful educational benefit, it can constitute a denial of a FAPE under the IDEA. (*Dear Colleague Letter*, Office of Special Education and Related Services (OSERS) (August 20, 2013) 61 IDELR 263.) It does not matter whether the bullying is related to the student's disability. (*Id.*, at p. 2.) Therefore, a determination of whether bullying has denied a student a FAPE requires a two-step analysis: (i) whether bullying occurred, and (ii) whether the bullying resulted in the student not receiving educational benefit within the meaning of *Rowley*. There is a "strong likelihood" that bullying of a disabled student will result in the denial of a FAPE. (*Dear Colleague Letter*, (OSERS) (October 21, 2014) 464 IDELR 115 *2.)

48. Bullying is not defined within the IDEA. The California Education Code defines bullying for purposes of finding grounds for suspension or expulsion of a student as “any severe or pervasive physical or verbal act or conduct by a pupil or group of pupils, and including one or more acts committed by a pupil or group of pupils as defined in Section 48900.2, 48900.3, or 48900.4, directed toward one or more pupils that has or can be reasonably predicted to have the effect of one or more of the following:

- (a) fear of harm to her person or property;
- (b) a substantially detrimental effect on her physical or mental health;
- (c) a substantial interference with her academic performance; or
- (d) a substantial interference with her ability to participate in or benefit from the services, activities, or privileges provided by a school.”

(Ed. Code, § 48900, subd.(r).)

49. “Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time.” (*Dear Colleague Letter*, OSERS (August 20, 2013) 61 IDELR 263 *1.) Confrontations between students that are not characterized by an imbalance in power generally do not constitute bullying. (*A.L. v. Jackson County Sch. Bd.*, 64 IDELR 173 (N.D. Fla. 2014) (an isolated instance of rough play between peers did not amount to bullying).) The Journal of the American Medical Association defines bullying as “a specific type of aggression in which (1) the behavior is intended to harm or disturb, (2) the behavior occurs repeatedly over time, and (3) there is an imbalance of power, with a more powerful person or group attacking a less powerful one.” (Tonja R. Nansel et al., *Bullying Behaviors Among US Youth: Prevalence and Association with Psychosocial Adjustment*, 285 JAMA 2094, 2094 (2001).) Repeated physical blows unaccompanied by intent to intimidate or harass does not constitute

bullying. (*Parent on behalf of Student v. Los Angeles Unified School District* (2015)Cal.Offc.Admin.Hrnngs.Case No. 2015050710.)

50. "The label used to describe an incident (e.g., bullying, hazing, teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications." (Office for Civil Rights (OCR) 2010 *Dear Colleague Letter on Harassment and Bullying*, <http://www.ed.gov/ocr/letters/colleague-201010.pdf>, at page 3.) "The definition of bullying includes a non-exclusive list of specific behaviors that constitute bullying, and specifies that bullying includes intentional efforts to harm one or more individuals, may be direct or indirect, is not limited to behaviors that cause physical harm, and may be verbal (including oral and written language) or non-verbal." <http://www.stopbullying.gov/laws/key-components/index.html> (United States Department of Education interagency bullying resource website.)

51. "Although there are no hard and fast rules regarding how much change in academic performance or behavior is necessary to trigger the school's obligation to convene the IEP team or Section 504 team, a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sessions of Section 504 services would generally be sufficient." (*Dear Colleague Letter*, (OSERS) (October 21, 2014) 464 IDELR 115 *3.)

52. In *M.L. v. Federal Way School District* (9th Cir. 2005) 394 F.3d 634 (*M.L.*), the Ninth Circuit addressed whether a student who was subject to teasing was denied a FAPE. There, the fact that parents removed the student from school after only five days did not allow the district a reasonable opportunity to prevent or address the teasing. Further, the parents failed to demonstrate that the teasing affected the student, interfered with his education, or resulted in the loss of an educational benefit. "If a

teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE." (*M.L.*, supra, 394 F.3d at pp. 650-651, citing *Davis v. Monroe County Bd. of Educ.* (1999) 526 U.S. 629, 633 [119 S.Ct. 1661, 143 L.Ed.2d 839]. [holding that to violate Title IX "harassment ... [must be] so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."].)

53. Student contends that he was bullied throughout his time at Mariners. At hearing, Parent presented a number of stories regarding bullying that Parent had witnessed or heard about or of Student's reaction to bullying. Parent told of how Student was afraid to walk into the schoolyard in the morning, but how one day a police officer agreed to accompany him. Unfortunately, that aura of protection did not last for long. These events, like the story recounted of teasing Student suffered at a beach club, do not seem to have been relayed to District.

54. Similarly, Ms. VanderWal testified that Parent told her about a boy that was bothering Student, but asked her to keep it confidential. Just as a child may fear consequences if an accusation reaches the ear of a bully, so too do parents. Parent stated that Student said he would hide in the restroom or go to the nurse's office to avoid bullying. There is no direct testimony or other proof that Student frequently hid in the bathroom, and, although argued by both sides, no conclusions about Student's visits to the nurse's office can be drawn from the logs kept in the nurse's office. Student asserts that he visited excessively and claimed somatic illnesses. District counters that Student's visits were not excessive for a child on powerful medication with side effects and more than half of his visits were prompted by illness. The record of Student's visits to the nurse's office does not establish that Student was bullied.

55. Although Student is small for his age, his teachers have reported that he plays too rough in free time and in physical education class. They have said that he gets into other's personal space, takes things from others, and knocks things out of their hands. The crowning event occurred on February 23, 2016, when Student either attacked another child or retaliated in self-defense. There is no means by which truth can be determined from the record.

56. What does show in the record is a progression of uncontrolled misbehavior at Mariners school:

In 2014-2015: Student tells Parent that another child is ostracizing him. Ms. VanderWal informs Parent that Student is playing rough. Student requests a "safe space" at school. Student is physical in other kids' personal space and grabs objects. Student is disciplined for knocking balls out of other kids' hands. Student goes to the nurse's office for sanctuary because other kids are picking on him. Student sits with Ms. Phillips during recess because of his fear of a couple of boys. Student is disciplined for pinching and pulling, and the disciplinary entry notes that he acted to defend a friend, another student on an IEP.

In 2015-2016: Student's friends do not return at the start of the new school year, he is isolated until one friend returns, who then leaves in December. Student struggles socially and gets into trouble in gym class. His teacher notes that he is having a really hard year with his peers. Student tells Parent that other kids are mocking him or mean to him. Student

resists going to school. Student tells Parent that three boys are picking on him. Student tells Parent that he is tripped and stomped on at the school fields. Parent overhears a group of boys mocking Student. Parent arrives to pick up Student at school and finds him being trodden on at a football game.

57. This culminates in the incident involving Student and Classmate A. This was not the first incident involving the two; Mr. Evans noted that Student had done the same thing a few weeks earlier and Classmate A's father was clearly at his breaking point over Student's alleged misbehavior. (Classmate A appears to have told his father that he was blameless in Student's misbehavior.) Although the prior incident was known to the boys, Mr. Evans, and one pupil's father, it does not appear in Mariner's records.

58. Principal Sacks testified that her approach to reducing bullying was to keep track so that the bullies would know that the adults were watching, but that approach appears to have failed. Likewise, her instructions to staff and students to report "anything" were not effective. Although no prior event involving either boy was in the school's discipline database, she believed that there was no pattern in the event, and the incident was a "level one" incident that would be handled by a campus supervisor or classroom teacher, Principal Sacks became deeply involved. She met with Student A's parents, directed Mr. Evans to conduct an investigation that would start from the premise that Student was lying, and reported that she had been told that Student "repeatedly tripped, hit, kicked" or was otherwise physical with other children.

59. Parent's direct evidence of bullying by mockery of Student by boys at a beach club took place outside of school hours and was not perceived by Student. Although it evidences a hostile atmosphere that was likely present at school, it does not prove that District was indifferent to bullying at school. Student's injuries and rough

incidents at play do not suffice to show bullying. District was on notice that there was an incident in fifth grade where Student told the school nurse he believed other children were picking on him, but it appears to be both isolated and transitory. In addition, even though Parent was in regular contact with Student's teachers about many issues, the bullying of Student by other children was never directly raised in any of the emails presented in the record. If Student were subject to as much bullying as he claims, there should be clear evidence in the record. Parent's evidence is anecdotal and uncorroborated.

60. At the same time, it is clear in the record that there were aggressive and violent acts occurring at the school. Student was subject to rough treatment, but was also viewed as an aggressor by some staff and one parent at the school. The February 23, 2016 incident was the final event in what Classmate A's father and Principal Sacks saw as a long campaign of tripping, hitting, kicking, and throwing objects at other students. The alacrity with which Principal Sacks got involved in the case and her immediate assumption that Student had committed an intentional battery on Classmate A belies her testimony that the matter was a one-time event. If it were so, as she testified, it would not have risen to her attention and would have been handled informally by a playground supervisor or teacher. The fact that it was not shows that Student was at the center of serious misbehavior. Parent contends that Student was being bullied and District asserts that his lack of self-control caused gave rise to escalating retaliations.

61. District's view is that Student's lack of impulse control and inability to respect others' personal space gave rise to incidents of physical conflict for which he was more responsible. That may or may not be true. It is possible that Student is out-sizedly aggressive, compensating for his smaller stature and isolation. It is also possible that Parent is correct, and the special needs children are targets in the Newport-Mesa

Unified School District. The administration at the school reacted slowly and perhaps unfairly to Student's situation at the school. However, Student has not carried his burden of proof that he was bullied at Mariners school in 2014-2015 or 2015-2016.

REMEDIES

DISTRICT'S ISSUE 1

1. District's psycho educational assessment was not appropriately conducted. Student is entitled to an independent psycho educational evaluation by an assessor of his choosing. District is ordered to arrange for an assessment by the independent assessor of Parents' choice, provided that the assessor meets the District or SELPA's requirements for credentialing and cost. District is not obligated to pay for Dr. Passaro's independent educational consultation, as it was prepared for purposes of litigation and not for use at an IEP team meeting. District may agree to compensate Dr. Passaro instead of funding a new assessment if it chooses.

STUDENT'S ISSUE 3

2. A parent may be entitled to reimbursement for placing a student in a private school without the agreement of the local school district if the parents prove at a due process hearing that: 1) the district had not made a FAPE available to the student prior to the placement; and 2) that the private school placement is appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); *see also School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369 [105 S. Ct. 1996, 85 L. Ed. 2d 385] [reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE] (Burlington); *see also Forest Grove School Dist. V. T.A.* (9th Cir. 2011) 638 F.3d 1234, 1238-1239 [the IDEA expressly provides that parents of parentally-placed private school students may be entitled to

reimbursement for costs of placement or services procured for their child when FAPE is at issue].)

3. However, 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, 14 [126 L.Ed.2d 284, 114 S.Ct. 361] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement 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 adequate progress.)

4. Reimbursement may be denied or reduced if at least 10 days prior to the private school enrollment the parents fail to give written notice to the district about their concerns, their intention to reject the district's placement and their intention to enroll the student in a private school at public expense. (20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb); 34 C.F.R. § 300.148(d)(1).) The cost of reimbursement, may, in the discretion of the ALJ, not be reduced for failure to provide the required notice if compliance with the notice requirement "would likely result in serious emotional harm to the child." (20 U.S.C. § 1412(a)(10)(C)(iv)(II)(bb); 34 C.F.R. § 300.148(e)(1).)

5. Analysis of Student's reimbursement requests requires determining whether Parent's unilateral placement was "appropriate" within the meaning of *Carter, supra*, and whether equitable factors require reduction of the requested reimbursement. Here, the Prentice school is a state-certified non-public school. Testimony at hearing reported that the educational program there was designed to provide a highly structured learning environment for students with intellectual, cognitive, behavioral, social/emotional, and communication deficits that impeded their ability to access their education. The classes have a high adult-to-student ratio. Student presented grade

reports and standardized assessments that reported that he made progress and was improving academically.

6. Student met his burden of proof that the Prentice School was an “appropriate” placement for purposes of reimbursement. Thus, Parents are entitled to reimbursement of tuition expenses incurred for the period of time in which he was denied FAPE.

7. Student demonstrated that the inappropriate psycho educational assessment deprived him of FAPE, but it is necessary to determine the date upon which District’s responsibility for those expenses began.

8. Counsel for Student gave District notice of intent to privately place Student pursuant to 34 C.F.R. § 300.148 on February 29, 2016. Student began attending the Prentice School on March 4, 2016. Counsel informed District on March 18, 2016, that Student would be seeking reimbursement for his tuition expenses. Parent complied with the notice requirements of the IDEA by no later than March 18, 2016, but District was not yet responsible for Student's tuition at the Prentice School. Parents’ decision to privately place Student at that point cannot be said to be due to District’s interference with parental participation in the decision-making process as the psycho educational assessment had not yet been prepared or presented to the IEP team.

9. District’s responsibility for tuition clearly attached by the date of October 7, 2016 IEP team meeting. The offer of FAPE made at that meeting was tainted by the denial of parental participation. In equity, however, an earlier date is more appropriate. District convened a pro formal triennial IEP meeting on April 22, 2016. That date was the date set by the IDEA at which the team should meet, review assessments, and construct an offer of FAPE. District was in no position to do this, not having finished the psycho educational reassessment required at the triennial. Instead of meeting its obligations

under the Act, District delayed the meeting through technical, but meaningless, compliance with the statutory timelines.

10. It would, however, also be inequitable to begin District's responsibility for Student's tuition expenses at that time because all parties were in agreement that Student needed to be evaluated for educationally-related mental health services. The need to generate a new assessment plan and complete the assessment delayed the meeting to June 3, 2016. At this meeting, the inappropriate assessment was presented to the IEP team. No offer of FAPE was made and the meeting adjourned at 3:27 p.m., after what appears to be less than two hours' meeting time. District set the duration of the meeting and ended it without making an offer of FAPE. The meeting was not resumed until October of the following school year, despite the fact that Student was parentally placed outside of District and there was no offer of FAPE for the upcoming school year. On that basis, it is appropriate for District's responsibility for reimbursement the tuition expenses borne by Parents to begin at that time. Further, had a proper assessment been done, it is easily conceivable that an offer of FAPE could have been made at that time. Since the denial of parental participation in the IEP process and the concomitant denial of FAPE was complete on June 3, 2017, District shall reimburse Parents for tuition and other educational expenses incurred from that date.

11. District is ordered to reimburse Student \$225 for registration costs for 2016-2017. District shall to reimburse Student \$2,403.34 for each month of attendance in the 2016-2017 school year through January 2017. District is ordered to reimburse Parent for all additional monthly tuition expenses incurred at the Prentice School after January 2017 within 30 days of receipt of proof of payment by Parent until such time as a new psycho educational assessment (either independent or by District) has been conducted, an IEP team meeting has taken place to review the assessment, and an offer of FAPE has been made by District. Parents shall cooperate with the psycho educational

assessor and shall make themselves reasonably available for the IEP meeting or forfeit further reimbursement.

12. Since none of Student's tutoring sessions from Active8 Learning took place after the June 3, 2017 date of denial of FAPE by District, no reimbursement for those services is ordered. Student did not present an itemized bill for attendance at the Prentice School in the 2015-2016 school year, providing only a master bill for the full school year's tuition. Student was in attendance at the School in the month of June and on some days over the summer. District shall reimburse Student for tuition expenses beginning with the month of June through the start of the next school year upon presentation by Student of an itemized bill for those expenses. If the Prentice school does not provide an itemized bill, District shall reimburse Student for the pro rata share of the \$7,404 tuition charged for Student for the 2015-2016 school year calculated on the basis of the number of days attended from June 3, 2016 through the end of term divided by Student's total number of days eligible for attendance from March 4, 2016.

ORDER

1. District's request for a finding that its June 2016 psycho educational assessment is valid is denied.

2. District shall commence the process of providing an independent psycho educational assessment of Student within 30 days of this order. Alternatively, District may, within 30 days of this order, reimburse Parents an amount equivalent to the cost of a psycho educational assessment for the cost of Dr. Passaro's independent educational consultation.

3. Within 15 calendar days of request by District, Parents will provide District with the name and contact information of their chosen independent assessor, which assessor must meet District or SELPA guidelines regarding credentialing and cost. The parties shall defer to the assessor's reasonable professional judgment on the timing of

observation, testing, and provision of the report. The assessor shall be compensated for travel to and attendance at the IEP meetings at which the independent psycho educational educational evaluation and its conclusions are discussed. If District pays for Dr. Passaro's independent consultation, it shall pay for his attendance for an IEP team meeting to discuss his report and develop a new IEP for Student.

4. District is ordered to reimburse Parents for tuition expenses beginning with the month of June 2016 through the start of the 2016-2017 school year within 30 days of presentation by Student of an itemized bill for those expenses. If the Prentice school does not provide an itemized bill or Parents do not present a bill within 30 days of this order, District shall reimburse Parents for the pro rata share of the \$7,404 tuition charged for Student for the 2015-2016 school year calculated on the basis of the number of days attended from June 3, 2016 through the end of term divided by Student's total number of days eligible for attendance from March 4, 2016.

5. District is ordered to reimburse Parents \$225 for registration costs for 2016-2017 and \$2,403.34 for each month of attendance in the 2016-2017 school year through January 2017. District is ordered to reimburse Parents within 30 days of receipt of proof of payment for all additional monthly tuition expenses after January 2017 incurred at the Prentice School by Parents until such time as a new psycho educational assessment has been conducted, an IEP team meeting has taken place to review the assessment, and the IEP team makes a new offer of FAPE. If an independent assessment is done, District shall compensate the assessor for attendance, including reasonable travel time, at the IEP meetings in which the assessment is discussed. Parents shall cooperate with the psycho educational assessor and shall make themselves reasonably available for the IEP meeting or forfeit further reimbursement.

6. All other relief requested 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. Student Prevailed on District Issue 1 and Student's Issue 3. District prevailed on Student's Issues 2 and 4.

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 26, 2017

/s/

CHRIS BUTCHKO

Administrative Law Judge

Office of Administrative Hearings