

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

DEL MAR UNIFIED SCHOOL DISTRICT.

OAH Case No. 2017010586

DECISION

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on January 9, 2017, naming Del Mar Unified School District.

Administrative Law Judge Ted Mann heard this matter in San Diego, California, on March 7, 8, 9, and 13, 2017.

Matthew Storey and Paul Hefley, Attorneys at Law, appeared on behalf of Student. Student's mother attended each day of the hearing. Student's father attended several days of the hearing. Student did not attend the hearing. Sundee Johnson, Attorney at Law, represented District. District's Director of Student Services Cara Schukoske attended each day of the hearing on behalf of District.

At the request of the parties, OAH continued this matter for written closing arguments. The record was closed on April 3, 2017, upon receipt of written closing arguments.

## ISSUES<sup>1</sup>

- 1) Did District deny Student a free appropriate public education by failing to assess Student for autism?
- 2) Did District, deny Student a FAPE by failing to provide appropriate goals in the area of autism?
- 3) Did District, deny Student a FAPE by failing to provide appropriate services, specifically as to autism?

## SUMMARY OF DECISION

Student contends that District denied him a FAPE by failing to assess him for autism. District contends that Student did not display sufficient indications of autism to require assessment for autism, and that Student's program addressed his unique needs in any event. Student provided District with an independent evaluation diagnosing Student with autism on April 25, 2016, but District failed to take any action to reconsider Student's educational program based on that information or to undertake its own evaluation to determine if Student had autistic-like characteristics that resulted in any additional educational needs. This Decision finds that the District's failure to consider Student's independent assessment or undertake an educational assessment of Student to investigate the existence or educational impact of his autism constitutes a denial of FAPE to Student and significantly deprived Parents of the opportunity to participate in the development of Student's educational program.

Student also contends that District denied him a FAPE by failing to provide autism-specific goals or services for Student. District contends the goals it developed for

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<sup>1</sup> At the prehearing conference, Student withdrew any issues stated in Student's complaint other than the issues stated in this Decision.

Student, along with the services provided to him, were designed to meet his unique needs and that Student did not need either autism-specific goals or autism-specific services. This Decision finds that Student met his burden of proving District's failure to consider Student's autism diagnosis in drafting goals or providing services after receipt of the independent evaluation denied Student a FAPE and significantly deprived Parents of the opportunity to participate in the development of Student's educational program.

## FACTUAL FINDINGS

1. At the time of the hearing, Student was a thirteen-year-old boy eligible for special education under the primary category of speech or language impairment, and secondary categories of hard of hearing, other health impairment, and specific learning disability. Student resided within District's boundaries at all relevant times.

2. Student was born several weeks premature and was taken immediately to neonatal intensive care with respiratory distress and significant congenital abnormalities, including microcephaly, cleft palate with midface deficiency, preaxial polydactyly, hypospadias, clavicular pseudarthrosis with cervical ribs, fifth toenail hypoplasia, laryngomalacia, low tone, and abnormal EEG. Student had delayed motor, language, and developmental milestones. His cleft palate was repaired in 2004, and he has been wearing bilateral hearing aids since December 2004. He also has bilateral pressure equalization tubes for his hearing. Student first walked at 22 months. He received feeding through a gastrostomy tube until the age of 30 months. Student was first found eligible for special education in November 2006. Student said his first words at age five, but did not put words together until age eight.

3. Student moved into District in 2006, and started at a special day class preschool at Sycamore Ridge. Student alternated between District schools and private schools from that time until February of 2016. He attended a District elementary school until approximately December 2011 when his parents moved him to Montessori schools

which he attended until October 2012. Parents returned Student to District in October 2012 where he attended Del Mar Heights for the remainder of second grade, and the first semester of third grade. Student then transferred to Ashley Falls for the remainder of his third grade year during Spring 2014. He then returned to his home school, Sage Canyon, for fourth grade during the 2014-2015 school year. Student began fifth grade at Sage Canyon, but Parents removed him from District and placed him at a private school, Excelsior Academy, in November 2015. He finished the 2015 fall semester at Excelsior, and then Parents returned him to Sage Canyon for approximately six weeks in early 2016. On February 12, 2016, Parents removed him from District and privately placed him at Banyan Tree School. Student remained at Banyan Tree as of the date of hearing.

#### NOVEMBER 2012 - RADY CHILDREN'S HOSPITAL REPORT

4. Rady Children's Hospital assessed Student in the fall of 2012 to determine the possible presence of an autism spectrum disorder, cognitive functioning, and other contributing factors to symptoms including academic and social delays. Rady issued an assessment report in approximately November 2012.

5. The Rady assessors conducted a comprehensive assessment, reviewed Student's previous records, conducted an interview with Mother, interviewed Montessori school staff, observed Student at school, observed Student's behavior during assessment, and administered a wide array of standardized tests, including the Autism Diagnostic Observation Schedule, Module 2, the Conners' Parent Rating Scale, the Social Communication Questionnaire, the Social Responsiveness Scale, the Vineland Adaptive Behavior Scales, and the Wechsler Intelligence Scale for Children. At the time of the assessment, Student's teacher and Parents reported concerns with inattention and learning problems.

6. The Montessori School co-director and Student's classroom teacher reported that Student was struggling socially and academically, and noted that Student produced only minimal amounts of academic work, and then only when receiving one-to-one attention. Both also reported that Student often displayed socially inappropriate behavior, including inappropriate play at playtime and, while interested in social relations with other children, his social behaviors were developmentally inappropriate for his age.

7. The assessors observed Student at school on October 10, 2012. Student was quite distractible during small group and individual work requiring considerable redirection. Student also was inappropriately active in moving aimlessly around the room, rolling on the floor during class time, and engaging in inappropriate touching of others. Throughout the observation, Student's interaction with peers was limited.

8. During assessments, Student engaged in minimal eye contact with assessors. He was often difficult to understand when speaking, and appeared to have difficulties with speech. His thought processes during the assessments were logical and coherent, and he engaged readily with the assessor. While generally presenting with an even mood, Student was more engaged during preferred tasks, and visibly frustrated during more difficult tasks while complaining the task was too hard or he was tired.

9. The Wechsler instrument assessed Student's cognitive abilities. He demonstrated large variability in his scores across the four assessment indices and the results were, therefore, not interpretable for a full scale IQ. His scores ranged from extremely low to low average. Student's score on the Verbal Comprehension Index was extremely low with a standard score of 53, in the 0.1 percentile. Student's score on the Perceptual Reasoning Index was in the low average range with a standard score of 86, in the 18th percentile. Student's score on the Working Memory Index was borderline with

a standard score of 71, in the 3rd percentile. Student's score on the Processing Speed Index was also borderline with a standard score of 73, in the 4th percentile.

10. The Child Behavior Checklist assessed Student's behavior and attention. Parents rated attention problems to be in the clinical range and his first grade teacher rated attention problems in the borderline clinical range. All parties endorsed items indicating that Student was inattentive, acted young for his age, failed to finish, and had difficulty concentrating and sitting still. The Connors' Parent Rating Scale was a parent report measure of Attention-Deficit/Hyperactivity Disorder-type symptoms completed by Mother. Student was within normal limits on 9 of 14 sub domains, but was rated in the borderline clinical range in the 5 sub domains of: cognitive problems/inattention; social problems; Connors' Attention-Deficit/Hyperactivity Disorder index; Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition inattentive; and DSM-IV total.

11. The Social Communication Questionnaire screened for social, communication, and behavioral difficulties associated with an autism diagnosis. The cut-off score for further assessment of autism was 15. Mother's report scored Student at 16, while Father's report scored him at 10. Based on his mother's score, Student was rated as needing further autism assessment. The Social Responsiveness Scale evaluated Student's social awareness, social cognition, social communication, social motivation, autistic mannerisms, and provided a total score. Student was rated by Parents and his first grade teacher. Scores over 60 suggested some degree of autism. Student's total scores ranged from 60 by his teacher to 72 by Mother, placing Student in the range strongly associated with mild autism.

12. The Autism Diagnostic Observation Schedule assessed Student for autism. The assessment was a semi-structured standardized measure designed to elicit communication and reciprocal social interactions for the purpose of diagnosing autism. Student was reported as "quite energetic and generally cooperative" throughout the

assessment. During the assessment, his speech lacked fluency and he often had difficulty with articulation. When pressed to elaborate on a verbal description of brushing his teeth, Student refused to cooperate further by complaining, "I'm tired." Student made verbalizations appropriately to make requests or get the assessor's attention. Although limited in his interactions with the assessors, Student appeared generally comfortable during the assessment and showed some pleasure interacting with the assessors on several occasions. Student engaged in considerable imaginative play during the assessment, although he had limited involvement with the assessor during that play. Student had some difficulty transitioning out of several tasks, including when asked to discontinue play and put toys away. Student also exhibited some unusual sensory interests, including a prolonged examination of a spinning silver-colored disk, and rubbing a textured block on his face. The report did not summarize the data from the diagnostic evaluation for autism.

13. The Vineland Adaptive Scales Behavior Scales, Second Edition, was a parent rating form used to assess Student's adaptive functioning, i.e. personal and social skills. Mother filled out the parent rating form assessing Student in three domains: communication, daily living skills, and socialization. Student's scores were in the moderately low range in communication, the moderately low range in daily living skills, and in the low range in socialization.

14. The Rady's Children's Hospital report concluded that Student's memory and attention were a primary area of concern. Student's expressive and receptive language was a second area of concern. The report found that Student's social and adaptive abilities were a final area of concern. In addressing the autism issue, the Rady assessors found that their direct assessment of autism symptoms indicated that while Student displayed some of the behavioral characteristics consistent with an autism spectrum disorder diagnosis (e.g. poor eye contact, difficulties with social

conversations), he displayed strong social motivation and enjoyed social interactions, which was not consistent with autism. The assessors also found that although Student displayed difficulty understanding social conventions and boundaries, his social difficulties appeared to be driven by his language and developmental deficits rather than reflecting a primary social deficit. They concluded that it was likely that Student's history of struggling with developing and maintaining peer friendships suggested that he had not yet developed and practiced the social skills necessary for successful peer interactions.

15. The report concluded Student had medical diagnoses of Attention-Deficit/Hyperactivity Disorder Predominantly Inattentive Type, and Mixed Receptive-Expressive Language Disorder. Parents did not provide District with the November 2012 Rady report until approximately March 2013.

#### MARCH 19, 2013 DISTRICT TRANS DISCIPLINARY REPORT

16. District conducted a trans disciplinary evaluation of Student in February and March of 2013, documenting the findings in a report dated March 13, 2013. Speech-language pathologist Suzanne Borsilleri, M.S., CCC-SLP; special education teacher Lauri Carpenter; occupational therapist Briana Dambacher, M.A., OTR/L; school psychologist Donna Kuriyama; deaf/hard of hearing itinerant teacher Julia Hall; and school nurse Lori Smiley all participated in the assessment. The assessment team presented the report at Student's triennial IEP team meeting on March 21, 2013.

17. The assessors summarized Student's previous records; received assessment input from Mother; received assessment input from school staff; observed Student's behavior during assessment; and administered a wide array of standardized tests, including the Adaptive Behavior Assessment System, 2nd Edition, the Social Language Development Test-Elementary Edition, the Wechsler Nonverbal Scale of Ability, the Woodcock Johnson III Tests of Achievement, and the Sensory Processing



Measure. Student had made steady overall gains in all areas, and appeared to be thriving within the structure and routine of his current classroom setting.

18. The assessors observed Student during the administration of the assessments. Student was pleasant and cooperative with the assessors and willingly agreed to the assessments, transitioning easily from the classroom for testing. Student sat nicely in a chair for testing, and worked intently and earnestly on the assessment tasks. Student demonstrated awareness of socially acceptable responses, but also demonstrated limited awareness of social behavior. At times, Student complained about the difficulty of a task and complained of being tired. Student demonstrated some distractibility to the environment and was capable of being redirected when he went off-task.

19. The Sensory Processing Measure was a system of rating scales to assess children on a range of characteristics related to sensory processing, social participation, and praxis. Mother and Student's special education teacher completed rating scales. Both ratings reports were broadly similar with both raters finding Student largely typical across most domains, and finding Student as having borderline-to-the-"some problems" for social participation.

20. Ms. Carpenter, administered the Woodcock-Johnson III Tests of Achievement, a standardized assessment of academic achievement. She assessed Student in the areas of reading, writing, and math. His grade equivalencies for the three areas were 1.6, 1.3, and 1.3, respectively, which was very low compared to others his age.

21. The Adaptive Behavior Assessment was a norm referenced assessment of adaptive skills, targeting functional skills in the classroom setting including communication, community use, functional academics, school living, health and safety, leisure, self-care, self-direction, and social functioning. Mother and Ms. Carpenter completed rating forms. The three composite scores (conceptual, social, practical) and

the general adaptive composite scores had a mean of 100, and a standard deviation of 15. Student's Mother consistently scored Student lower than did his teacher. Ms. Carpenter's composite scores were 70, 101, and 75, respectively, and her general composite was 82. Mother's composite scores were 67, 78, and 70, respectively, and her general composite was 64. Student's teacher rated Student's social development as an area of relative strength.

22. The Social Language Development Test assessed language-based skills of social interpretation and interaction with friends, including the language required to appropriately infer and express what another person is thinking or feeling within a social context, to make multiple interpretations, take mutual perspectives, and negotiate with and support their peers. Ms. Borsilleri administered the test. Student exhibited a range of scores from average to below average, to "not score able" due to Student's lack of understanding of the directions. Overall, Student was able to make appropriate inferences based on pictures, but had difficulty expressing his answers, and he had the most difficulty responding appropriately in difficult social situations.

23. Ms. Borsilleri summarized Student's pragmatics at the end of her portion of Student's assessment. She found that Student exhibited appropriate eye contact most of the time, and appeared highly motivated in social situations, although he occasionally engaged in inappropriate hugging or displays of affection. Student identified emotions and acted them out appropriately, and made inferences from pictures of emotions. Student had a tendency to use statements rather than questions, and had the most difficulty responding appropriately to peers in difficult social situations.

24. The assessment team recommended that the IEP team discuss special education eligibility in four educational disability categories. The team recommended continuing eligibility in speech or language impairment and hard of hearing, and also recommended the IEP team discuss two new categories: other health impairment arising

from the Rady Children's Hospital diagnosis of Attention-Deficit/Hyperactivity Disorder, and specific learning disability. The team suggested that Student would continue to benefit from highly structured educational programming that offered clearly defined expectations and limits, visual formats with review and over learning opportunities, and multiple explanation opportunities.

#### MARCH 21, 2013 TRIENNIAL IEP

25. District held Student's triennial IEP team meeting on March 21, 2013. District administrator Mimi McGinty, school psychologist Donna Kuriyama, speech/language pathologist Suzanne Borzilleri, occupational therapist Bree Dambacher, Student's special education teacher Lauri Carpenter, deaf/hard of hearing itinerant teacher Julia Hall, Student's private therapist Terri Kisselovich, Student's private psychology intern Natalia Walsh, Student's advocate Allan Roth, and Parents attended. Student was in second grade and attended Del Mar Heights Elementary School.

26. Student was very cheerful and easy going, and he loved to socialize with other children and adults. He was independent with personal care, although Mother expressed concerns about Student fastening his pants, and the team agreed to add a goal to address her concern. Student could follow school and class rules, prepare for his school day, participate in the morning meeting, and navigate the school campus without support. Student could work on task for 30 minute increments.

27. Parents were concerned with Student's progress in reading, writing, and math, with his ability to work independently, and with access for him to the general education classroom. In reading, Student decoded consonant-vowel-consonant words at 90 percent accuracy or better, and words with beginning blends at 82 percent accuracy. His first Seeing Stars sight words were 87 percent accurate. In writing, Student could identify characters, actions, and details in pictures to create a teacher written word bank, copy the words onto a graphic organizer, and write one sentence about the

picture. In math, Student was able to add and subtract using touch point strategies, and he worked with two digit/one digit numbers without regrouping, but had difficulties with two digit/two digit numbers. He was able to count by ones, fives, and tens, and identify coins and their values, as well as count pennies. In the area of receptive and expressive language, Student was able to listen to a first grade passage of between 25-50 words (level 2), repeated one to two times, and then answer basic inferential questions with 50 percent accuracy when presented two choices. In the area of pragmatics, Student was able to identify emotions in four of five trials, but had difficulty applying those emotions to situations presented and could only do so in one of five trials with moderate prompting.

28. The IEP team reviewed District's Trans disciplinary Report. Student qualified for special education under the primary eligibility category of speech and language impairment with secondary eligibility categories of deaf/hard of hearing and other health impairment, arising from Attention-Deficit/Hyperactivity Disorder. The team also discussed adding specific learning disability as a possible eligibility. Parents requested that District assess Student for oral motor strength to determine whether his tongue had full range of motion.

29. District's placement offer was 25 percent of the school day in a general education setting, and the remaining 75 percent outside the general education setting while Student participated in specialized academic instruction in a small group setting as needed to address his IEP goals. District offered specialized academic instruction for 23 hours per week. Student also received deaf/hard of hearing services, audiology consult services, speech and language services in group and individual settings, occupational therapy services, and private District-funded vision therapy. District offered extended school year for five weeks over summer 2013. Parents agreed to the March 2013 IEP in full on June 6, 2013.

## FEBRUARY 27, 2014 ANNUAL IEP

30. District held Student's annual IEP team meeting on February 27, 2014. District administrator Mimi McGinty, speech/language pathologist Suzanne Borzilleri, occupational therapist Courtney Alhberg, Student's special education teachers Lauri Carpenter and Caitlin Livingston, deaf/hard of hearing itinerant teacher Julia Hall, North County Consortium for Special Education audiologist Linda Dye, Student's advocate Dayon Higgins, and Parents attended. Parents agreed to waive the participation of the general education teacher. Student was approximately ten years and two months old at the time of the IEP team meeting, in third grade at Del Mar Heights.

31. Student was very outgoing and happy. He could follow school and classroom rules and routines. At recess he played with typical peers, and he sat with typical peers at lunch. He made significant gains in the area of pragmatics, and demonstrated understanding and use of personal space and appropriate conversation initiation. He could identify emotions and explain why a person might feel that way. He continued to struggle with identifying expected versus unexpected behaviors with friends at school and on the playground. When academic work was difficult, Student would attempt off topic conversation or state that the work is too hard. He was easily distracted in class, but would refocus with prompting. In small group or two-to-one instruction he could work for 30 minute increments. His behavior interfered with his learning, as his Attention-Deficit/Hyperactivity Disorder impacted his ability to stay on task without frequent prompting or without small group instruction. He frequently complained of being tired, and was reported to have fallen asleep after lunch on several occasions. Student was independent in general education "mainstreaming" situations with minimal support from teachers.

32. Parents expressed concerns about Student's progress in academics, working independently, and accessing the general education classroom and curriculum.

In writing, Student had good ideas, but needed support for organization. He used a graphic organizer to develop a word bank. He required prompting to extend stories and for sentence development. Student's handwriting was slow, but his penmanship on college-ruled paper was good. He had grade-appropriate typing skills with good keyboard awareness, and typed 8 to 10 words per minute. In reading, Student could read 1.5 grade level text with minimal assistance for word reading. He was better at multiple choice or fill in the blank questions than open ended questions. In math, Student could count beyond 100 by 2's, 5's, and 10's. He could use regrouping when adding, but had more difficulty with subtraction. He could count groups of four mixed coins at 70 percent with three verbal and one gestural prompts across all trials, and could identify all coins and their value.

33. The IEP team discussed his present levels of performance. Student made reasonable progress on his goals. The IEP team reviewed proposed goals. Parents expressed concern that Student was not making sufficient progress in reading, as they expected that he would make one year's grade level progress per school year. Student's new reading goal was matched to his learning rate, which was slower than year-for-year. The team engaged in a lengthy discussion about Student's hearing aids and a personal FM radio system versus a classroom system as assistive technology to help Student in the classroom. The team discussed Parents' recent visit to the Ashley Falls Elementary School special day class program, and the team agreed that Student's needs could be addressed in that less restrictive classroom. The IEP team agreed that Student would change schools and attend school at Ashley Falls beginning on March 10, 2014. The team discussed and agreed on accommodations and services, and scheduled 45-day review IEP.

34. District made an offer of FAPE that included placement for one third of the school day in a general education setting and two thirds in a small group setting,

specialized academic instruction, a variety of related services to address his needs, 16 goals and extended school year. Parents agreed to the IEP on February 27, 2014.

#### APRIL 17, 2014 IEP

35. On April 17, 2014, the IEP team convened an IEP to evaluate his transition to Ashley Falls. School principal Chris Delehanty, North County Consortium for Special Education program specialist Linda Hagerty, speech/language pathologist Dina Irwin, occupational therapist Bree Dambacher, Student's special education teacher Caitlin Livingston, Student's third grade general education teacher Mariebelle Olivas, Student's advocate Dayon Higgins, and Parents attended. The IEP meeting was audio recorded by Parents with District permission

36. Student transitioned well to the new program. He fit into class academic groups, and was doing well on the playground and at recess. Student socialized more with special education classmates, but did interact with general education students, as well. Student's speech/language therapist and occupational therapist both reported their observations of Student in the new program. The IEP team discussed Student's reading goals, and special education teacher Caitlin Livingston reported that reading goals with a target grade level of 2.0 were appropriate. Student's advocate Dayon Higgins asked if staff observed behaviors consistent with autism. The team had observed Student had social-pragmatic language needs, but felt that Student did not present a full profile consistent with autism. Parents agreed to the IEP on April 17, 2014.

#### SEPTEMBER 29, 2014 30 DAY REVIEW IEP

37. District prepared an amendment to Student's February 27, 2014 IEP documenting that Parents reenrolled Student at his home school, Sage Canyon. On September 29, 2014, the IEP team reconvened for a 30-day review IEP. District administrator Mimi McGinty, speech/language pathologist Elena Martinez, Student's

special education teacher Natasha Burney, Student's fourth grade general education teacher Gina Abbamonte, Student's advocate Dayon Higgins, and Parents attended.

38. Parents expressed concerns about Student's progress and requested frequent progress updates. Special education teacher Natasha Burney and general education teacher Gina Abbamonte reviewed Student's progress in their respective classrooms. Speech pathologist and Ms. Martinez reviewed his progress on his IEP speech goals. The team agreed to Parents' requests for a reading level book for Student each night, consistent weekly homework, and a developmental reading assessment of Student. The team reviewed the services provided for Student.

#### MARCH 13, 2015 ANNUAL IEP

39. District held Student's annual IEP team meeting on March 13, 2015. District administrator Mimi McGinty, speech/language pathologist Elena Martinez, occupational therapist Kerry Boesch, occupational therapy intern Lindsay Carwin, Student's special education teacher Natasha Burney, Student's fourth grade general education teacher Gina Abbamonte, Student's advocate Dayon Higgins, and Parents attended. District's itinerant deaf/hard of hearing teacher was unable to attend the IEP and her absence was excused by Parents. Student was approximately eleven years and three months old at the time of the IEP team meeting, in fourth grade at Sage Canyon Elementary School.

40. Student was a friendly and outgoing fourth grader who enjoyed talking with his peers and sharing stories about his life, often including stories about his siblings. He was very active and liked to play sports; he played with peers at recess and lunch, and followed playground rules. He worked well with others. Student understood the concepts of expected and unexpected, but needed to apply those concepts more to his actions. He was able to follow rules and routines independently, and was able to navigate between two different classrooms on different floors very well, as well as the campus, generally. He had difficulty with organization, and was often forgetful about



homework. He was able to take care of his personal needs at an age-appropriate level, including cleaning and checking his hearing aid batteries, and buttoning and unbuttoning clothing.

41. Parents expressed concerns about Student's academic progress, his attention to task, and his independence. Student could read a second grade level text independently and correctly answer closed-ended comprehension questions. He could read third grade sight words and some fourth grade words. His DRA level was 12, an improvement from the beginning of the school year. Student had difficulty with the writing process, and putting his thoughts in writing, and needed support to put his ideas into complete sentences. Student had good number sense, and could count by groups of 2, 5, 10, 20, and 100. He could use a number line, touch points, and tallies to solve math problems. He could interpret a chart, and read and create a simple bar graph. He could add and subtract multi-digit numbers with regrouping. He could solve basic single-operation word problems after being read the problem aloud.

42. The IEP team discussed Student's progress on his goals from the prior IEP. Student met 7 of 16 goals, and made progress on the remaining nine goals. The IEP team proposed and discussed 15 new goals. Student's advocate requested a goal regarding Student's time-on-task, which the IEP team developed and included.

43. District offered placement of 49 percent of the school day in a general education setting, and the remaining 51 percent outside the general education setting while Student participated in specialized academic instruction in a small group setting as needed to address his IEP goals. District offered 16 goals, specialized academic instruction for 800 minutes per week. Student also received deaf/hard of hearing services and consultation, speech and language services in group and individual settings, and occupational therapy services. District offered five weeks of extended

school year over summer 2015. Parents agreed to the IEP on March 13, 2015. This was Student's last agreed upon IEP.

#### SPRING 2015 INDEPENDENT NEUROPSYCHOLOGICAL EVALUATION

44. Lisa Davidson, Ph.D., conducted an independent educational evaluation of Student in January and February 2015. Dr. Davidson is a clinical psychologist and neuropsychologist with a private practice in Poway, California. She assessed Student at her office on four sessions in January and February of 2015. Dr. Davidson's report was dated February 28, 2015, but Parents did not give it to District until April 2016.

45. The assessment included neuropsychological testing of Student; interview and observations of Student at office; interview with Mother; Parent rating scales; and a review of records. Neuropsychological testing instruments included: Kaufman Brief Intelligence Test, Second Edition; Children's Memory Scale; California Verbal Learning Test, Children's Version; Trail Making Test, Parts A and B; Personality Inventory for Children, Second Edition; Behavior Assessment System for Children, Second Edition, Parent Rating Scales and Teacher Rating Scales; Beery Developmental Test of Visual-Motor Integration, Sixth Edition; and the Autism Spectrum Rating Scale.

46. Dr. Davidson reported Student to be cooperative, friendly, and in a good mood with congruent affect. Student expressed feelings of being tired throughout the testing. She noted intermittent perseveration, yawning, and complaints of fatigue. He was enthusiastic during the administration of the Beery assessment, apparently enjoying the assessment, and expressing happiness when he felt he was doing well.

47. Student had below average cognition with a wide discrepancy between verbal intelligence (Standard Score 67, 1st percentile) and non-verbal intelligence (Standard Score 105, 63rd percentile), with an IQ composite score of 84, at the 14th percentile. He had very low memory and working memory scores on the Childhood Memory Scale, which indicated significant memory deficits. On the Beery assessment,

Student obtained a standard score of 77, which placed him in the 6th percentile, Student had visual-motor deficits with a motor coordination subtest score that was so low as to be not reportable.

48. On the Autism Rating Scale, Mother rated him as elevated or very elevated in all but 1 of 11 scales. Overall, his T-score of 77 placed him in the 99th percentile and in the very elevated range for autism. On the Behavior Assessment parent scales, both Mother and Father scored Student as at-risk for behavioral symptoms, while his special education teacher found him to be average in that area. Father also rated Student as at-risk for externalizing problems. None of the three found Student's adaptive skills to be other than average. Student's teacher found student to be at-risk on the school problems index. On the Personality Inventory, completed by Mother, Student was scored as elevated for cognitive impairment, reality distortion, and social skills deficit. Mother also reported Student to have characteristics consistent with autism, including difficulties with appropriate communication, unusual behaviors, difficulty relating to peers, withdrawal, social skills, adaptive skills, and skills of daily living.

49. Dr. Davidson diagnosed Student with Autism Spectrum Disorder, Level 1; Attention-Deficit/Hyperactivity Disorder, Combined Type; Provisional Tic Disorder (by history); Language Disorder; Specific Learning Disorder – Reading; Specific Learning Disorder – Math; Specific Learning Disorder – Written Expression; Developmental Coordination Disorder; Major Neurological Disorder; and Global Development Delay. She also noted a history of traumatic brain injury. She recommended Student obtain a medication consultation for his Attention-Deficit/Hyperactivity Disorder, psychotherapy, optometry consultation, occupational and physical therapy evaluations, and speech therapy evaluation. She recommended an educational experience and setting which addressed his adaptive functioning issues and learning disabilities.

## AUGUST 31, 2015 IEP TEAM MEETING

50. District held an IEP team meeting on August 31, 2015. District administrator Mimi McGinty, speech/language pathologist Elena Martinez, occupational therapist Emily Dodge, Student's special education teacher Natasha Burney, general education teacher Michelle Turnbull, Student's advocate Ms. Higgins, and Parents attended. District's itinerant deaf/hard of hearing specialist was unable to attend the IEP. Student was approximately eleven years and eight months old entering fifth grade at Sage Canyon.

51. Parents expressed concern with Student's progress in reading and math. They reported that an independent assessment of Student had been done, but that the report was not yet completed and would be shared with the team when finished. Based upon their belief that Student was not making adequate progress, Parents requested District fund a non-public school placement for Student. Parents no longer agreed to the District's March 13, 2015 IEP FAPE offer.

52. Student's advocate testified at hearing that she had shown or handed the Davidson report to a District staff person at the August 31, 2015 IEP team meeting. Her account was contrary to the hearing testimony of multiple District staff who attended the meeting, and the written record of the IEP itself. Her account was not persuasive. Student's Mother also testified that the report was shown to District at the IEP meeting. Student's Mother's testimony was vague, non-specific, and uncertain about any details of the report being shown to District. Her testimony was also inconsistent with testimony of District personnel and the written records. Student's Mother's account was not persuasive. Subsequent to the IEP meeting, District requested a copy of the report in two separate letters to Parents sent by District program specialist Ms. McGinty on November 2, 2015, and December 10, 2015, respectively. The requests by Ms. McGinty, who had attended five of the last six IEPs held for Student, including the IEP of August

31, 2015, strongly support the conclusion that District had not received the report as of the writing of the two letters, and certainly had not received the report at the August 31, 2015 IEP. The Davidson report was not provided to District at the August 31, 2015 IEP team meeting.

#### DISTRICT'S PRIOR WRITTEN NOTICE

53. On September 8, 2015, District sent prior written notice to Parents advising them that District was denying their request for non-public school placement and funding. On October 2, 2015, parents wrote to District notifying it that they were privately placing Student at Excelsior Academy.

54. On November 2, 2015, Ms. McGinty sent prior written notice to Parents advising them that District was denying Parents' request for funding of their unilateral placement of Student at Excelsior Academy. District also referred to Parents' previous representations that an independent assessment had been completed, reiterated Parents' representations that they would provide District with the report, and requested a copy of the report.

55. On December 10, 2015, Ms. McGinty sent another prior written notice to Parents in further response to the October 30, 2015 private placement letter, advising them that District was denying their request for funding of Parents' unilateral placement of Student at Excelsior Academy after District had observed Student at Excelsior Academy. District also repeated its prior request to be provided a copy of the independent assessment of Student.

#### PRIVATE PLACEMENT AT EXCELSIOR ACADEMY

56. Student attended Excelsior Academy in November and December of 2015. Ms. McGinty and Ms. Higgins conducted an observation of Student at the school, and both agreed that it was not an appropriate placement for Student based upon his

individual needs. During the observation, they observed, among other things: Student not being engaged by the teacher, not interacting with classroom peers, and putting his head down to sleep. The other students at Excelsior were working at much too high a level, at or near grade level, for Student who was as at much lower level. The school also lacked sufficient staffing, and was not using research-based curriculum materials. Ms. Higgins personally advised Parents that the placement was not appropriate, and Parents pulled Student from Excelsior.

#### PRIVATE PLACEMENT AT BANYAN TREE

57. On February 24, 2016, Parents privately placed Student at Banyan Tree, a non-public school. The school was recommended to Parents by Student's advocate. Student's program at Banyan Tree consisted of six classes, all of which were delivered in a small group of four students or individually. Student spent at least four hours per day in individual one-to-one instruction with a teacher. Most of the teachers were not credentialed. Student did not change classrooms during the day. Student did not have typical peers in class or on campus with whom to interact. The students ranged in age from seven to twelve years old, and all had IEPs. The school itself consisted of two classrooms with four areas per classroom for individual instruction of student.

#### TRIENNIAL PSYCHO EDUCATIONAL REPORT – DR. GRISWOLD

58. In preparation for Student's triennial IEP, District school psychologist Richard Griswold, Ph.D., conducted a psycho educational evaluation of Student and prepared a report of his findings. District assessed Student on March 16, 2016, and March 24, 2016, and documented its findings in a report dated April 2, 2016.

59. Dr. Griswold was qualified to conduct a psycho educational assessment and to testify as an expert based on his education, training and experience. He had a bachelor of science in psychology, a master of science in rehabilitation counseling, and

Ph.D. in clinical psychology. He held a Pupil Personnel Services credential as a school psychologist. Dr. Griswold had worked as a school psychologist for District since 2001. He was experienced in diagnosing children with autism, having worked with approximately three to five children per year during his employment with District. He had received training in autism from the North Coastal Consortium for Special Education, had been trained in the ADOS, and had undertaken training with Michelle Garcia-Winter.

60. Dr. Griswold was well acquainted with Student. He was the school psychologist at Sage Canyon during Student's fourth and fifth grade years, and had informally observed Student both in his fourth grade special day class and on the playground. Dr. Griswold also conducted social skills training based upon Garcia-Winter's "Social Thinking" curriculum for 30 minutes per week with Student's day class group. He observed Student to exhibit overall appropriate behavior although he would sometimes blurt things out or act silly in class. He also observed Student was very active in playing kickball and other games in group play with his peers on the ball court at recess.

61. Dr. Griswold never observed Student to have problems making appropriate eye contact, nor with perseverative or repetitive behaviors. Instead, he viewed Student as a "gregarious guy" who liked being part of a group, and was typically happy except when challenged academically. He was able to quickly establish rapport with Student during the assessment, and reported that Student said "I'm back" when he presented to him for assessment.

62. Dr. Griswold based his psycho educational evaluation of Student on a review of school records, including prior District assessments from 2009 and 2013, as well as the Rady Hospital report. He observed that the Rady report looked at possible autistic behaviors by Student, but the report found that speech/language delays and

Attention-Deficit/Hyperactivity Disorder were more significant drivers of Student's disabilities. He also considered teacher reports, a health history filled out by Mother, a Student interview, the Behavior Assessment Scales, Conners Rating Scale, the Beery-Buktenica Visual Motor Development test, and selected subtests from the Wechsler Intelligence Scales. Dr. Griswold noted Student's extensive medical history of birth complications, congenital conditions, motor, developmental, and language milestone delays, along with a history of attending multiple school as a grade schooler.

63. Dr. Griswold found that Student's cognitive functioning was consistent with previous assessments, as he displayed difficulties on the Wechsler test that assessed verbal intelligence, but performed better on the non-verbal intelligence testing. On the Conners test for Attention-Deficit/Hyperactivity Disorder, all three raters (Parent, Sage Canyon teacher, and Banyan Tree teacher) found Student to have significant Attention-Deficit/Hyperactivity Disorder symptoms, with two raters (Parents and Sage teacher) finding Student to show strong indications of Attention-Deficit/Hyperactivity Disorder. On the Behavior Assessment Scales, Student was also rated high for Attention-Deficit/Hyperactivity Disorder behaviors and a typicality. Dr. Griswold found that the Conners in combination with the Behavior Scales, supported findings that Student had significant issues with hyperactivity and inattention. He did not find results in any of his evaluations that he believed warranted evaluating Student for autism. His observations of Student's good communication with peers were consistent with that finding.

## 2016 TRIENNIAL IEP

64. District rescheduled Student's March 11, 2016 triennial IEP team meeting at Parents' request to April 1, 2016. The April 1, 2016 meeting was then rescheduled to April 25, 2016, to ensure all District members of the team were available. District convened the first substantive portion of the triennial IEP on April 25, 2016. District



administrator Jennifer Havlat, occupational therapist Kerry Boesch, special education teacher Natasha Burney, school psychologist Rich Griswold, deaf/hard of hearing itinerant teacher Julia Hall, Ms. Higgins, and Parents attended. District's speech-language pathologist was unable to attend the IEP due to illness, and her attendance was excused. Student was approximately twelve years and four months old at the time of the IEP team meeting. At the April 25, 2016 meeting, Parents provided District with a copy of Dr. Davidson's independent assessment of Student containing her diagnosis of Student as being on the autism spectrum. The IEP team did not discuss Dr. Davidson's report at the April 25, 2016 meeting.

65. The IEP team discussed District's triennial assessments. The IEP team agreed to reconvene on May 27, 2016, due to time constraints. The meeting was rescheduled to June 8, 2016 because school was closed on May 27, 2016.

66. The IEP team met on June 8, 2016. District administrator Jennifer Havlat, occupational therapist Kerry Boesch, speech-language pathologist Kelly Hellerud, school psychologist Rich Griswold, deaf/hard of hearing itinerant teacher Julia Hall, special education teacher Natasha Burney, general education teacher Michelle Turnbull, Michelle Turnbull, Student's Advocate Ms. Higgins, and Parents attended.

67. The IEP team discussed Ms. Martinez's speech and language report. The team reviewed Student's goals from his March 13, 2015 IEP. The team attributed Student's lack of progress on the goals to his limited time attending Sage Canyon during the 2015-2016 school year. Student had attended Sage Canyon from August 24, 2015, to October 30, 2015, during the fall semester, and from January 4, 2016, to February 12, 2016, during the spring semester.

68. The IEP team reviewed Student's present levels of performance. Parents were concerned about Student's progress in reading comprehension, writing, overall academic progress, and attention to task. Parents were also concerned about finding the

proper placement for Student. The team reviewed proposed goals for Student and agreed to all goals.

69. District made the following offer of FAPE:34 percent of the school day in a general education setting, and 66 percent outside the general education setting while Student participated in specialized academic instruction in a small group setting as needed to address his 26 IEP goals; 1060 minutes per week of specialized academic instruction at the Sage Canyon 3-6 special day class; deaf/hard of hearing services and consult; speech and language services in group and individual settings; occupational therapy services; and 19 days of extended school year over summer 2016. Parents did not consent to the IEP.

70. District did not assess Student for autism at any time after it received Dr. Davidson's report and before Student filed his due process complaint. District did not discuss Dr. Davidson's report at an IEP meeting, or convene an IEP meeting to discuss the report. District made no changes to Student's IEP based upon Dr. Davidson's report.

71. Parents paid \$4,410.69 for tuition at Excelsior Academy; \$67,137.64 in tuition at Banyan Tree School; and incurred mileage expenses to and from Banyan Tree School in the amount of \$1,777.24.

## LEGAL AUTHORITIES AND CONCLUSIONS

### INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA<sup>2</sup>

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) et seq.,<sup>3</sup> Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a

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<sup>2</sup>Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>3</sup>All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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 Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [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 mean the *Rowley* standard, which should be applied to determine whether an

individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)The Supreme Court’s recent decision in *Andrew F. v. Douglas County Sch. Dist. RE-1* (2017) 580 U.S.\_\_\_\_ [137S.Ct. 988, \_\_ L.Ed.2d \_\_ (2017 WL 1066260) (*Andrew F.*)] 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; any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6)& (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, 56505, subd. (j).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)In this matter, Student, as the complaining party, bears the burden of proof.

5. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)). A school district is not required to place a student in a program preferred by a parent, even if that

program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was offered or denied a FAPE is determined by looking to what was reasonable at the time the IEP was developed, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrman v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

#### ISSUE 1: ASSESSMENT FOR AUTISM

6. Student contends that District denied him a FAPE by failing to assess him for autism. District contends that Student did not display sufficient indications of autism to require assessment for autism, and that Student's program nevertheless addressed his unique needs.

#### Applicable Law

7. Assessments are required to determine eligibility for special education, and what type, frequency, and duration of specialized instruction and related services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be

performed if warranted by the child's educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

8. In California, a district assessing a student's eligibility for special education must use tests and other tools tailored to assessing specific areas of educational need, and must ensure that a child is assessed in all areas related to a suspected disability.(Ed. Code, § 56320, subds. (c), (f); see also, 20 U.S.C. § 1414(b)(3)(B).) A school district must conduct assessments in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd.(h).)

9. 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 local plan area" must conduct assessments of students' suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The determination of what tests are required is made based on information known at the time. (See *Vasherresse v. Laguna Salada Union School Dist.*

(N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

10. Under California law, autism is a developmental disability that significantly affects verbal and nonverbal communication and social interaction, generally evident before age three, which adversely affects a child's educational performance.

Characteristics often associated with autism are repetitive activities, stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. (Cal. Code Regs., tit. 5, § 3030, subd. (b)(1).)

11. A disability is "suspected," and a child must be assessed, when the district is on notice that the child has displayed symptoms of that disability or that the child may have a particular disorder. (*Timothy O. v. Paso Robles Unified School Dist.* (9th Cir. 2016) 822 F.3d 1105, 1120-21 (*Timothy O.*)) That notice may come in the form of concerns expressed by parents about a child's symptoms, opinions expressed by informed professionals, or other less formal indicators, such as the child's behavior. (*Id.* at p. 13 [citing *Pasatiempo by Pasatiempo v. Aizawa* (9th Cir. 1996) 103 F.3d 796, and *N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202].)

12. 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, ex rel. Park v. Anaheim Union High School Dist.*, 464 F.3d, 1025, pp. 1032-1033; *Timothy O., supra*, 822 F.3d at pp. 1120-22.) A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. §1415(f)(3)(E)(ii); see Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992)



960 F.2d 1479,1484 (*Target Range*.) In the autism context, parental participation is closely scrutinized, and absent meaningful participation by parents, the “provision of a free appropriate public education is ‘impossible’ when the IEP team fails to obtain information that might show a child is autistic.” (*Timothy O., supra*, 822 F.3d at pp. 1120-22.)

### Analysis

13. District completed a multidisciplinary report in March 2013. The report did not assess for autism. District had no reasonable basis to assess Student for autism at that time based on either the observations of Student by District staff, or the independent report from Rady Children’s Hospital from November of 2012, which ruled out autism or which concluded Student’s challenges were more likely explained by diagnoses other than autism. Subsequently, Student made reasonable progress at school, despite multiple placement changes initiated by Parents. Student was social at school, and teachers and staff observed him engaging in consistent social and classroom interactions with peers, contrary to Parents’ view of Student’s socialization skills. The behaviors noted by Parents and giving rise to their concerns about autism (e.g. failure to make eye contact, perseverative behavior, social issues, etc.) were sporadic at school, and were neither of significant consistency, nor of such concentration, as to give rise to concerns by District about possible autism. Similarly, Student’s advocate’s inquiry at the April 17, 2014 placement review IEP meeting about District’s staffs’ observations of autism in Student was insufficient to put District on notice before April 25, 2016, that it needed to assess Student for autism.

14. The preponderance of evidence proved that District received Dr. Davidson’s report on April 25, 2016, which, for the first time within the relevant statutory period, put District on notice that Student had a medical diagnosis of autism. The IEP team did not discuss the report at any time. But, Student proved that, as of April 25,

2016, District knew or should have known that Dr. Davidson had diagnosed Student with autism, which triggered District's obligations to address her findings. District should have either addressed Dr. Davidson's report at an IEP team meeting, or conducted its own assessment to determine if Student required additional goals, interventions, and supports to enable him to make progress appropriate for his needs. It did neither. District's failure to address Dr. Davidson's diagnosis of autism between April 25, 2016, and Student's filing of his due process complaint in January 2017, resulted in a procedural violation of the IDEA.

14. Under *Timothy O., supra*, 822 F.3d at pp. 1120-22, and based on the facts in this case, District's failure to assess Student for autism was a *per se* FAPE violation. By failing to assess Student or consider Dr. Davidson's report, District did not have enough information to determine if he had specific needs related to autism that would have informed the IEP team as to whether he required additional interventions or supports. District deprived Student of educational benefit and denied him a FAPE from April 25, 2016, to January 9, 2017. District also denied Parents the opportunity to participate in a meaningful way in the development of Student's IEP because it did not consider Parents' independent assessment report.

### ISSUES 2 AND 3: AUTISM-SPECIFIC GOALS AND RELATED SERVICES

15. Student contends that District denied him a FAPE by failing to offer or provide autism-specific goals and related services during the statutory period. District contends that the goals and services it provided for Student were designed to meet his unique needs and that no autism-specific goals or services were needed.

#### Applicable Law

16. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to

enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).)

17. The purpose of goals is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team shall consider the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial evaluation or most recent evaluation of the child; and the academic, functional, and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56345; *Letter to Butler*, 213 IDELR 118 (OSERS 1998).) There is no requirement that an IEP include baselines for the goals, other than addressing a student's present level of performance. (*Student v. San Diego Unified School Dist.*(2011) Cal. Offc. Admin. Hrngs Case No. 2011080459, at pp. 10-11.)

18. The IEP team need not draft IEP goals in a manner that the parents find optimal, as long as the goals are objectively measurable. (*Bridges v. Spartanburg County Sch. Dist. Two*, 57 IDELR 128 (D.S.C. 2011) (the use of percentages tied to the completion of discrete tasks is an appropriate way to measure student progress).)

19. A failure to offer an appropriate goal is a procedural violation of the IDEA. However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of

educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a); Ed. Code, § 56505, subd. (f)(2) & (j); *Target Range, supra*, 960 F.2d at p. 1484, *superseded in part by statute on other grounds*["... procedural inadequacies that result in the loss of educational opportunity, [citation], or seriously infringe the parents' opportunity to participate in the IEP formulation process, [citations], clearly result in the denial of a FAPE."].) The hearing officer "shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian of the pupil to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).) While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

#### Analysis – Issues 2 and 3

20. First, as to Issue 2, Student met his burden of proving District failed to draft goals specifically directed to Student's autism diagnosis by Dr. Davidson. The Ninth Circuit Court's conclusions in *Timothy O., supra*, at F.3d at pp. 1120-22 apply here. The Court in *Timothy O.* found that the district in that case was unable to offer the student a FAPE because it failed to assess him for autism and failed to consider that diagnosis at his IEP. Similarly, here District knew Student had a medical diagnosis of autism in April 2016, it had Dr. Davidson's report, and it did nothing to follow up on the findings in that report. District's failure to either discuss Dr. Davidson's report at an IEP meeting, or assess Student for autism, resulted in the lack of information available to District and Parents that was necessary to determine whether Student had educationally related needs related to his autism diagnosis. The March 2015 IEP had 16 goals, however, at the time those goals were developed, District did not have any information that Student had

autism. Thus, while those goals may have addressed Student's needs known to District at that time, District's argument that the goals adequately addressed all of Student's needs, including those that may have been related to an autism diagnosis, was speculative at best, and not persuasive.

21. For the same reasons, Student prevailed on Issue 3. District could not know whether it was offering appropriate related services to address Student's needs related to his autism diagnosis without assessing Student, or at least having the IEP team consider Dr. Davidson's recommendations in her assessment report.

22. Student proved that District denied him a FAPE by failing to consider at any time between April 2016 and when he filed his complaint whether he had needs related to his diagnosis of autism that justified offering additional goals or appropriate related services in his IEP.

## REMEDIES

1. Student prevailed on Issues 1, 2, and 3 by proving that District failed to assess Student for autism following receipt of Dr. Davidson's report, which resulted in its inability to develop appropriate goals or services related to autism for Student. District's failures significantly impeded Parents' opportunity to participate in the decision making process, denied Student educational benefit and a FAPE.

2. As a remedy, Student requested reimbursement for the cost of: (1) tuition at Excelsior Academy in the amount of \$4,410.69; (2) tuition at Banyan Tree School in the amount of \$67,137.64; and (3) mileage to/from Banyan Tree School in the amount of \$1,777.24. District argues that Student is not entitled to reimbursement because neither Excelsior Academy nor Banyan Tree were appropriate placements.

3. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide FAPE to a disabled child. (20 U.S.C.

§1415(i); see *School Committee of Town of Burlington, Mass. v. Department of Educ. of Mass.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*.) This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.*, 557 U.S. 230, 244, n. 11.) Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at pp. 369-371.) When school district fails to provide a FAPE to a pupil with a disability, the pupil is entitled to relief that is "appropriate" in light of the purposes of the IDEA. ALJs have broad latitude to fashion equitable remedies appropriate for a denial of a FAPE. (*Id.* at 369-370; *Forest Grove School Dist. v. T.A., supra*, 557 U.S. at 244, n. 11.)

4. Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted reasonably with respect to the unilateral private placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176; see *Patricia P. v. Bd. of Education of Oak Park* (7th Cir. 2000) 203 F.3d 462, 469 [reimbursement denied because parent did not allow district a reasonable opportunity to evaluate student following unilateral placement].)

5. There is broad discretion to consider equitable factors when fashioning relief. (*Florence County Sch. Dist. Four v. Carter by & Through Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361].) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.) Factors to be considered when considering the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and

the general cooperative or uncooperative position of the school district. (*Target Range, supra*, 960 F.2d at 1487; *Glendale Unified School District v. Almasi*, 122 F.Supp.2d 1093, 1109.)

6. In *C.B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3d 1155 (*Garden Grove*), the Ninth Circuit set forth the standards to be applied in determining whether a private placement is appropriate for the purpose of reimbursement. There a student had benefited substantially from a private placement, but parents had been awarded only partial reimbursement because the placement did not address all of the student's special education needs. (*Id.* at pp. 1157-1158.) The Court of Appeals held that parents were entitled to full reimbursement because the IDEA "does not require that a private school placement provide all services that a disabled student needs in order to permit full reimbursement." (*Id.* at p. 1158.) In reaching this conclusion the Ninth Circuit relied upon a standard set forth by the Second Circuit. The Court concluded that, for a parent to qualify for reimbursement, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only to demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from instruction. (*Id.* at p. 1159 [quoting *Frank G. v. Bd. of Education* (2d Cir. 2006) 459 F.3d 356, 365 (citations and emphases omitted)].)

7. Here, Student failed to establish that he was entitled to any remedy or reimbursement before April 25, 2016, when District received Dr. Davidson's report. After that date, and continuing up until the time of Student's filing of the instant complaint, District denied Student a FAPE and significantly deprived Parents of an opportunity to participate in his educational program because it failed to assess or otherwise address Student's autism diagnosis.

8. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an independent evaluation at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); Ed. Code, § 56506, subd. (c).) An independent educational evaluation (IEE) at public expense may also be awarded as an equitable remedy, if necessary to grant appropriate relief to a party. *Los Angeles Unified School District v. D.L.* (C.D.Cal. 2008) 548 F.Supp.2d 815, 822-3.

9. Here, Parents are entitled to a publicly funded independent educational evaluation because of District's failure to assess Student for autism, or to consider the private assessment report provided by Parents. Parents are entitled either to receive reimbursement for Dr. Davidson's report, and for the cost of her attendance at one IEP meeting to discuss her report, or, alternatively, to a publicly funded independent psycho educational evaluation by an assessor of Parent's choosing who meets District's guidelines for independent assessors.

10. Student's request for reimbursement of close to \$70,000 for tuition based upon parents' choice to privately place him at Banyon and Excelsior is not an appropriate equitable remedy. Parents did not act reasonably in placing Student at Banyan Tree School. That placement did not afford Student any advantage over the placement offered by District in either the 2015 or 2016 IEPs, and instead placed Student in a highly restrictive environment. Significantly, by placing Student at Banyan Tree, Parents removed Student from any contact with typical peers such as he experienced on an ongoing and successful basis at District's schools. Similarly, both private placements removed Student from a full-service campus to a small, sequestered placement. Student made reasonable progress at his District placement prior to the private placement. To the extent that Parents believed Student did not appear to make significant progress during the 2015-2016 school year, the evidence established that his



progress was negatively affected, at least in part, by Parents' decisions to transition him between four different placements during the 2015-2016 school year. Parents did not prove that tuition reimbursement was an appropriate equitable remedy for District's failure to consider Dr. Davidson's report or assess Student to determine whether he had needs as a result of his diagnosis of autism.

## ORDER

1. District shall fund an independent psycho educational evaluation of Student by an assessor of Parents' choosing who meets District's guidelines for independent assessors. Alternatively, at Parents' option, District shall reimburse Parents for the cost of Dr. Davidson's independent evaluation. Parent shall notify District of which option they choose not later than 15 days after issuance of this Decision and Order. If Parents choose a new independent educational evaluation, they shall provide a copy of the final report to District within 15 days of their receipt of the report.

2. District shall hold an IEP meeting for Student no later than 30 calendar days after its receipt of either 1) receipt of the report of the independent educational evaluation if a new evaluation is conducted; or 2) the issuance of this Decision and Order. If the assessment report is completed during the summer, District shall hold the IEP meeting within 30 days of the first day of the 2017-2018 school year.

3. District shall pay for a maximum of six hours of time for Student's independent assessor to attend the IEP meeting referenced above, including preparation and travel time.

4. All other requests for relief are denied.

## PREVAILING PARTY

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

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

DATE: April 18, 2017

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TED MANN

Administrative Law Judge

Office of Administrative Hearings