

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:  
PARENTS ON BEHALF OF STUDENT,  
  
v.  
TEMECULA VALLEY UNIFIED SCHOOL  
DISTRICT,

OAH Case No. 2016100111

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TEMECULA VALLEY UNIFIED SCHOOL  
DISTRICT,  
  
v.  
  
PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2016120478

DECISION

Parents on behalf of Student filed a request for due process hearing with the Office of Administrative Hearings on September 26, 2016, naming Temecula Valley Unified School District. District filed a request for due process hearing with OAH on December 6, 2016, naming Student. On December 19, 2016, OAH consolidated the cases. On February 6, 2017, OAH granted the parties' joint request to amend their complaints.<sup>1</sup> On February 21, 2017, OAH granted the parties joint request to continue the consolidated matter.

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<sup>1</sup> District filed its response to Student's amended complaint on February 16, 2017, which permitted the hearing to go forward. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. March 27, 2017) \_\_\_ F.3d \_\_\_, 2017 WL 2330615, \*\*5-6. (*M.C.*))

Administrative Law Judge Paul H. Kamoroff heard the consolidated matter in Temecula, California, on April 12, 13, 17, 18, 19, 20, 27, and 28, 2017, and May 8, 2017.

Maureen R. Graves, John G. Nolte, and Rhonda L. Krietemeyer, Attorneys at Law, appeared on behalf of Student. Student's mother and grandmother attended the hearing. Student did not attend the hearing.

Jack B. Clarke, Jr., and Dorothy R. McLaughlin, Attorneys at Law, appeared on behalf of District. Ami Paradise, District's Director of Special Education, attended the hearing.

At the request of the parties, OAH continued this matter for closing briefs and reply briefs. The record closed on June 6, 2017, upon receipt of written reply briefs.

## ISSUES<sup>2</sup>

### STUDENT'S ISSUES:

1. Did District deny Student a free appropriate public education during the 2014-2015 school year by:
  - a. Failing to conduct an occupational therapy assessment?
  - b. Failing to conduct an educationally related mental health assessment?
  - c. Failing to conduct an assistive technology assessment?
  - d. Failing to offer appropriate goals in the area of behavior and learning at school, in the September 30, 2014 individualized education program, and any amendments occurring this school year?

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<sup>2</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to renumber and redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

- e. Failing to offer appropriate goals in the area of behavior and learning at home, in the September 30, 2014 IEP, and any amendments occurring this school year?
- f. Failing to offer appropriate goals in the area of reading in the September 30, 2014 IEP, and any amendments occurring this school year?
- g. Failing to offer appropriate goals in the area of written language in the September 30, 2014 IEP, and any amendments occurring this school year?
- h. Failing to offer appropriate goals in the area of math in the September 30, 2014 IEP, and any amendments occurring this school year?
- i. Failing to offer appropriate behavior and academic support, in the September 30, 2014 IEP, and any amendments occurring this school year, to allow Student to be successful in the least restrictive environment?
- j. Failing to offer appropriate behavior supports at home in the September 30, 2014 IEP, and any amendments occurring this school year?
- k. Failing to offer appropriate services and supports in reading in the September 30, 2014 IEP, and any amendments occurring during this school year?
- l. Failing to offer appropriate services and supports in written language in the September 30, 2014 IEP, and any amendments occurring this school year?
- m. Failing to offer appropriate services and supports in math in the September 30, 2014 IEP, and any amendments occurring this school year?
- n. Failing to offer appropriate academic instruction in the September 30, 2014 IEP, and any amendments occurring this school year?
- o. Failing to offer appropriate occupational therapy services in the September 30, 2014 IEP, and any amendments occurring this school year?

- p. Failing to offer placement, services, and supports that are research-based for autism in the September 30, 2014 IEP, and any amendments occurring this school year?
  - q. Failing to offer educationally related mental health services in the September 30, 2014 IEP, and any amendments occurring this school year?
  - r. Failing to offer assistive technology services in the September 30, 2014 IEP, and any amendments occurring this school year?
  - s. Failing to offer appropriate inclusion supports in the September 30, 2014 IEP, and any amendments occurring this school year?
  - t. Failing to offer extended school year services in the September 30, 2014 IEP, and any amendments occurring this school year?
2. Did District deny Student a FAPE during the 2015-2016 school year by:
- a. Failing to conduct an occupational therapy assessment?
  - b. Failing to conduct an educationally related mental health assessment?
  - c. Failing to conduct an assistive technology assessment?
  - d. Failing to offer appropriate goals in the area of behavior and learning at school, in the September 29, 2015 IEP, and any amendments occurring this school year?
  - e. Failing to offer appropriate goals in the area of behavior and learning at home, in the September 29, 2015 IEP, and any amendments occurring this school year?
  - f. Failing to offer appropriate goals in the area of reading in the September 29, 2015 IEP, and any amendments occurring this school year?
  - g. Failing to offer appropriate goals in the area of written language in the September 29, 2015 IEP, and any amendments occurring this school year?

- h. Failing to offer appropriate goals in the area of math in the September 29, 2015 IEP, and any amendments occurring this school year?
- i. Failing to offer appropriate behavior and academic support, in the September 29, 2015 IEP, and any amendments occurring this school year, to allow Student to be successful in the least restrictive environment?
- j. Failing to offer appropriate behavior supports at home, in the September 29, 2015 IEP, and any amendments occurring this school year?
- k. Failing to offer appropriate services and supports in reading in the September 29, 2015 IEP and any amendments occurring during the school year?
- l. Failing to offer appropriate services and supports in written language in the September 29, 2015 IEP, and any amendments occurring this school year?
- m. Failing to offer appropriate services and supports in math in the September 29, 2015 IEP, and any amendments occurring this school year?
- n. Failing to offer appropriate academic instruction in the September 29, 2015 IEP, and any amendments occurring this school year?
- o. Failing to offer appropriate occupational therapy services in the September 29, 2015 IEP, and any amendments occurring this school year?
- p. Failing to offer placement, services, and supports that are research-based for autism, in the September 29, 2015 IEP, and any amendments occurring this school year?
- q. Failing to offer educationally related mental health services in the September 29, 2015 IEP, and any amendments occurring this school year?
- r. Failing to implement assistive technology accommodations and services from the September 29, 2015 IEP, and any amendments occurring this school year?
- s. Failing to offer appropriate inclusion supports in the September 29, 2015 IEP, and any amendments occurring this school year?

- t. Failing to offer extended school year services in the September 29, 2015 IEP, and any amendments occurring this school year?
  - u. Failing to make a clear, written offer of services in the September 29, 2015 IEP, and any amendments occurring this school year?
  - v. Failing to allow parent to meaningfully participate in the IEP process by providing vague progress reporting?
  - w. Failing to allow parent to meaningfully participate in the IEP process by not scheduling the IEP meetings at a mutually agreeable date and time?
  - x. Failing to offer placement in the least restrictive environment in the September 29, 2015 IEP, and any amendments occurring this school year?
3. Did District deny Student a FAPE during the 2016-2017 school year by:
- a. Failing to conduct an educationally related mental health services assessment?
  - b. Failing to conduct an assistive technology assessment?
  - c. Failing to offer appropriate goals in the area of behavior and learning at school, in the September 23, 2016 IEP, and any amendments occurring this school year?
  - d. Failing to offer appropriate goals in the area of behavior and learning at home, in the September 23, 2016 IEP, and any amendments occurring this school year?
  - e. Failing to offer appropriate goals in the area of reading in the September 23, 2016 IEP, and any amendments occurring this school year?
  - f. Failing to offer appropriate goals in the area of written language in the September 23, 2016 IEP, and any amendments occurring this school year?
  - g. Failing to offer appropriate goals in the area of math in the September 23, 2016 IEP, and any amendments occurring this school year?

- h. Failing to offer appropriate behavior and academic support, in the September 23, 2016 IEP, and any amendments occurring this school year, to allow Student to be successful in the least restrictive environment?
- i. Failing to offer appropriate behavior supports at home, in the September 23, 2016 IEP, and any amendments occurring this school year?
- j. Failing to offer appropriate services and supports in reading, in the September 23, 2016 IEP, and any amendments occurring during the school year?
- k. Failing to offer appropriate services and supports in written language in the September 23, 2016 IEP, and any amendments occurring this school year?
- l. Failing to offer appropriate services and supports in math in the September 23, 2016 IEP, and any amendments occurring this school year?
- m. Failing to offer appropriate academic instruction in the September 23, 2016 IEP, and any amendments occurring this school year?
- n. Failing to offer appropriate occupational therapy services in the September 23, 2016 IEP, and any amendments occurring this school year?
- o. Failing to offer placement, services, and supports that are research-based for autism in the September 23, 2016 IEP, and any amendments occurring this school year?
- p. Failing to offer educationally related mental health services in the September 23, 2016 IEP, and any amendments occurring this school year?
- q. Failing to offer appropriate inclusion supports in the September 23, 2016 IEP, and any amendments occurring this school year?
- r. Failing to implement assistive technology accommodations and services from the September 23, 2016 IEP, and any amendments occurring this school year?
- s. Failing to make a clear, written offer of services in the September 23, 2016 IEP, and any amendments occurring this school year?

- t. Failing to allow parent to meaningfully participate in the IEP process by providing vague progress reporting?
- u. Failing to allow parent to meaningfully participate in the IEP process by not scheduling IEP meetings at a mutually agreeable date and time?
- v. Failing to allow parent to meaningfully participate in the IEP process by predetermining placement at the September 23, 2016 IEP?
- w. Failing to offer placement in the least restrictive environment at the September 23, 2016 IEP, and any amendments occurring this school year?

**DISTRICT'S ISSUE:**

4. Did District offer Student a FAPE in the least restrictive environment in the September 23, 2016 IEP, as modified in the October 11, 2016 and January 26, 2017 IEPs, such that District may implement the combined IEP without parental consent?

**SUMMARY OF DECISION**

Student had significant behavior problems that impeded his ability to access his education. District frequently amended his educational plan, yet Student regressed academically and behaviorally. Student required a small, structured placement to receive a meaningful educational benefit, which District offered for the first time in October 2016. That offer, as amended in January 2017, was appropriate to meet Student's unique needs.

The Decision finds that District failed to provide Student an appropriate placement during the 2015-2016 school years. The Decision also holds that District unnecessarily delayed assessments in the areas of occupational therapy and assistive technology. Finally, the Decision finds that District's combined IEP offer of September 23, 2016, October 11, 2016, and January 26, 2017, was appropriate for Student.



## FACTUAL FINDINGS

1. Student was an eight-year-old boy who, at all relevant times, resided with his adoptive parents, Mother and Grandmother, within the boundaries of District. He received special education under the eligibility categories other health impairment, due to an attention deficit hyperactivity disorder, and autism.

2. ADHD and autism are neuro developmental disorders. ADHD is characterized by difficulties with executive functions that cause attention deficits, hyperactivity, or impulsiveness. Autism is characterized by impaired social interaction, verbal and non-verbal communication, sensory difficulty, and restricted behavior. As a result of his disabilities, Student had difficulty with attention, impulsivity, behavior, sensory processing, and difficulty completing school work.

3. Student attended Ysabel Barnett elementary school, a District school, from kindergarten through the beginning of his third grade, September 2016. Parents unilaterally removed him from school at that time. In February 2017, Parents placed Student at the Institute for Effective Education's Cook Education Center, a nonpublic school located in San Diego, California. Student attended the Cook Center during the due process hearing.

## CONDUCT PRIOR TO THE YEARS IN DISPUTE

4. In May 2012, District conducted an initial assessment of Student, including a speech and language assessment, and determined that he did not qualify for special education. In July 2012, Parents wrote District a letter reporting that Student had obsessive compulsive disorder, social skills delays, autism, sensory processing delays, and a family history of drugs and alcohol. In response, District offered to conduct another speech and language assessment, which Parents declined.

5. During the 2013-2014 school year, Student attended kindergarten at Barnett. The classroom teacher observed Student exhibit "extreme break-downs," difficulty focusing and completing work, poor self-control, and increasing behavior difficulty at school. District tried to remediate Student's behaviors through various accommodations and positive behavior interventions in the general education classroom, and developed a Student Study Team for Student. Student's behaviors grew worse and, by the end of the school year, he was not responsive to school-based interventions.

6. On May 1, 2014, Student was privately assessed by the Center for Autism Research, Evaluations, and Services, a nonpublic agency that provided Student applied behavior analysis services at home.<sup>3</sup> The CARES assessment was partially conducted by Brittney DeWall, who administered standardized tests. Student had average cognitive and academic abilities. However, Student had attention and concentration delays which met the criteria for ADHD. Per the Autism Diagnostic Observation Schedule, Second Edition, a standardized assessment tool, Student had autism.

7. By the end kindergarten, Student's behaviors had become more disruptive and it was evident that a general education classroom, even with accommodations and interventions, was not sufficient. Accordingly, District's Student Study Team referred Student for special education. District staff promptly responded to the referral and offered to assess Student for special education eligibility. Parents consented to District's offer to assess and District timely completed its initial multidisciplinary testing at the beginning of the 2014-2015 school year, the start of the timeframe in dispute.

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<sup>3</sup>ABA is a behavior modification methodology which focuses on the observable relationship of behavior to the environment, including antecedents and consequences.

## THE 2014-2015 SCHOOL YEAR

### The Initial Multidisciplinary Assessment

8. District completed an initial Multidisciplinary assessment for Student on September 9, 2014. Student was six years old and beginning the first grade. District selected school psychologist Jill Toth; speech and language pathologist Vanessa Garcia; education specialist Carynn Kanow; general education teacher Ivy Schlemmer; and a school nurse, to complete the assessment.

9. District assessors had reviewed the CARES assessment and intended to assess Student in all areas related to autism, ADHD, and speech and language impairment. Assessment procedures included a records review, interviews, observations, vision and hearing screening, a psycho-educational assessment, and a speech and language assessment. District did not conduct an occupational therapy assessment.

10. Observations and interviews revealed that Student had difficulty participating in class, difficulty joining or playing with peers, required frequent and multiple prompting, used odd phrases, and perseverated on preferred tasks. Student squirmed and fidgeted, was anxious, and upset by changes in routine. His behaviors caused his peers to shy away from him. Student tantrum med and had severe behaviors in class which impacted his learning and that of others. Student's teacher was overwhelmed by Student's behaviors and, at times, called the school principal to intervene.

11. Student was bright. The Kaufman Assessment Battery for Children-Second Edition, an intellectual assessment, showed average to above average cognitive abilities. Results of the Developmental Test of Visual Processing –Third Edition, revealed that Student had delays in visual motor integration and in sensory/motor skills. His visual motor integration, which included fine motor skills, was delayed in the area of eye-hand

coordination. Per the Wide Range Assessment of Memory and Learning – Second Edition, Student had delays in attention and concentration. The Behavior Rating Inventory of Executive Function, rating scales used to determine a pupil’s behavior profile and executive functioning, showed that Student had difficulty shifting between activities, delays in emotional control, initiating tasks, working memory, organizing materials, and work habits. Results of the Gilliam Autism Rating Scale, an autism screening test, rated Student as possibly having autism.

12. Results of the Wechsler Individual Achievement Test – Third Edition, which assessed Student’s academic abilities, showed that Student was at or above grade level in every area tested. Grade level equivalencies ranged from beginning first grade to middle-second grade levels. Student had just begun the first grade when tested. Standardized scores also revealed average-to-above average skills. An exact average standard score was 100, with a standard deviation, 15 points higher or lower, falling within the average range. Student received standard scores of 109 in listening comprehension; 110 in early reading skills; 110 in reading comprehension; 120 in math problem solving; 119 in sentence composition; 91 in word reading; 105 in writing; 104 in pseudoword decoding; 128 in numerical operations; 112 in oral expression; 86 in oral reading fluency; 104 in spelling; 97 in math fluency-addition; and 110 in math fluency-subtraction.

13. Ms. Garcia performed the speech and language assessment. Student had delays in social skills and functional communication. He did not present delays in articulation, phonological processing, fluency, or receptive and expressive language. Although the assessor did not formally assess for assistive technology, she did not recommend assistive technology or augmentative communication devices.

14. District’s assessment recommended that Student receive special education under the eligibility category other health impairment, due to an attention disorder.

Although Student had been diagnosed with autism and exhibited autistic-like behaviors, District assessors believed that Student's challenges were better indicated under other health impairment.

#### The September 30, 2014 IEP

15. District held an IEP team meeting for Student on September 30, 2014, to review the initial multidisciplinary assessment. The IEP team included Mother; Grandmother; Ms. Garcia; Ms. Toth; Ms. Kanow; Ms. Schlemmer; Chris Dixon, school principal; and Dana Portis, a resource specialist program teacher. District provided Parents a copy of their Parental Rights and Safeguards at the start of the meeting.

16. Student had strong reading skills, with some difficulty in oral reading fluency. Per the developmental reading assessment, Student was at grade level in reading. Student had above average sentence composition skills, but had difficulty writing, including forming letters. Student was average to above average in all areas of math.

17. Student had social, behavior and emotional problems. He had difficulty following classroom rules and would not finish work if it was not a preferred task. He required constant redirection, was often off-task and disorganized. Student was disruptive, would stomp his feet, and argue with others. His teacher had attempted various strategies to control his behavior, including breathing techniques, breaking down instruction, and had used sensory devices, fidgets, to replace his off-task behaviors. Student struggled with reciprocal language, eye contact, and had difficulty staying on topic. The IEP team determined that Student's primary deficits were behavior, reading decoding, and pragmatic language.

18. To address those deficits, the IEP team proposed four goals. The first goal, in behavior, required Student to begin a task within two minutes and to refrain from off-task behavior, for the duration in four of five activities. Goal two, also in behavior,

required Student to demonstrate compliance, stay calm, complete a task, and refrain from non-compliant behavior, in four of five directives. The third goal, in reading decoding, sought for Student to identify, segment and blend sounds to make a recognizable word, with eight of 10 correct responses in two of three activities. Goal four, in pragmatic language, required Student to demonstrate appropriate use of social skills, with 80 percent accuracy in four of five trials.

19. The IEP offered Student the following accommodations: preferential seating; positive reinforcement; extra time to complete assignments and tests; chunking multi-step tasks into smaller pieces; checking for understanding; a visual schedule; opportunities for movement and movement breaks; front-loading for changes and transitions; and ear buds to decrease noise distractions.<sup>4</sup>

20. District offered Student placement in a general education classroom with the following services: group speech and language, provided in the general education class, one time monthly for 30 minutes per session; and resource specialist program services, provided in the general education class, four times per week, for 30 minutes per session.

21. Parents participated during the meeting and expressed concerns regarding Student's behavior, self-control, and ability to maintain friends. The team agreed to transition Student from a separate, quiet room, the "friendship room," to the playground during recess, to help develop his play skills and friendships.

22. Parents were also concerned that Student had poor fine motor abilities. Misunderstanding the difference between fine and gross motor skills, the IEP team agreed to an adaptive physical education screening, a tool designed to detect gross

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<sup>4</sup>Ear buds are headphones that are made to fit inside the ear, just outside of the ear canal.

motor deficits. Fine motor falls under the province of occupational therapy. Student had difficulty handwriting, deficits in eye-hand coordination, and sensory processing concerns. In class, teachers had provided Student sensory devices like fidgets, and movement breaks in an attempt to calm his behavior, possibly indicative of a sensory processing deficit. Student was also sensitive to sound and often covered his ears when in a large group. Given those problems, District should have conducted an occupational therapy assessment as it was aware of Student's fine motor and sensory difficulties.

23. District adopted the finding of its initial multidisciplinary assessment and offered Student special education eligibility under other health impairment, due to an attention disorder. District believed that Student's deficits were best described under other health impairment, and declined to add autism as a secondary area of eligibility. Parents consented to the September 30, 2014 IEP.

#### The October 16, 2014 IEP Amendment

24. Student immediately demonstrated serious behavior problems in the general education classroom. He was resistant to instruction, resisted changes, had difficulty transitioning, tantrum med, and cried loudly in class. Per the classroom teacher's request, District convened an addendum IEP team meeting two weeks following the September meeting, on October 16, 2014.

25. The addendum IEP team reconsidered District's decision that Student did not qualify under autism, and added autism as a secondary area of eligibility to his IEP. The team also increased Student's resource specialized program services to 60minutes, four times weekly. The service would continue to be pushed into the general education classroom. Finally, District presented Parents an assessment plan for a functional behavior assessment, to determine causes for Student's maladaptive behaviors. No other changes were made to Student's IEP.

26. Along with necessary District staff, Mother participated in the addendum IEP team meeting. She consented to the addendum IEP and to the functional behavior assessment.

#### The January 8, 2015 IEP Amendment and Behavior Support Plan

27. District timely convened an addendum IEP team meeting on January 8, 2015, to review the functional behavior assessment and adaptive physical education screening. Grandmother participated in the meeting, along with Ms. Dixon; Ms. Toth; Ms. Portis; Ms. Schlemmer; and Colin Dowey, District's adapted physical education teacher.

28. Mr. Dowey screened Student in the area of adaptive physical education, which involved gross motor testing. Student could jump, hop and skip without problems, evidencing no gross motor delays.

29. Student continued to demonstrate serious behavior difficulty in class and during recess. He had minimal interaction with peers, did not follow instructions, tantrum med, cried loudly, struggled to get along with others, and was normally off-task. In an attempt to minimize those behaviors, Student's teacher had tried interventions not listed in his IEP, including consulting with District's autism specialist; using positive behavior interventions and instruction; placing Student in a social skills group each morning that was part of a mild/moderate special day class; and, frequently sending Student to the friendship room, that was more controlled and quiet than the general education classroom he was assigned. Nonetheless, Student's behavior grew worse and created an "extensive impact" on his teacher and peers.

30. Ms. Toth reviewed the functional behavior assessment, which she completed in December 2014. The behavior assessment included interviews with Student's teachers and staff, observations, and a records review. Behaviors targeted by the assessment included resisting instruction; difficulty accepting no; difficulty



transitioning; tantrums; and crying loudly. The classroom teacher had already put into place various interventions, including a first/then visual schedule on Student's desk; various visual reminders regarding behavior skills, following instructions, listening to others, etc.; a positive behavior reward system; and other behavior interventions. Yet, Student verbally protested, disturbed other students, made noises, leaned against peers, tried to hit peers, had difficulty communicating with peers, talked during instruction, and did not follow or respond to teacher instruction. Academically, Student avoided tasks, had poor reading decoding skills, and difficulty handwriting. Handwriting was a non-preferred task that Student tried to avoid altogether.

31. Ms. Toth observed Student and recorded the frequency of Student's positive and problem behaviors. During one day of observation, Student had problem behaviors 46 percent of the time. He chased and hit another student and required multiple prompts to look at or listen to the teacher. Antecedents, or triggers, for problem behaviors were abundant. They included whole group instruction, rotations to small group instruction, physical education, interacting with peers, playing games, when he was fearful, transitions, and to avoid tasks.

32. Some of Student's behaviors were typical of students with high functioning autism. He had difficulty understanding and predicting others' emotions; difficulty understanding the perspective of others; lacked understanding how his behaviors impacted how others felt; difficulty with voice volume and eye contact; and difficulty understanding his body movement.

33. Student's behavior negatively impacted his education and that of others. Ms. Toth recommended a tier-two behavior support plan, which was more supportive than the District wide positive behavior interventions. In addition to the interventions utilized by the teacher, the plan recommended teaching Student coping strategies; not having adults engage Student when he was verbally perseverating on a topic; using a

visual count-down strategy prior to a transition; provide choices throughout the day; and instructing Student in the areas of conversation, voice volume, and perspective. Reinforcements and reactive strategies, including praise and describing behaviors were also suggested. The behavior support plan included a new behavior goal. The goal required Student to, when presented a social interaction, stop when prompted, identify how his peer might feel, and generate a strategy to improve the situation, in four of five trials. The plan required communication between Parents, school staff, and the at-home service provider.

34. District amended the October 2014 IEP to include the behavior support plan, behavior goal, and a classroom aide to support Student in general education. No other changes were made to the annual IEP. Mother participated during the meeting and consented to the amended IEP.

#### The February 17, 2015 Addendum IEP

35. District convened another addendum IEP team meeting the following month, on February 17, 2015. Parents, along with all necessary District staff attended and participated during the meeting. Student was still demonstrating problem behaviors. In response, the IEP team agreed to continue his aide support, three and a half hours daily, through the end of the school year. Parents consented to the addendum IEP.

#### The June 2, 2015 Addendum IEP

36. District convened an addendum IEP team meeting for Student at the end of the 2014-2015 school year, on June 2, 2015. Grandmother attended, along with Ms. Schlemmer, Ms. Portis, and Ms. Dixon.

37. Student continued to demonstrate serious behavior problems in class and during recess. He was normally off task, struggled with handwriting, was disorganized,

lacked focus, and required multiple prompts during classroom instruction. Yet, District offered the same educational placement and services for the following school year. Parents consented to the addendum IEP.

#### THE 2015-2016 SCHOOL YEAR

38. Student demonstrated similar, or worse, behaviors at the start of the 2015-2016 school year. In class, he frequently kicked, screamed and tantrum med.

39. By October 2016, it was evident to his classroom teacher Natalie Walton that general education was not appropriate for Student, and she requested additional support from school administrators. Ms. Walton testified during the hearing and her testimony was supported by IEP notes and behavior data. She persuasively recounted that Student required a small, structured, special day classroom.

40. In addition to the other behaviors reported, Student had begun pretending that he was a dinosaur, crawling around the classroom floor and grabbing students' clothing by his teeth through their chairs. He did this with such frequency that staff had developed a name for that behavior, "dyno-mode." Student was a danger to others and Ms. Walton had to occasionally evacuate the classroom to isolate Student.

41. Academically, Student refused to write, required constant redirection, and could not complete any work independently. Although Ms. Walton and the aide implemented the behavior support plan, positive behavior interventions, and other behavior strategies, Student "missed a lot of instruction" in general education.

42. Resource teacher Ms. Brosche similarly testified that general education was inappropriate for Student at that time. He was far below his peers in his ability to perform grade level work or to work independently. By December 2016, Student was an island in the classroom, present but not receptive to instruction or peer interaction.

## The October 12, 2015 IEP

43. District attempted to hold Student's annual IEP team meeting on September 29, 2015, but continued the meeting to October 12, 2015, to accommodate Parents' schedule. Parents attended the October meeting, along with Ms. Toth; Ms. Garcia; Ms. Portis; school principal Dr. Amber Lane; and Ms. Walton. Student was seven years old and in the second grade.

44. Prior to the IEP team meeting, Parents requested that an autism specialist attend the meeting. District timely sent Parents a prior written notice letter denying that request. Nonetheless, the school psychologist, Ms. Toth, attended the meeting. Ms. Toth was a credentialed school psychologist with a certificate in behavior intervention and vast training in autism. Prior to her work as a school psychologist, Ms. Toth worked as a special education teacher and autism service provider. She held a bachelor's degree in social work and a masters' degree in school psychology. During hearing, Ms. Toth persuasively testified that she described her experience to Parents and utilized her knowledge and training in autism to assist the IEP team.

45. The team first reviewed Student's progress towards his past IEP goals. Student had met one goal, in the area of reading decoding. Student did not meet the remaining three goals from his last annual IEP, or the additional behavior goal offered in the January 2015 addendum IEP. Per the developmental reading assessment, Student was reading at below grade level. He continued to have difficulty writing, and his penmanship was illegible. Student struggled with communication development. He lacked social communication skills, recognizing personal space, interrupting others, and staying on topic. Student struggled in the classroom. He was slow to start assignments, required multiple prompting, and did not finish work independently. He personified inanimate objects.

46. Student's grades were poor. He had a 65 percent in reading, 85 percent in mathematics, 46 percent in spelling, and 63 percent in writing. For spelling, Student received modified assignments. In writing, Student shut down altogether.

47. Despite having a behavior support plan and many accommodations, Student's maladaptive behaviors had grown worse. He had difficulty following school and classroom rules, became extremely agitated in class, lashed out, yelled, screamed, eloped from the classroom and from the school, crawled under desks, and laid on the floor. He sometimes lied down outside of class and refused to enter the classroom. His behaviors were extremely distracting to other students in class. The classroom was evacuated to protect other students from Student. Student's behavior impeded his learning and that of others.

48. The IEP team determined that Student's primary delays included behavior, reading decoding, writing, and pragmatic language. To address those delays, District offered seven new goals. The first goal, in behavior, required Student to demonstrate compliance by beginning at task within two minutes, with one prompt, and refrain from off-task behavior until the task was completed, in four of five activities. Goal two, also in behavior, required Student, when given a non-preferred task, to stay calm and to complete the task, in four of five directives, with 80 percent accuracy. The third goal, in behavior, was similar to the goal offered in Student's January 2015 IEP and behavior support plan. Goal four was for pragmatic language and required Student to make appropriate comments during adult and peer interactions, with 80 percent accuracy in four of five trials. Goal five, also in pragmatic language, called for Student to describe others' thoughts and feelings, with 80percent accuracy, in four of five trials. Goal six, in reading fluency, required Student to read a second grade text with 80 percent accuracy, in four of five trials. The last goal, in writing, required Student to write a four to five sentence paragraph using a rubric in two of three trials. Special education staff, teachers,

and the speech and language pathologist were responsible for Student meeting those goals.

49. The October 2015 IEP offered Student access to assistive technology, including a keyboard for writing, and ear buds to diminish noise distractions. Steve Israel, a District program specialist, testified that those devices were assistive technology specific to Student's unique needs. Although District had not assessed Student to determine appropriate assistive technology devices or services, during hearing Mr. Israel opined that such assessment was not necessary to offer Student appropriate assistive technology interventions.

50. The October 2015 IEP offered accommodations that were similar to those included in the September 2014 annual IEP, including: preferential seating; positive reinforcement; extra time to complete assignments and tests; chunking, or breaking apart, of tasks to smaller parts; checking for understanding; visual schedules; movement breaks; frontloading for changes; ear buds to decrease noise; aide support in the classroom; collaboration between the general education and special education teachers; access to technological devices, including a keyboard, for writing; and teacher notes.

51. At that time, District had sufficient information to determine that Student required a more structured placement than regular education to support his behavior and learning. Yet, District offered Student placement in a regular education classroom. Services were substantially the same as those last offered: 30 minutes weekly of group speech and language, and 60 minutes resource specialist program services, four times weekly, inside or outside of the classroom, per the discretion of the service provider.

52. Parents participated during the IEP team meeting. Grandmother shared information regarding ABA. She believed that Student's lack of progress was attributable to a poorly trained aide. She also raised concerns regarding Student's social interactions, sensory issues, and his difficulty completing tasks and homework. Grandmother also

requested for District to teach Student keyboarding, to help with writing. Given those concerns and Student's disability, District had an obligation to offer assessments in the areas of occupational therapy and assistive technology, but failed to offer those assessments. District agreed to break down multistep tasks, to modify Student's homework so that he was responsible for less work than that assigned to his peers, and referred Parents to a website that would help teach Student keyboarding skills.

53. Parents did not consent to the October 2015, IEP. They primarily objected to the school aide not being adequately trained in ABA. Parents offered to provide Student's home-aide at school, funded by their private insurance. However, the aide District selected had received standard school training, training in ABA, training by District's autism specialist Jennifer Parker, and training from the school psychologist, Ms. Toth. District believed that the aide's training was sufficient and declined Parents' request for a privately funded aide for Student at school.

#### The December 10, 2015 IEP Amendment

54. District convened an amendment IEP team meeting on December 10, 2015. Mother attended, along with necessary District staff. The team briefly met to add interventions to Students' behavior support plan, including: use of a break card; a Chrome book to decrease frustration during writing tasks; movement breaks; writing down steps for assignments; and front-loading and pre-correcting activities.<sup>5</sup> Mother consented to implementation of Student's IEP and amendment, but not that it provided a FAPE.

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<sup>5</sup> A Chrome book is a laptop computer that also functions as a tablet, touchscreen computer.

## The February 3, 2016 IEP Amendment

55. District convened another amendment IEP team meeting for Student on February 3, 2016. Mother participated, along with Student's attorney; Ms. Walton; Ms. Toth; Ms. Garcia; Ms. Kanow; Mr. Israel; assistant principal Natalie Waddell; and District's attorney.

56. The amendment IEP increased the aide service to full time; added meetings with the home service providers, 60 minutes monthly; and speech and language services during recess to facilitate peer interaction, 20 minutes weekly; and supervision by a District board certified behavior analyst, 90 minutes monthly.

57. Previously, Student's behavior support plan had been implemented, and data collected, by the general education teacher and the classroom aide. Although Ms. Toth had composed the behavior support plan, she did not oversee its implementation or review data to determine its efficacy. The team agreed that District's board certified behavior analyst, Tara Boland, would work with Ms. Toth to prepare a new behavior plan.

58. Student struggled in reading and the team agreed to update his academic testing. Student demonstrated sensory difficulty and the team agreed that Student required an occupational therapy assessment. During the meeting, District offered, and Mother signed, an assessment plan for academic, behavior, and occupational therapy assessments.

59. Student would remain in general education, and no other changes were made to Student's educational plan. Parents consented to implementation of the amendment IEP at the end of March 2016.

60. Following the amendment IEP, Student continued to decline. On March 17, 2016, Dr. Lanesent Parents a letter identifying Student as an at-risk learner. Student was not attaining grade level standards and required additional academic interventions.



## The April 22, 2016 Addendum Behavior Report

61. District conducted an addendum behavior assessment on April 22, 2016. The report was completed by Ms. Toth, Ms. Brosche, Ms. Walton, and an intern. The examiners observed Student individually and in the classroom.

62. During a 60-minute classroom observation, Student crawled on the floor, acting like a dinosaur, grabbing students' clothing with his teeth, and ignoring adult requests to stop. The behavior disrupted the classroom and was normal for Student. Other observations revealed that Student normally refused to do work, and cried, kicked or screamed when directed from a preferred activity. Student had been disciplined for eloping from class, escaping through the campus gate, pushing, kicking, hitting, and throwing objects at others, and running away from his aide.

63. Ms. Toth analyzed Student's behavior using the Prevent, Teach and Reinforce functional behavior assessment, a model aligned with principals of ABA. The ABA principles used were functional behavior assessment procedures, reinforcement of desired alternative behaviors, shaping of new behaviors, fading of prompts, and reinforcement and contingency management approaches. Problem behaviors were identified throughout the school day. Almost any direction or task caused a problem behavior. Student was not cooperative with his classroom teacher, aide, or school principal. An exception was during his social skills class, which was taught in a special day classroom. The report suggested various behavior strategies, most which had been previously attempted, and a new behavior goal.

## The May 9, and 20, 2016 IEP Amendment

64. District convened an amendment IEP team meeting for Student over two days, May 9, and 20, 2016. Student was finishing the 2015-2016 school year, his second grade. Mother and Grandmother attended, along with Student's attorney; Ms. Walton; Ms. Toth; Ms. Garcia; Mr. Israel; Ms. Waddell; Dr. Lane; resource specialist program

teacher Gisella Brosche; behavior specialist Tara Boland; and Jenna Campbell, District's occupational therapist. Lilly Flores-Fiumara, a therapist from the Tikvah Center, a nonpublic agency employed by Parents, attended the meeting on May 20, 2016. In addition to the updated behavior report, the team reviewed District's occupational therapy assessment, academic testing, and Student's overall performance at school.

65. Prior to the IEP team meeting, Parents requested that the meeting be held before school, at 7:30 a.m., or after school, at 3:30 p.m. to accommodate Grandmother's schedule. Grandmother was a teacher at a different school district and had difficulty attending IEP team meetings during school hours. District sent Parents a prior written notice letter denying the request. District cited that meetings had to be scheduled at mutually agreeable dates and times, both for Parents and District. Due to contractual obligations, District team members were not available before or after school hours. Nonetheless, District held the May 9, 2016 IEP team meeting at 3:30 p.m., and Grandmother and Mother were able to attend both parts of the IEP team meeting.

66. Ms. Campbell shared the results of her occupational therapy assessment, dated April 5, 2016. As part of her assessment she interviewed Student's parents and teacher. The classroom teacher was concerned that Student's behaviors impacted all academics in the general education setting. Student also had difficulty copying from the board. Parents were concerned that Student had difficulty writing, was hypersensitive to sounds and touch, lacked replacement behaviors, and had social delays, along with other academic and behavior problems. Following her interviews, Ms. Campbell observed and formally assessed Student.

67. Ms. Campbell administered the Wide Range Assessment of Visual Motor Abilities, which found Student to be below average, at the fourth percentile, in his visual motor abilities. That means Student was functioning lower than 96 percent of his peers. Ms. Campbell utilized the Sensory Processing Measure to test Student's sensory

processing. Sensory processing is the ability to take in information from one's body and environment, to screen out what is important, to organize oneself. The Sensory Processing Measure interpreted scores into three domains, ranging from least to most seriously delayed: typical performance, some problems, and definite dysfunction. The assessment tested in seven areas, including social participation; vision; hearing; touch; body awareness; balance and motion; and planning and ideas. Student received a definite dysfunction score in six areas, indicating significant sensory processing deficits.

68. Overall, Ms. Campbell found that Student had difficulty writing, including problems in word and letter spacing, alignment and size, and sensory processing delays. She recommended that Student receive direct occupational therapy for writing. For sensory processing, she recommended access to District's motor lab, a room designed for sensory input and management, along with various sensory supports and tools in the classroom. The IEP team adopted Ms. Campbell's findings and offered Student direct occupational therapy services for fine motor, 16 sessions per year, for 30 minutes per session; and consultation between the occupational therapist and classroom teacher, nine sessions yearly, for 15 minutes each, for sensory processing. District offered an occupational therapy goal, in handwriting. The goal called for Student to copy three-to-four sentences with letter alignment and spacing, with 85 percent accuracy, on three of four work samples.

69. During hearing, District occupational therapist Sara Weingartner provided persuasive testimony in support of Ms. Campbell's assessment. Ms. Weingartner clarified that Student required the intervention of an occupational therapist due to problems in handwriting, attention, behavior, and sensory processing. She persuasively described that those areas fell under the province of an occupational therapist. Student had manifested problems in those areas for some time, and Ms. Weingartner was unable to explain why District had not previously assessed Student for occupational therapy.

70. Student's behaviors were more extreme than before. He had daily outbursts that had increased in severity, duration and frequency. He tantrum med, was a threat to his teacher and others, and his classroom was evacuated with more frequency, to isolate him during prolonged behavior outbursts. Student eloped from his classroom and from school grounds, creating safety problems. School staff had reinforced fencing around the campus to prevent Student from eloping into traffic. Student had pervasive discipline problems and was sometimes kept isolated in the principal's office, with school staff standing by the door to ensure he did not escape. Student frequently missed instruction and impeded the learning of others. Review of his behavior goals revealed that Student refused instructions more than 90 percent of the time, and responded to behavior interventions less than 50 percent of the time. Student had not benefited from the general education classroom and had regressed behaviorally. Each IEP team member, including Ms. Flores-Fiumara of the Tikvah Center, believed that District had many behavior interventions and strategies in place. Yet, each IEP team member agreed that Student's behaviors impeded his ability to access his educational placement.

71. Student also regressed academically. District staff reviewed the results of the Kaufman Test of Educational Achievement, dated April 27, 2016. The Kaufman was an academic assessment similar to the Wechsler academic testing that District conducted in September 2014. Each assessment used an average standard score of 100, with a 15 point deviation falling within the average range. On the Kaufman, Student received standard scores of 81 in letter and word recognition; 70 in written expression; 81 in spelling; 89 in reading comprehension; 84 in reading; 104 in math; and 76 in writing.

72. One standard deviation is 15 points, and represents a statistically meaningful change. A decrease of a standard deviation represents a lack of progress,

and regression, in that area. Compared to District's 2014 academic testing, Student had fallen 21 points in reading comprehension; 26 points in reading; 23 points in spelling; 29 points in writing; and 16 points in math. Student regressed in a statistically significant manner in each area tested.

73. On the developmental reading assessment, Student was far below grade level, level 18, below the level 28 expected of second grade students. Student failed most subjects, with scores of 49 percent in reading; 52 percent in writing; and 68 percent in math.

74. District staff acknowledged that Student's academics had declined. In an effort to curb that decline, the team added goals in reading, math, and communication development, along with the handwriting goal. Accommodations remained the same as those last offered, including assistive technology devices to support Student in handwriting.

75. It was observable to the May 2016 IEP team that Student was misplaced in general education. During the IEP team meeting, Ms. Brosche reported that Student required small group instruction. During the hearing, school teachers and staff unanimously testified that Student required a small, structured special day class to receive an educational benefit. Yet, District continued to misplace Student in a general education classroom.

76. Along with general education, District offered the following services: speech and language services, 30 minutes, twice weekly, and during lunch, 20 minutes, once per week; the occupational therapy recommended by Ms. Campbell; and resource specialist program services, 120 minutes daily. Parents consented to implementation of the IEP amendment on August 29, 2016.

77. During the May 2016 meeting, Parents requested an assistive technology assessment to examine if there were devices or software that was better suited to

Student's disability. On June 7, 2016, Mr. Israel sent Parents a prior written notice letter denying the request. District mistakenly believed that an assistive technology assessment was not necessary because IEP team members had already determined what devices and services were appropriate for Student.

#### THE 2016-2017 SCHOOL YEAR

78. District ambitiously began the new school year on August 10, 2016. Beginning the first week of school, Ms. Brosche tested Student using the developmental reading assessment. Student was still at a level 18, evidencing no regression during the summer break. Ms. Brosche worked with renewed fervor, teaching Student individually and frequently testing Student. With significant help, repetition, and structure, Student was eventually able to score at a level 24 on the reading assessment; still below grade level, but indicating some progress in reading.

79. Ms. Boland reviewed an immense collection of behavior data collected by the teacher and aide, and began collecting her own data. She frequently observed Student and assisted Ms. Toth in developing a more aggressive, tier three, behavior support plan for Student's pending annual IEP. By the end of September 2016, Ms. Boland had spent over 45 hours working on Student's educational plan, six times what was offered in his IEP.

80. District took steps to address Parents' concerns regarding the individual aide's training. District created a new position for a higher trained aide, and hired Amy Annett for that position. Ms. Annett had privately worked with Student, from 2014 to 2015, providing ABA services at his home through CARES. Ms. Annett had a master's degree in special education, vast training and experience in ABA, and had worked as a behavior aide privately and for school districts. She had worked in various settings, including home, special day classes, and general educational classrooms.

81. In addition to that experience, District hired a non public agency to provide Ms. Annett intensive behavior training, supervised by a private board certified behavior analyst. On August 2, 2016, District amended Student's IEP to include that training and supervision, which Parents consented to on August 10, 2016.

82. District continued providing Student various behavior interventions and strategies, his behavior support plan, the friendship room, motor lab, frequent breaks, and an "office," created by Ms. Brosche; an isolated place Student could go when he felt frustrated or overwhelmed. District also continued to provide Student social skills in a special day class each morning.

83. Yet, Student's problem behaviors persisted. Almost immediately, Student began exhibiting the same, or worse, behaviors, to those exhibited during the last school year. Student's behavior continued to impede his learning and that of others. On several occasions, his third grade general education teacher, Leigh Rivera, complained to school staff that she was frightened that Student would hurt her or another student.

84. Teachers and staff continued to believe that Student required a small, structured classroom. Student was receptive to instruction provided in the special day classroom, by special education teacher Sonny Lazo. Mr. Lazo was a calm, competent teacher with significant experience teaching pupils like Student, who were bright but had behavioral challenges. Student had not demonstrated problem behaviors in Mr. Lazo's classroom, and Mr. Lazo had helped calm Student during recess.

85. Prior to the pending annual IEP team meeting, District team members began informally discussing Mr. Lazo's special day class as a possible placement for Student. Parents misconstrued these informal discussions as predetermination. Although Parents feared that District had decided to place Student in a special day class prior to the IEP team meeting, testimony from school staff, including Ms. Brosche, showed that no such decision was made.

86. Parents unilaterally removed Student from school on September 22, 2016, because they felt it was unsafe and that Student was not receiving any benefit from his education. Parents did not place Student in another educational setting at that time.

#### The 2016 Annual IEP

87. District convened Student's annual IEP team meeting over two days, on September 23, 2016, and October 11, 2016. Student was eight years old and in the third grade. Parents attended, along with Student's attorney; Ms. Toth; Ms. Brosche; Ms. Garcia; Ms. Boland; Dr. Lane; Ms. Rivera; District program specialist Nicki Lewis; and District occupational therapist Sara Weingartner. Similar to each IEP team meeting, District offered Parents a copy of procedural safeguards and encouraged Parents and their representatives to actively participate during the meeting.

88. The team first reviewed Student's present levels of performance. Student was sweet and wanted to be liked by his peers. Yet, he struggled to follow classroom rules and lacked the social skills necessary to interact with adults and peers. He required lots of frontloading, pre-teaching, redirection, prompting, visual and verbal cues to understand or complete any task. The classroom pacing in general education was too much for Student, and he was normally anxious and frustrated.

89. Student learned best in a small group setting, at a slower pace than provided in general education. He required multi-modality instruction, including having a task modeled to him with auditory and visual support, and then practicing the task with an aide. He required breaking down of academic tasks, with scaffolding and repetition, to avoid emotional outbursts. He required many prompts and a token reward system to complete tasks. He required constant redirection to maintain focus and did not finish work independently.

90. Student met two of the seven annual goals prescribed in his last annual IEP of September 2015. He met goal five in pragmatic language and goal six in reading



fluency. Student did not meet his three behavior goals and, in goal three, had regressed to a zero percent ability to appropriately respond to behavior interventions in the classroom and during recess. Student made some progress towards, but did not meet, goal four in pragmatic language, and goal seven, in writing.

91. Student struggled in reading. Student was now well below grade level. He had delays in reading fluency and comprehension and required many prompts. Student struggled more in writing, which remained a non-preferred task. He required a variety of supports and many days to complete a writing task. Student had delays in fine motor skills. He had difficulty copying from the board and his handwriting was still illegible. Writing samples had gotten progressively worse over the past school years.

92. Problem behaviors had grown worse since the last annual IEP. Student became extremely agitated in class, would yell, scream, lash out, throw things, crawl under the desk, lie on the floor, and elope. Ms. Rivera was afraid for her safety and her students. On several occasions, she had sought the help of school staff to help control Student. Classroom evacuations continued to occur due to Student's behaviors. School staff had implemented the behavior support plan, positive behavior intervention strategies, soothing strategies, visual schedules, breaks, and other behavior intervention strategies. Yet, Student's behaviors had increased in frequency and severity, and continued to impede his learning and that of others.

93. Student's problem behaviors manifested throughout the school day with the exception of his social skills class, which Student received each morning in the school's mild-to-moderate special day class. That classroom provided a small, structured, environment with small group and individual instruction. Student liked the special education teacher, Mr. Lazo, and performed well in his class. He was less anxious, interacted appropriately with the other students, and was receptive to Mr. Lazo's

instruction. Although Mr. Lazo had taught Student daily for over a year, Student had not demonstrated any behavior problems in his special day class.

94. After reviewing Student's present levels of performance, the IEP team agreed that Student's primary delays were behavior, social/emotional, reading, writing, and pragmatic language. To meet those needs, the IEP team prepared nine, measurable, annual goals. The first goal called for Student to begin a task within 60 seconds, with no more than three prompts, in four of five opportunities, during three consecutive days. Goal two required Student to request a break to protest a non-preferred task, with prompting, in four of five opportunities. Goal three required Student to, after a break, return to task 60 percent of the time, with prompts, over three consecutive days. The fourth goal required Student to retell grade level stories in sequential order, 80 percent of the time in four of five trials. Goal five anticipated Student writing a five-to-eight sentence paragraph, with correct form, spelling and grammar, using a rubric, measured by work samples. Goal six required Student to legibly copy three-to-four sentences with proper letter alignment and spacing, with 85 percent accuracy on three of four samples. Goal seven required Student to label expected versus unexpected behaviors during social scenarios, and consequences for behaviors, with 80 percent accuracy in four of five trials. The eighth goal called for Student to meet the developmental reading assessment level 40, with 80 percent accuracy, as measured by testing. The last goal sought for Student to use appropriate vocal volume, ask and answer relevant questions, and comment appropriately, when prompted, with 80 percent accuracy across three consecutive sessions. The people responsible for implementing the goals included the general education teacher, special education teacher, speech and language pathologist, occupational therapist, and school staff.

95. Ms. Toth reviewed the functional behavior analysis assessment and updated behavior support plan. Behaviors and interventions were similar to those last

reported. The function of Student's behavior was to avoid, or escape, non-preferred tasks. Student refused work and any request to stop a preferred activity led to crying, kicking, and screaming. Student was "not available for instruction." He disrupted the classroom with loud protesting, crying, kicking, and screaming. Predictors and circumstances for behavior were ubiquitous: the morning, after meals, and during the afternoon. Environmental changes and strategies suggested to diminish behaviors were similar to the accommodations and interventions that had been in place over the prior school years. Suggested reinforcements, including breaks, first/then checks, and praise, were also similar to past reinforcements. The updated behavior support plan specified several people to implement and track data, including the school's behavior certified behavior analyst, psychologist, teachers, and other school staff.

96. The annual IEP offered Student the following accommodations: preferential seating; positive reinforcement; extra time to complete assignments; chunking of multistep tasks into smaller steps; checking for understanding; visual schedules; movement breaks; front-loading for changes; noise canceling headphones, 30 minutes daily; assistive technology for writing, 20 minutes daily; teacher notes; consultation between District's board certified behavior analyst and school staff, 120 minutes each month; an individual aide for the entire school day; access to the friendship room, for 20 minutes, two times each week; access to the motor lab, for fifteen minutes daily; sensory supports, including a vestibular cushion, theraband, and fidgets, for 30 minutes each day; a compression vest for sensory input, for 20 minutes, two days weekly; speech and language consultation with the general education teacher and aide, 10-15 minutes weekly; first-then card and a break card, for two minutes each, five times per day; speech-to-text assistive technology software, 20 minutes daily; and occupational therapy consultation with the general education teacher, for 15 minutes, nine times per year.

97. The IEP offered Student the following services: specialized academic instruction in a separate classroom, individually and in a small group, 1,200 minutes weekly, for reading, writing, science, and social studies; speech and language services, 30minutes, twice weekly, in a small group; occupational therapy, 30minutes weekly, individually and in a small group; and the updated behavior support plan. Student would spend 70 percent of the school day in Mr. Lazo's special day class, and the remaining 30 percent in general education. An individual aide, Ms. Annett, would accompany Student throughout the school day.

98. Parents did not consent to the 2016 annual IEP offer. They primarily objected that Student's aide was not sufficiently trained in ABA, despite the extensive training that Ms. Annett had received. Parents believed that Student could be fully mainstreamed, if he received ABA with fidelity from his aide throughout the day.

99. By letter on January 19, 2017, Parents notified District that they would be placing Student at the Cook Center, and would seek reimbursement for that placement, transportation, and related costs. On January 23, 2017, District denied the request for reimbursement.

#### The Assistive Technology Assessment

100. During the annual 2016 IEP team meetings, District staff agreed that Student required an assistive technology assessment. Shortly after that meeting, District offered, and conducted, an assistive technology assessment. The assessment was completed on December 9, 2016, by Denise Dugger, District's assistive technology specialist, collaboratively with Ms. Brosche, Ms. Rivera, Ms. Weingartner, and Ms. Garcia.

101. An assistive technology device is any piece of equipment, or product system that is used to increase, maintain, or improve the functional capabilities of individuals with disabilities. An assistive technology service is any service that directly

assists an individual with a disability in the selection, acquisition, or use of an assistive technology device.

102. For Student, an assistive technology assessment was warranted because his IEPs had provided him assistive technology devices. District team members believed that technologies would improve Student's performance, participation, and independence. Program specialist Mr. Israel testified that, since September 2015, each IEP had taken into account Student's unique needs when offering assistive technology devices, and not just offered technology or devices that were available to all pupils in general education. Consequently, to formulate District's FAPE offer, it was necessary to assess Student to determine which assistive technology devices and services met his unique needs.

103. The assessment included a review of Student's school records, a description of problems, and a review of the efficacy of prior strategies and devices. Student had problems sitting, writing, and in organization. The assessment recommended a modified chair and a personal computer with specialized software, including Word Predictions and speech-to-text digital tools. Assessors also recommended that Student use fidgets, sticky notes, a calendar, and a timer.

#### The January 26, 2017 Amendment IEP

104. District convened an amendment IEP team meeting on January 26, 2017. Parents attended with their representative, along with all necessary school staff.

105. Ms. Dugger reviewed the assistive technology assessment. Parents and their representative participated during the discussion. Based upon Parents' request, District agreed to additional testing to determine if Student required assistive technology for reading. In the meantime, District offered the program Google Read and Write, in addition to the other recommendations contained in the assessment.

106. The January 2017 IEP team also discussed Parents' request for a private placement and that Student had not attended school since September 22, 2016. District declined Parents' request for a private placement, and Parents declined the IEP offer. Student began attending the Cook Center the following month, February 2017.

#### THE BEHAVIOR EMERGENCY REPORTS

107. Student had serious behavior difficulty since he began attending Barnett. In August 2014, teachers reported that he had severe tantrums that impacted his entire class. Teachers were unable to control Student's behavior, and school staff, including the school principal, was called to intervene. Beginning in December 2015, school staff recorded some of Student's behavior incidents in writing, entitled behavior emergency reports.

108. Between December 2015 and September 22, 2016, Student's last day at Barnett, he received 12 behavior emergency reports. Each incident seriously disrupted Student's education and that of his peers. A significant amount of time was taken away from teachers' ability to instruct Student and others to address Student's behaviors. During each incident, school staff tried various behavior strategies, interventions, calming techniques, and the behavior support plan. Yet, the behaviors persisted. Many of the incidents required the intervention of multiple staff members at the same time, physically restraining Student, and evacuating students from the classroom and playground. On several occasions, medical attention was offered to Student, teachers and staff, and other students. Student was sometimes removed from class or school, including suspension, as a result of his behaviors. The recorded incidents include the following:

109. On December 14, 2015, Student prevented other students from using a slide and bit a student, necessitating medical attention. The report indicated that the reported behavior was not new.

110. On January 27, 2016, Student refused to attend class, eloped from school grounds, yelled at staff, and kicked, punched and pushed the adult aide. He disrupted the classroom and pushed tables and chairs trying to get at another student. His teacher tried unsuccessfully to restrain Student, using a restraint methodology "to get him down safely." Student scratched, kicked and screamed at her, and broke free. He then eloped from campus through a fence. Four staff members were needed to calm Student, and Mother was called to remove Student from campus. Medical attention was required after the incident and the teacher took photographs.

111. On January 29, 2016, Student refused to return from class after recess, screamed and chased a peer, attacked that peer, including punching him with two closed fists to the back. During a transition to the library that same day, Student cried and screamed and eloped from campus. Two staff members were called to return him to campus, where Student laid on the ground, flailing his arms and legs, and yelling loudly. Medical attention was offered to staff and/or students.

112. On February 3, 2016, Student screamed, refused directions, threw himself on the ground, kicked, screamed, and attacked a substitute teacher, rendering her unable to move. He hit and pushed his aide, knocking her over, when she tried to intervene. Student then attacked a third teacher who tried to intervene. He screamed, kicked and yelled, and charged the teacher, head first. Students had to be cleared from the classroom, and from the playground, as staff was unable to contain Student and he was charging at people. Medical attention was offered to staff and/or students.

113. On February 17, 2016, during recess, Student choked and pulled a peer to the ground, and threw handfuls of dirt on that peer and others. He then threw a rock at the same student and refused to hand over another rock to staff.

114. On February 22, 2016, Student yelled and screamed during class, and hit a peer with closed fists. He then eloped from class to the playground, and threatened to harm his aide if she returned him to class.

115. On March 17, 2016, Student pushed and hit, with a closed fist to the face, a peer, and chased him around a table, even as his aide tried to restrain him. Student kicked another student and yelled that he wanted to go home. When the aide tried to redirect Student, he squirted juice on her face.

116. On May 23, 2016, Student refused to return to class after recess. He screamed and yelled, threatened and kicked his aide.

117. The following school year, 2016-2017, Student exhibited similar behaviors. On August 12, 2016, Student ignored directions and hit a peer. Later that day, he refused to go to class and kicked his aide. On September 21, 2016, during math, he crawled on the floor, yelled, swung a chair, and threw the chair at a classmate. He attempted to throw another chair but was blocked by the aide. He ran from the classroom to his resource specialist program classroom, where he demanded a toy, yelled, screamed, and kicked. He then attempted to elope from the school grounds, but was blocked by a recently reinforced gate. This occurrence lasted for 87 minutes. On September 22, 2016, Student refused teacher and aide instruction, screamed, ran at his teacher but was blocked by the aide and the school principal, and then threw books from his desk.

#### DISTRICT'S WITNESSES

118. The following witnesses testified in support of District: Ami Paradise; Nicki Lewis; Jill Toth; Amber Lane; Tara Boland; Steve Israel; Brittney DeWall; Amy Annett; Vanessa Garcia; Sara Weingartner; Natalie Walton; Sonny Lazo; Gisella Brosche; Denise Dugger; and Jennifer Parker.



119. District witnesses consistently testified that Student required placement in a special day class. Student required small group instruction, with more structure and at a slower pace than what was offered in general education. Although Student was well liked and bright, it had been understood by his teachers for some time that Student was lost socially and academically in a general education classroom.

120. School staff cared deeply for Student and often went beyond what was required by his IEPs. Classroom teachers sought the help of District's autism specialists; provided sensory devices like weighted vests and fidget toys; modified assignments, and; gave Student an exorbitant amount of their time, teaching, re-teaching, prompting, and intervening. Group services, like resource specialist program, became individualized. Alternative places for Student to go when overwhelmed were over-utilized, like the friendship room and motor lab, or created just for Student, like his private office. The classroom teacher and aides diligently implemented the behavior support plan and school-wide positive behavior intervention strategies. They also diligently collected data regarding Student's behavior. Yet, Student's problems persisted. Testimony unvaryingly showed that Student's behaviors grew worse each year. Student lost instructional time and was unable to access his educational placement as a result of his disabilities.

121. Each District witness was qualified to perform the tasks assigned to her or him. For example, Ms. Garcia was an experienced and licensed speech and language pathologist. Ms. Boland was a board certified behavior analyst. Ms. Toth was a credentialed school psychologist with a certificate in behavior intervention and training in autism and social-emotional deficits.

122. Each witness was familiar with Student's needs and provided helpful insight to those needs. Included amongst those professionals was Mr. Lazo. Mr. Lazo had 33 years teaching experience, autism and behavior training, and had taught the same special day class at Barnett for 16 years. He was confident in his abilities and

classroom. Where other teachers were overwhelmed by Student and frightened by his behavior, Mr. Lazo was calm and reassuring. He was familiar with Student, having taught his social skills class daily for one and half years. Mr. Lazo's temperate demeanor boded well with Student. They liked each other, and Student did not demonstrate behavior challenges in the special day class.

123. Mr. Lazo's mild-moderate special day class was comprised of 10 students, ranging from third-to-fifth grades. There would be four adults in the class: the teacher, teacher's assistant, classroom aide, and Student's individual aide. Pupils had moderate disabilities, including those with attention disorders, specific learning disabilities, and high functioning autism. Most were mainstreamed at various times throughout the day. Mr. Lazo followed the regular education curriculum and differentiated instruction, so that each student was taught at his or her grade level. Instruction was provided in whole group, small group, and individually.

124. The special day class was more structured, slower paced, and less noisy than regular education classes. Research-based methodologies were utilized for instruction, including specific reading and spelling programs, multisensory language instruction, and computer based programs. Research-based interventions were also used for behavior, including multisensory approaches; visual schedules; token economy and positive reinforcement; and discrete trial therapy strategies. Mr. Lazo had implemented many behavior support plans for varying degrees of behavior problems.

125. Each District witness that was familiar with Mr. Lazo praised his teaching abilities and persuasively recommended his special day class for Student. Student's witnesses did not contradict that testimony.

126. The emphasis of District witness testimony in support of the special day class diminished District's ability to show that Student had received a meaningful educational benefit in general education, which comprised the majority of his

educational placement up to the 2016 annual IEP. There was scant evidence which showed that Student had received an educational benefit while in general education. Rather, overwhelming evidence illustrated that Student had regressed educationally and had required a more structured placement for some time.

#### STUDENT'S WITNESSES

127. The following witnesses testified for Student: Dr. Caroline Bailey; Lilly Flores-Fiumara, Lori Spear; Mother; and Grandmother.<sup>6</sup>

##### Dr. Bailey and Ms. Flores-Fiumara

128. Dr. Bailey was an associate professor at California State University, Fullerton, and a clinical associate at the University of Southern California's psychological services center. Dr. Bailey had a master's degree in psychology and a doctorate in clinical and developmental psychology. Dr. Bailey reviewed Student's records, interviewed Parents and observed Student. She did not formally assess him.

129. Ms. Flores-Fiumara was the founder and clinical director of the Tikvah Center, a private agency located in Corona, California. Tikvah provided ABA to individuals with disabilities. Ms. Flores-Fiumara had a masters' degree in human behavior and was working on her doctorate in psychology. Ms. Flores-Fiumara reviewed Student's records, interviewed Parents, observed Student, attended the May 2016 IEP team meeting, and had assessed Student as part of a June 2016 Tikvah treatment plan.

130. Dr. Bailey confirmed that writing and sensory delays had been a problem for Student since the first grade, necessitating occupational therapy. The lack of

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<sup>6</sup> Student attempted to call Kim Foster as an assistive technology expert. District's objection to Ms. Foster's testimony was sustained because Student failed to show that she was qualified to testify as an expert in that area.

occupational therapy had exacerbated his behavior. Student also required assistive technology for writing, spelling and math.

131. Dr. Bailey offered mild criticism of Student's academic goals, including that a reading goal was too lofty and that 80 percent achievement levels were too low. Overall, Dr. Bailey was concerned by Student's lack of academic and social progress while at Barnett, and recommended compensatory academic and counseling services.

132. Ms. Flores-Fiumara was critical of the manner that District took behavior data. The classroom teacher and aide took behavior data daily in alignment with the behavior support plan. That data often reflected the frequency of problem behaviors. Ms. Flores-Fiumara believed the data should have better emphasized antecedents, consequences, and whether specific interventions changed behavior. For Ms. Flores-Fiumara, the manner that District took data reflected a lack of fidelity to ABA strategies, which could be corrected by better aide training.

133. Ms. Flores-Fiumara was also critical of Ms. Toth's functional behavior assessments and behavior support plans. She opined that the assessments and plans failed to identify the functions of Student's behavior. However, the functional behavior assessments included observations and questionnaires for that purpose, and found that the desired effect of behavior was to escape, or avoid, non-preferred tasks, or to attain an object. The behavior support plans carefully described the target behaviors and contained systematic observation of those behaviors. The plans hypothesized predictors of target behaviors and recommended curricular and environmental changes to minimize the target behaviors. Student's behavior support plans suggested evidence-based approaches, including token economy and social skills training, and reinforcements, and designated personnel to administer those strategies. Each plan also included reactive strategies and behavior goals. Teachers and aides diligently implemented the behavior support plans and took copious data regarding Student's

behaviors. For those reasons, Ms. Flores-Fiumara's criticism of Student's behavior assessments and plans was not persuasive.

134. Dr. Bailey and Ms. Flores-Fiumara believed that school staff had not properly addressed Student's behaviors. They were concerned that reinforcers were not working and may have increased behaviors. They recommended various behavior strategies including praise, calming techniques, redirection, limited breaks, and social skills development. Yet, District had tried those strategies. Ms. Flores-Fiumara's suggestions that District staff ignore problem behaviors and only focus on praising positive behaviors, or to punish bad behavior, were impractical in the school setting.

135. Student's experts were critical of Student's lack of progress while at Barnett. Their criticism of District's educational program was not without merit. Student was off task, and therefore received no instruction, between 30 to 70 percent of the time in his general education class. Evidence showed that his behaviors inhibited his learning and he regressed behaviorally and academically. Yet, Student's experts were unable to describe a cohesive reason for the school's failure.

136. For example, Dr. Bailey opined that different instructional methodologies existed, but was unable to coherently link that testimony to Student's needs or IEPs. Dr. Bailey also failed to explain a basis for her opinion, such as a test that supported a particular methodology. This stood in contrast to District witnesses, who uniformly pinpointed Student's lack of progress on his placement in regular education, and based that finding upon years of observation and the collection of daily data.

137. Dr. Bailey and Ms. Flores-Fiumara's recommendation for ABA and placement was similarly disjointed. They did not recommend direct ABA services, as proposed in the June 2016 Tikvah report. Rather, each expert recommended that Student be placed back in a regular education classroom, with an individual aide that utilized ABA strategies. Dr. Bailey and Ms. Flores-Fiumara testified that Student could

succeed in a regular education classroom if he received an aide that was trained in ABA. However, that recommendation did not comport with Student's educational history. During the 2014-2015 and 2015-2016 school years, Student received an aide trained by the school's autism specialist, Ms. Parker, and school psychologist Ms. Toth, which included ABA training. During the 2016-2017 school year, Student received a higher trained aide, Amy Annett. Ms. Annett had significant experience providing ABA services privately and publicly, and had provided Student ABA services at his home. Student failed to present any evidence that impugned Ms. Annett's training or ability to serve as Student's individual aide. Yet, even with an ABA trained aide, Student continued to perform poorly in a regular education classroom. For those reasons, Dr. Bailey and Ms. Flores-Fiumara's testimony in support of placing Student in a regular education classroom for the majority of the school day was not persuasive.

138. Rather, Student required a small, structured, special day class, which was slower paced with less noise and distractions than a regular education classroom. That fact was persuasively attested to by Ms. Paradise, Mr. Israel, Ms. Parker, Ms. Boland, Ms. Toth, Ms. Brosche, Ms. Walton and Ms. Annett. Dr. Bailey and Ms. Flores-Fiumara corroborated District's testimony by testifying that Student had done well, and progressed, at the Cook Center.

139. Notably, Dr. Bailey and Ms. Flores-Fiumara each recommended that Student stay at the Cook Center, as an alternative to their recommendations for placement in regular education. However, the Cook Center had small class sizes, with a high adult-to-student ratio, similar to the special day class District offered. Each provided small group and individual instruction, with differentiated curriculum, at a slower pace than regular education. The Cook Center was substantially similar to Mr. Lazo's special day classroom, except that District's placement provided Student mainstreaming opportunities.

140. In sum, witness testimony supported that Student did poorly at Barnett because his classroom placement in general education was inappropriate, not because his aide required more ABA training.

#### Testimony of Student's Occupational Therapist

141. Lori Spear was a pediatric, registered occupational therapist with over 30 years' experience working with children with disabilities. She reviewed Student's records, interviewed his parents, and observed Student. She did not formally assess him.

142. Ms. Spear was concerned that District had delayed offering Student occupational therapy until May 2016. Student had a lengthy history of writing, sensory processing, noise sensitivity, and behavior delays, areas that fell under the province of occupational therapy. As an occupational therapist, Ms. Spear believed that early intervention by an occupational therapist would have assisted Student in those areas. District's occupational therapist Ms. Weingartner shared this opinion. At hearing, she was unable to defend District's decision to delay occupational therapy for Student until May 2016.

143. Student required direct occupational therapy for handwriting since first grade. Student's handwriting had gotten worse each year. Work samples began illegible and got progressively worse each year. Ms. Spear persuasively testified that an occupational therapist could assist Student's handwriting whether the delay was rooted in fine motor, motor planning, or behavior.

144. Student required occupational therapy for attention and behavior since the first grade. It was normal for an occupational therapist to work collaboratively with school staff to address behaviors and implement behavior plans. Students with attention delays and impulsivity, along with sensory seeking behaviors, were assisted by occupational therapy.

145. Student also required occupational therapy for sensory deficits since the first grade. Student had a history of sensory processing and noise sensitivity that was reported in each IEP. Sensory interventions had been attempted by classroom teachers without the supervision of an occupational therapist, or tracked to determine its efficacy.

146. Ms. Spear persuasively testified it was necessary to first assess in any area that required a related service, including occupational therapy and assistive technology, before providing remediation in that area. Assessment was necessary to first determine what was needed to meet a student's unique needs, before formulating an offer for services or devices.

147. Ms. Spear testified that District's 2016 occupational therapy assessment was fundamentally adequate. She opined that Student's fine motor delays were more seriously delayed than what was described in the report. On that basis, Ms. Spear recommended a higher level of services, including direct occupational therapy services, twice weekly. Nonetheless, Ms. Spear's testimony mirrored Ms. Weingartner's in several ways, including that each believed that Student would benefit from the occupational therapy services offered in the September and October 2016 IEP.

#### Parents' Testimony

148. Mother and Grandmother were Student's adoptive parents. Each was a caring advocate for Student. Grandmother was an experienced teacher at a nearby school district and utilized that experience during her participation at the IEP team meetings. Parents were primarily concerned by Student's behaviors at school, and his inability to create meaningful friendships. Parents provided Student many services and activities outside of school. Private interventions included ABA services, tutoring, and a variety of sports and social activities.



149. Parents were frustrated by District's refusal to permit a privately funded aide at school. Similar to Student's experts, Parents believed that Student could have succeeded in a regular education classroom, if he had an aide trained in ABA.

150. Parents were kept abreast of Student's daily behavior challenges at school. At home, Student had grown increasingly resistant to going to school. He cried, tantrum med, and laid on the ground to avoid going to school. He was overwhelmed by his classroom placement, lack of friends, and discipline in response to behaviors that he could not control. He pled with Parents daily to not go to school, yet they forced him to go, so that he could receive some academic benefit.

151. Parents' perception regarding school attendance changed after the May 2016 IEP team meeting. Until then, Parents had not fully understood the extent of Student's academic regression. They no longer saw any benefit to forcing Student to attend school. Parents therefore removed Student from Barnett and home-schooled him for the last weeks of the 2015-2016 school year.

152. Parents returned Student to Barnett at the beginning of the 2016-2017 school year. However, Student did no better in his third grade regular education classroom. By September 22, 2016, Parents had lost faith in District's ability to educate Student and they removed him from school altogether. Nonetheless, Parents continued to cooperate with District. They attended IEP team meetings, communicated with District staff, made Student available for assessments, and permitted District staff to observe Student outside of school, including at the Cook Center.

153. The Cook Center was a nonpublic, special education school. The Cook Center provided a highly structured school placement for students with disabilities and significant behavior problems. Students were closely supervised and class sizes were small. Teachers provided differentiated instruction, individually teaching each pupil at his or her grade level. The Cook Center did not offer instruction with typical peers and

was inconsistent with the regular education program Parents preferred. Yet, Parents each testified that Student had done well academically and behaviorally during his short time there.

154. Parents have solely paid for Student's placement at the Cook Center, and transported him there daily. Parents are also seeking reimbursement for various sports and social activities. However, except for the Cook Center, Parents failed to establish a nexus between the requested reimbursement and Student's educational program.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>7</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 et seq. (2006)<sup>8</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 further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); see Ed. Code, § 56000, subd. (a).)

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<sup>7</sup>Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>8</sup>All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

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

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

4. The Supreme Court recently clarified and expanded upon its decision in *Rowley*. In *Andrew F. v. Douglas County School District*, the court stated that the IDEA guarantees a FAPE to all students with disabilities by means of an IEP, and that the IEP is required to be reasonably calculated to enable the child to make progress appropriate in light of his or her circumstances. (*Andrew F. v. Douglas County School District* (March 22, 2017, No. 15-827) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 996, 197 L.Ed.2d 335](*Andrew F.*.)

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

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

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

the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits for the child. (20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*.)

8. 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. (See *Gregory K. v. Longview School District* (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 of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*; 20 U. S.C. § 1401(9).) The IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207.)

## THE IEP

9. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

## LEAST RESTRICTIVE ENVIRONMENT

10. A child with a disability must be educated with children who are not disabled to the maximum extent appropriate. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56342.) A child with a disability should be removed from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. A child with a disability shall not be removed from an age-appropriate regular classroom solely because the general curriculum requires modification. (34 C.F.R. § 300.116(e).)

## INSTRUCTIONAL METHODOLOGY

11. The *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at pp. 207-208.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*); *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeals noted, the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*Ibid.*) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loath to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 207-208).)

## DUTY TO ASSESS IN ALL AREAS OF SUSPECTED DISABILITY

12. Assessments are required to determine eligibility for special education, and what type, frequency, and duration of specialized instruction and related services are required. 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), (3); 34 C.F.R. § 300.304(b)(2), (c)(4); Ed. Code, § 56320, subds. (e), (f).) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

13. 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.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033. (*Park*.)

## RELATED SERVICES

14. Related services include specialized academic instruction for reading, writing, and math, and services for auditory processing, visual processing, phonological processing, and occupational therapy services, and other services as may be required to assist a child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371, 82 L.Ed.2d. 664]; *Union School Dist. v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527 (*Union*.) Related services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

DETERMINATION OF ISSUES: ISSUES 1(A), (L), (O), AND 2(A), (L), (O):  
OCCUPATIONAL THERAPY ASSESSMENT AND RELATED SERVICES (2014-2015 AND  
2015-2016 SCHOOL YEAR)

15. Student alleged that District denied him a FAPE during the 2014-2015 and 2015-2016 school years, by failing to provide assessments in all areas of suspected deficit, including occupational therapy. Student alleges that he required that assessment, along with related occupational therapy and writing services, to receive a FAPE.

Occupational Therapy Assessment

16. A preponderance of evidence showed that Student had suspected and identified disabilities that required an occupational therapy assessment and services, including for writing, and that District's delay in assessing Student was a denial of FAPE. For example:

17. Occupational therapists Ms. Weingartner and Ms. Spear persuasively testified that sensory processing, visual and fine motor, handwriting, attention, and behavior delays fell under the province of an occupational therapist. District was informed of those deficits throughout the time-frame in dispute.

18. District was informed of occupational therapy concerns since July 2012, when Parents wrote District a letter reporting that Student had sensory processing delays. In May 2014, CARES diagnosed Student with autism, a disability commonly linked to occupational therapy. In September 2014, Ms. Toth ascertained that Student had deficits in visual motor integration, including fine motor skills, attention and behavior. School staff reported that Student had difficulty in handwriting, eye-hand coordination, sensory processing, attention and behavior. In class, teachers had provided Student sensory devices like fidgets, and movement breaks in an attempt to calm his behavior. Student was also sensitive to sound and often covered his ears when in a large group. Parents reported that Student had poor fine motor abilities.



19. In January 2015, teachers reported that Student had difficulty handwriting, and avoided writing altogether. In February and June 2015, Student still struggled with handwriting, attention, behavior, and sensory processing. The following 2015-2016 school year was no different. Student refused to write and did not meet his annual writing goal. He demonstrated sensory issues, along with attention and behavior problems that impacted his ability to access his education.

20. During hearing, Ms. Spear persuasively testified that Student required an occupational therapy assessment and services since the first grade. District's occupational therapist, Ms. Weingarten, did not contradict that testimony and could not explain why District had not assessed Student for occupational therapy until the end of the 2015-2016 school year.

21. District first assessed Student in occupational therapy in April 2016, and held an IEP team meeting to review that assessment on May 9, and 20, 2016. District's occupational therapist Ms. Campbell found that Student was below average, at the fourth percentile, in his visual motor abilities. Student had severe sensory processing delays and difficulty writing. Ms. Campbell recommended that Student receive direct occupational therapy for writing and sensory processing, access to motor lab, and sensory supports and devices in the classroom. District offered Student direct occupational therapy services, 16 sessions per year, for 30 minutes per session; and consultation between the occupational therapist and classroom teacher, nine sessions yearly, for 15 minutes each. District also offered an occupational therapy goal, in handwriting. However, the school year ended two weeks later, on June 3, 2016.

22. In sum, Student had sensory processing, visual and fine motor, writing, attention, and behavior delays during the 2014-2015 and 2015-2016 school years that required an assessment by an occupational therapist. District's delay in assessing Student in occupational therapy constitutes a procedural violation of the IDEA. (*R.B., ex*

*rel. F.B.v. Napa Valley Unified Sch. Dist.*(9th Cir. 2007) 496 F.3d 932, 940 (“we have, more often than not, held that an IDEA procedural violation denied the child a FAPE.”).) A procedural violation of the IDEA constitutes 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.” (Ed. Code, § 56505(f)(2); *Target Range*, *supra*, 960 F.2d at p. 1484.) Here, Student’s disability resulted in difficulty in handwriting, sensory processing, attention, and behaviors, areas which fall within the purview of occupational therapy. Therefore, District’s failure to assess Student in occupational deprived him of educational benefits, and, accordingly, District denied Student a FAPE on that basis. (*Carrie I. ex rel. Greg I. v. Dep’t of Educ., Hawaii* (D.Haw. 2012) 869 F.Supp.2d 1225, 1247 (*Carrie I.*)) (“The lack of assessments alone is enough to constitute a lost educational opportunity.”).)

#### Occupational Therapy and Writing Services

23. A preponderance of evidence also showed that Student required occupational therapy and written language services to meet his unique needs and to benefit from his educational program. District was aware that Student’s writing was illegible since September 2014. Writing samples showed that Student’s writing grew worse, not better, during the 2014-2015 and 2015-2016 school years. Testimony from Ms. Walton and Ms. Brosche confirmed that Student’s writing got worse while at Barnett.

24. Student’s sensory processing delays also grew worse and impeded his ability to maintain attention and to access instruction. Teachers tried ad hoc measures, including sensory breaks, fidgets, noise-cancelling devices, and other sensory tools in an attempt to remediate Student’s disability. All of these measures required the consultation of an occupational therapist. By the end of the 2015-2016 school year,

Student required access to a motor-lab due to sensory problems, thereby missing more instruction.

25. Uncontroverted testimony from Ms. Spear and Ms. Weingartner established that occupational therapy services were necessary for Student to benefit from instruction, including for writing and sensory processing. Yet, those services were not offered until May 20, 2016, the end of the 2015-2016 school year.

26. Consequently, a preponderance of evidence showed that District denied Student a FAPE during the 2014-2015 and 2015-2016 school years, by failing to provide an occupational therapy assessment and related occupational therapy and writing services.

#### ISSUES 1(C), 2(C) AND 3(B): DISTRICT'S FAILURE TO ASSESS FOR ASSISTIVE TECHNOLOGY

27. Student complains that District denied him a FAPE by failing to provide him an assistive technology assessment.

28. A school district is required to provide any assistive technology device that is necessary to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a)(12)(B)(i); 34 C.F.R. § 300.105; Ed. Code, § 56341.1, subd. (b)(5).) An IEP team must consider whether a child requires assistive technology devices or services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324 (a)(2)(v); Ed. Code, § 56341.1, subd. (b)(5).) An assistive technology device is any piece of equipment that is used to increase, maintain, or improve the functional capabilities of individuals with disabilities. An assistive technology service is any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.) Assessment is required to formulate the type, duration, and frequency of a related service. (20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(b)(2), (c)(4); Ed. Code, § 56320, subds. (e), (f).)

#### 2014-2015 School Year

29. District based its September 2014 IEP offer upon a recent psycho-educational evaluation and speech and language assessment. Although District did not conduct an assistive technology assessment, the speech and language assessor did not recommend assistive technology. Student was average to-above-average academically. There was some evidence that Student had problems which fell within the province of assistive technology, including problems in organization, attention and handwriting. However, Student failed to present evidence that correlated those problems with a need for assistive technology when the September 2014 IEP offer was made. At the time that IEP was offered, the IEP team did not have sufficient information that it was necessary to offer assistive technology devices or services. During hearing, Student failed to provide any assessment or persuasive witness testimony to impeach the September 2014 IEP offer and its amendments, as it related to assistive technology. Student therefore failed to meet his burden of persuasion for that claim as it related to the 2014-2015 school year.

#### 2015-2016 School Year

30. By the beginning of the 2015-2016 school year, District believed that Student required assistive technology devices as part of his IEP. District team members believed that assistive technologies would improve Student's performance, participation, and independence. For example, Mr. Israel persuasively testified that each IEP, since September 2015, had offered assistive technology as part of its FAPE offer. Mr. Israel testified that District had taken into account Student's unique needs when offering assistive technology devices, and not just offered technology devices that were available to all pupils in general education. Consequently, an assistive technology assessment was required to formulate District's offer of assistive technology, to ensure that the type of devices and services met Student's unique needs.

31. District's assistive technology specialist, Ms. Dugger, credibly testified that deficits in handwriting, attention, and organization fell under the province of assistive technology. District was informed that Student had serious deficits in each of those areas. By October 2015, it was observable to District that services and placement that had been offered pursuant to the initial multidisciplinary assessment were not effective. For example, Student had met just one of four annual goals and received failing grades. His writing was illegible and writing samples had gotten worse. Student lacked the ability to progress in writing, attention, and organization, and an assistive technology assessment would have helped address those deficits.

32. On May 20, 2016, Parents requested an assistive technology assessment. On June 7, 2016, District sent Parents a prior written notice letter denying the request. District mistakenly believed that an assessment wasn't necessary because the IEP team had already made determinations regarding assistive technology. District overlooked that it was required to assess in all areas of suspected deficit, including assistive technology, prior to offering related services or, as here, devices. (20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(b)(2), (c)(4); Ed. Code, § 56320, subds. (e), (f).)

#### 2016-2017 School Year

33. In October 2016, District offered Student an assistive technology assessment. In December 2016, qualified District staff, including speech and language pathologist Ms. Garcia, and assistive technology specialist Ms. Dugger, completed the assessment. The assessment was timely reviewed by Parents and necessary IEP team members in January 2016. District found that Student had problems sitting, writing, and in organization that required assistive technology. The assessment recommended a modified chair, a personal computer with specialized software and speech-to-text digital tools, along with various sensory and organizational devices to access instruction.

34. Based upon the foregoing, a preponderance of evidence shows that Student had delays that required assistive technology. District was informed that assistive technology was an area of deficit during the 2015-2016 school year, yet failed to assess in that area.

35. District's failure to timely assess Student's in the area of assistive technology constitutes a procedural violation of the IDEA. Student's disability resulted in difficulty in handwriting, attention, and organization, areas which fall within the purview of assistive technology. Failure to assess Student deprived Parents of necessary information to assist in the educational decision making process. Also, District's failure to assess Student in assistive technology deprived him of educational benefits, and District denied Student a FAPE on that basis. (*Carrie I., supra*, 869 F.Supp.2d at p. 1247.)

36. Consequently, Student met his burden of proving that District denied him a FAPE during the 2015-2016 school year, by failing to provide an assistive technology assessment. A preponderance of evidence shows that District did not deny Student a FAPE during the 2014-2015 and 2016-2017 school years, by failing to provide an assistive technology assessment.

ISSUES 1(R), 2(R), 3(R): FAILURE TO OFFER ASSISTIVE TECHNOLOGY SERVICES (2014-2015), AND TO IMPLEMENT ASSISTIVE TECHNOLOGY SERVICES (2015-2016 AND 2016-2017)

37. Student complains that District denied him a FAPE, by failing to offer assistive technology services during the 2014-2015 school year; failing to implement assistive technology services during the 2015-2016 school year, and; failing to

implement assistive technology services during the 2016-2017 school year, beginning September 23, 2016.<sup>9</sup>

#### 2014-2015 School Year: Failure to Offer Services

38. Student failed to prove that District reasonably should have known it was necessary to offer assistive technology services when the September 2014 IEP was offered. District based that annual IEP offer upon a recent psycho-educational evaluation and speech and language assessment. The assessors did not recommend assistive technology services and testing showed that Student was average to-above-average academically. While Student had problems related to assistive technology, there was no evidence presented to show that District knew it was necessary to offer assistive technology services for Student to benefit from instruction at that time.

39. During hearing, Student failed to provide any assessment or persuasive witness testimony that impeached the September 2014 IEP offer and its amendments, as it related to assistive technology. Student therefore failed to meet his burden of proving that District denied him a FAPE during 2014-2015 school year, by failing to offer assistive technology services.

#### Failure to Implement Services

40. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy

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<sup>9</sup> During hearing, witness testimony suggested that District failed to implement portions of Student's IEP that were unrelated to assistive technology. Whether District failed to implement portions of Student's IEP, other than assistive technology, was not one of the 68 issues specified for this matter and was not fully litigated during the hearing. That issue will therefore not be considered in this Decision. (*M.C., supra.*)

between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815, 822.) However, "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail." (*Ibid.*) The *Van Duyn* court emphasized that IEPs are clearly binding under the IDEA, and the proper course for a school that wishes to make material changes to an IEP is to reconvene the IEP team pursuant to the statute, and "not to decide on its own no longer to implement part or all of the IEP." (*Ibid.*)

#### THE 2015-2016 SCHOOL YEAR

41. The October 2015 annual IEP offered Student access to assistive technology, including a keyboard for writing, and ear buds to diminish noise distractions. The assistive technology was described as accommodations for Student's classroom. During the 2015-2016 school year, District did not offer Student assistive technology services, other than the devices described as classroom accommodations.

42. During hearing, Student failed to present any evidence to show that District failed to implement the assistive technology devices. In contrast, the classroom teacher, Ms. Walton, persuasively testified that she implemented all of the classroom accommodations, including assistive technology, in an attempt to minimize Student's problem behaviors.

43. In sum, Student failed to show by a preponderance of the evidence that District failed to implement assistive technology services during the 2015-2016 school year.

#### THE 2016-2017 SCHOOL YEAR

44. Student's annual IEP of September 23, 2016, and October 11, 2016, offered assistive technology devices and services, including noise canceling headphones, 30 minutes daily; and assistive technology for writing. In December 2016, District assessed



Student in the area of assistive technology. The assessment recommended a modified chair, a personal computer with specialized software, speech-to-text digital tools, fidgets, sticky notes, calendar, and a timer. On January 26, 2017, District amended Student's annual IEP to include those recommendations.

45. However, Parents unilaterally withdrew Student from school on September 22, 2016. Student had not attended a District school since prior to the September 23, 2016 IEP, or consented to an IEP offer. Consequently, it was not possible for District to implement the assistive technology devices and services contained in the September 23, 2016 and October 11, 2016 IEP, and amendment. Thus, there is no basis for Student's claim.

46. For the foregoing reasons, Student failed to prove by a preponderance of evidence that District denied him a FAPE by failing to offer assistive technology services during the 2014-2015 school year; or to implement assistive technology services during the 2015-2016 and 2016-2017 school years.

#### ISSUES 1(I), (J), (K),(M),(N),(P),AND (S),AND 2(I),(J), (K), (M),(N), (P),AND (S): THE EDUCATIONAL PROGRAM FOR THE 2014-2015 AND 2015-2016 SCHOOL YEARS

47. Student complains that he did not receive an appropriate educational program during the 2014-2015 and 2015-2016 school years, first and second grade. Student asserts that District failed to provide adequate behavior and learning supports at home and school; academic instruction and supports; inclusion support, and; autism based services, supports and placement.

48. District primarily responds to Student's various claims with two arguments. First, that it titrated Student's educational plan to see how he responded to

interventions in regular education.<sup>10</sup>Second, that Student received an educational benefit.

49. For the 2014-2015 school year, beginning with Student's initial IEP of September 2014, followed by amendments in October 2014, January 2015, February 2015 and June 2015, District offered Student placement in general education. Similarly, for the 2015-2016 school year, the annual IEP of October 12, 2015, followed by amendments in December, February, and May 2016, offered placement in general education. Yet, evidence overwhelmingly showed that general education was not appropriate to support Student's behavior and learning needs. To analyze District's titration argument, it is important to examine at what point District knew, or reasonably should have known, that Student was not responding to interventions in regular education and required a more structured placement.

50. During the 2013-2014 school year, Student attended kindergarten in a regular education classroom. The classroom teacher observed Student exhibit "extreme break downs," difficulty focusing and completing work, poor self-control, and increasing behavior difficulty at school. District tried to remediate Student's behaviors through various accommodations and positive behavior interventions in a general education classroom, and developed a Student Study Team for Student. Student's behaviors grew worse and, by the end of the school year, he was not responsive to school-based interventions. By the end of the 2013-2014 school year, it was evident that a general education classroom, even with accommodations and behavior interventions, was not sufficient. District had that information when it first offered Student special education in September 2014, for the 2014-2015 school year. However, Student was bright,

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<sup>10</sup>District argues that it gradually increased services to observe Student's response to intervention, not that it provided medication.

performed well on academic testing, and had not yet received special education services in regular education. Accordingly, there is some merit to District's argument that it was necessary to gradually increase services and supports in general education, to see how Student reacted to that intervention, before offering a more restrictive placement.

51. However, that argument is only reasonable for the 2014-2015 school year. By the beginning of the 2015-2016 school year, District had observed Student for a year in regular education, with special education services, accommodations, an aide, a behavior support plan, and various behavior interventions. Student responded poorly to those interventions. A review of the 2014-2015 school year shows that District knew, or reasonably should have known, that Student required a more supportive placement by the beginning of the 2015-2016 school year. For example:

52. In September 2014, District staff had observed Student having difficulty participating in class and interacting with typical peers. He required frequent and multiple prompting, used odd phrases, perseverated, squirmed, fidgeted, was anxious, upset by changes, tantrum med and his behavior impacted his learning and that of others. Student had difficulty following classroom rules, refused to finish work, required constant redirection, was off-task and disorganized. Student was emotional, would stomp his feet, and argue with others. His teacher had attempted, without much success, various strategies to control his behavior, including breathing techniques and breaking down instruction, and had used sensory devices, fidgets, to replace his off-task behaviors.

53. By October 2014, Student demonstrated worse behaviors than anticipated. Overwhelmed, the classroom teacher called an IEP team meeting just two weeks after the initial IEP. Even with the IEP services and accommodations in place, and school wide positive behavior intervention strategies, Student resisted instruction, had difficulty transitioning, tantrum med, and cried loudly in class. His behavior continued to impede

his education and that of his peers. District added autism as an area of eligibility, doubled his resource specialist program services, and agreed to a functional behavior assessment. Yet, those modifications were insufficient to support Student's behavior and learning.

54. Student continued to demonstrate serious behavior difficulty in class and recess. He continued to have minimal interaction with peers, refuse instructions, tantrum med, cried loudly, and was normally off-task. Student's teacher implemented the IEP and interventions that exceeded his IEP. She also frequently sent Student to the friendship room, which was more controlled and quiet than the general education classroom he was assigned. Nonetheless, Student's behaviors grew worse and created an extensive impact on his teacher and peers.

55. By January 2015, the school psychologist had observed Student exhibit problem behaviors in the classroom 46 percent of the time. Student chased and hit peers and required multiple prompts to look at and to listen to the teacher. Antecedents for problem behaviors were found throughout general education classroom, including whole group instruction, rotations to small group instruction, physical education, transitions, writing, and interacting with peers.

56. District again amended Student's IEP to include a behavior support plan and aide. Behaviors targeted by the assessment included resisting instruction; difficulty accepting no; difficulty transitioning; tantrums; and crying loudly. The classroom teacher had already put into place various interventions, including a first/then visual schedule on Student's desk; various visual reminders regarding behavior skills, following instructions, listening to others, etc.; a positive behavior reward system; and other behavior interventions. Yet, during class Student verbally protested, disturbed other students, made noises, leaned against peers, tried to hit peers, had difficulty communicating with peers, talked during instruction, and did not follow or respond to teacher instruction.

57. District held another amendment IEP team meeting on February 17, 2015. Even with an aide and behavior support plan, Student demonstrated significant behavior problems. District held yet another amendment IEP team meeting at the end of the school year, in June 2015. Teachers, aide and staff had implemented Student's IEP and behavior support plan, and numerous behavior interventions throughout the school year. Yet, Student continued to demonstrate serious behavior problems in class. He was normally off task, struggled in handwriting, lacked focus, and required multiple prompts during classroom instruction. District had introduced special education services, doubled specialized academic instruction, added an aide, and implemented a behavior support plan, gradually over the course of the school year. Yet, Student demonstrated similar, or worse, behaviors.

58. Despite having interventions gradually increased throughout the school year, Student's maladaptive behaviors grew worse. By October 2015, he refused instruction, lashed out, yelled, screamed, eloped from the classroom and from the school, crawled under desks, and laid on the floor. Although Ms. Walton and the aide implemented the behavior support plan, positive behavior interventions and other behavior strategies, Student was a danger to himself and others. Teachers evacuated the classroom to protect other students and to isolate Student. Ms. Walton persuasively testified that Student missed a significant amount of instruction as a result of his behavior. Ms. Walton and Ms. Brosche persuasively testified that Student required a small, structured placement to support his behavior and learning during his second grade. Student was alone in the classroom, present but not receptive to instruction or peer interaction. For those reasons, District errs in its argument that it was appropriate to continue gradually increasing services during yet another year, the 2015-2016 school year, rather than offer a more supportive placement.

59. District's argument that Student received an education benefit is also misplaced. A review of Student's progress over the 2014-2015 school year reveals scant educational progress. For example, by the October 2015 annual IEP, Student met only one of four annual goals. His reading level fell to below grade level. His writing was illegible. Student struggled with communication development, social communication skills, recognizing personal space, interrupting others, and staying on topic. He struggled in the classroom. He was slow to start assignments, required multiple prompting, and did not finish work independently. Student's grades were poor, including a 65 percent in reading, 46 percent in spelling, and 63 percent in writing. For spelling, Student received modified assignments. In writing, Student shut down altogether.

60. Yet, District offered Student a similar educational plan for the 2015-2016 school year, including placement in a regular education classroom. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029 (*Neosho R.V. School Dist.*)) Given the information that was available to District at the time of the October 2015 IEP, it was not reasonable to offer Student the same placement in regular education and District denied Student a FAPE on that basis.

61. Evidence also shows that Student did worse, not better, during the 2015-2016 school year. More behavior strategies were offered to student during an amendment IEP team meeting held on December 10, 2015. Yet, Student got worse. Between December 2015 and September 22, 2016, Student's last day at Barnett, he received 12 behavior emergency reports. Each incident seriously disrupted Student's education and that of his peers. A significant amount of time was taken away from teachers' ability to educate Student and others, to address Student's behaviors. During each incident, school staff tried various behavior strategies, interventions, calming

techniques, and the behavior support plan. Yet, the behaviors persisted. Many of the incidents required the intervention of multiple staff members at the same time, physically restraining Student, and the evacuation of students from the classroom and playground. On several occasions, medical attention was offered to Student, teachers and staff, and other students. Student was removed from class or school, including suspension, as a result of his behaviors.

62. Although District had several opportunities following the 2015-2016 annual IEP, including amendment IEP team meetings held in December, February and May, of that school year, District failed to substantially modify Student's educational plan or to offer a more supportive placement.

63. The May 2016 IEP stands in stark contrast to District's argument that Student benefited from placement in regular education. By the end of the 2015-2016 school year, the classroom teacher reported that Student's behaviors impacted all academics in the general education setting. Student's behaviors were more extreme than before. He had daily outbursts that had increased in severity, duration and frequency. He tantrumed, was a threat to his teacher and others, and his classroom was evacuated with greater frequency to isolate him during prolonged behavior outbursts. Student eloped from his classroom and from school grounds, creating safety problems. Student had discipline problems and was sometimes kept isolated in the principal's office. Student frequently missed instruction and impeded the learning of others. Review of his behavior goals revealed that Student refused instruction more than 90 percent of the time, and responded to behavior interventions less than 50 percent of the time. Student had not benefited from the general education classroom and had regressed behaviorally.

64. District's argument that Student's progress towards goals evidenced an educational benefit is similarly unpersuasive. While Student made some progress

towards his 2015-2016 goals, he met just two of seven annual IEP goals. That modest evidence of progress was outweighed by a preponderance of evidence that Student did not receive an academic benefit. For example, a comparison of District's standardized academic testing, from September 2014, to April 2016, reveals that Student fell more than one standard deviation, a statistically significant change, in each area tested. He fell 21 points in reading comprehension; 26 points in reading; 23 points in spelling; 29 points in writing; and 16 points in math. Student did not progress, and regressed, in each academic area. Per the developmental reading assessment, Student began first grade at grade level, and ended his second grade at far below grade level.

65. Throughout the time frame in dispute, it was clear to the IEP team that Student was misplaced in general education. Each District witness that testified regarding Student's placement, including Ms. Paradise, Dr. Lane, Ms. Brosche, Ms. Walton, Mr. Israel, Ms. Toth, Ms. Boland, Ms. Lewis and Ms. Parker, persuasively recommended a special day class for Student. A regular education class did not have the behavior or learning supports that Student required to access and benefit from instruction. The uniformity of District witness testimony in support of a special day class for Student rebuffed District's ability to show that Student had received educational benefit while in general education, which comprised the majority of his education, up to the 2016-2017 school year.

66. Not with standing the foregoing, Student had difficulty presenting an organized or persuasive argument proving why Student failed to progress. Student's experts Dr. Bailey and Ms. Flores-Fiumara were critical of District's program to the extent that it failed to include an aide trained in ABA. Student's experts recommended that Student be placed in a regular classroom with unmodified instruction, so long as he had a properly trained aide. However, Dr. Bailey and Ms. Flores-Fiumara also, inconsistently, advocated for keeping Student at the Cook Center; a private, highly structured special



day class. Neither expert recommended that District provide Student direct ABA or home-based services, as recommended by Tikvah, just ABA strategies provided by an aide. Student's experts also failed to recommend a research-based placement, services or supports for autism, other than the ABA training for Student's aide.

67. Yet, District had provided an ABA trained aide that provided ABA strategies. That aide was trained by qualified District staff, including District's autism specialist, Ms. Parker, and school psychologist, Ms. Toth. The training included ABA. For the 2016-2017 school year, District selected a higher trained aide, Ms. Annett. She had vast experience in behavior strategies, including ABA, and had privately provided Student ABA at home. In addition, District hired a nonpublic agency to further train Ms. Annett. Parents were familiar with Ms. Annett and had agreed to her training in August 2016. Student failed to elicit any testimony during hearing which impugned Ms. Annett's ability or training. Yet, Student continued to demonstrate behavior problems and was unable to benefit from instruction in regular education, even though Ms. Annett conscientiously administered ABA strategies. Consequently, there was no persuasive evidence that showed Student would benefit from a regular education classroom if only his aide had better training in ABA.

68. Ms. Flores-Fiumara was critical of District's functional behavior assessments, behavior support plans and how District collected data. District's testing and plans were completed by qualified District staff, including a school psychologist, identified the desired effect of behaviors, carefully described target behaviors, and contained systematic observation of those behaviors. Data was collected by Student's teacher and aide, those who observed him most. The behavior plans hypothesized predictors of target behaviors and recommended curricular and environmental changes to minimize the target behaviors. Student's behavior support plans suggested evidence-based approaches, including token economy and social skills training, and

reinforcements, and designated personnel to administer those strategies. Each plan also included reactive strategies and behavior goals. Teachers and aides diligently implemented the behavior support plans and took copious data regarding Student's behaviors. For those reasons, Ms. Flores-Fiumara's criticism of Student's behavior assessments, plans, and data, was not persuasive.

69. Dr. Bailey and Ms. Flores-Fiumara recommended various behavior strategies including praise, calming techniques, redirection, limited breaks, and social skills development. Yet, District had tried those strategies in regular education and Student was not receptive to those interventions. Ms. Flores-Fiumara's suggestions that District staff ignore problem behaviors and only focus on praising positive behaviors, or to punish bad behavior, were impractical in the school setting.

70. Dr. Bailey opined that different instructional methodologies existed. However, there was no cohesive correlation between that testimony and Student's IEPs. She failed to clearly explain what instructional methods should have been used, or when and why they should have been utilized. Dr. Bailey also failed to explain a basis for her opinion, such as a particular test that supported a particular methodology. Other than aide provided ABA strategies, Dr. Bailey and Ms. Flores-Fiumara failed to coherently describe what specific autism, behavior, or academic instruction the IEPs lacked.

71. On the other hand, District witnesses Ms. Walton, Ms. Toth, Ms. Brosche, Ms. Paradise, Mr. Israel, Ms. Parker, Dr. Lane, and Ms. Annett persuasively linked Student's educational problems to his need for a special day class placement. They based that opinion upon years of observation and data collection. Evidence overwhelmingly showed that it was inappropriate to offer Student placement in a regular education classroom in the October 2015 IEP, and its amendments. A regular classroom was unable to support Student's learning or behavior. That poor choice of placement, not the aide's lack of fidelity to ABA, denied Student a FAPE.

72. Based upon the foregoing, Student failed to prove by a preponderance of evidence that he was denied a FAPE because District failed to provide him support or services for behavior and learning at home; research based placement, services, or supports for autism; or academic instruction or services for reading and math during the 2014-2015 and 2015-2016 school years.

73. As described herein, Student had writing problems that required occupational therapy assessment and services and District's failure to provide services for occupational therapy and writing denied Student a FAPE during the 2014-2015 and 2015-2016 school years.

74. Finally, a preponderance of evidence showed that District denied Student a FAPE during the 2015-2016 school year, by failing to provide a placement that supported his behavior and learning at school. The regular education classroom District offered did not provide the structure and support that Student required to benefit from instruction and District denied him a FAPE on that basis.

#### ISSUES 1(D),(E),(F),(G), AND (H), AND (2)(D),(E),(F),(G), AND (H): THE IEP GOALS (2014-2015 AND 2015-2016 SCHOOL YEARS)

75. Student alleges that the goals offered by District failed to meet his needs in behavior and learning, including in areas of reading, writing and math.

76. The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general curriculum; and (2) meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP team develops measurable annual goals that address the student's areas of need and which the student has a reasonable chance of attaining within a year. (Ed. Code § 56344; *Letter to Butler* (OSERS Mar. 25, 1988) 213 IDELR 118; U.S. Dept. of Educ., Notice of Interpretation, Appendix A

to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,471 (1999 regulations).) The purpose of goals is to assist the IEP team in determining whether the student is making progress in an area of need. As such, the IEP must also contain a statement of how the student's goals will be measured and when the parent will receive periodic reports on the student's progress towards his goals. (20 U.S.C. §1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the offered educational services. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

#### The 2014-2015 School Year

77. The September 30, 2014 IEP team appropriately reviewed Student's present levels of performance. Parents actively participated in that discussion, along with qualified District staff including a school psychologist, speech and language pathologist, program specialist, and a general education teacher. District reviewed recent psycho-educational, academic and speech and language testing that had been performed by qualified staff. Student had strong reading skills, with some difficulty in oral reading fluency. Per the developmental reading assessment, Student was at grade level in reading. Student was average to above average in all areas of math. Student had above average sentence composition skills, but had difficulty writing, including forming letters. He had some difficulty in pragmatic language.

78. To meet those areas, the District offered Student four, annual measurable goals: two in behavior, one in reading, and one in pragmatic language. The goals were an appropriate means of tracking progress in those problem areas, but failed to address Student's writing deficit.

79. District convened an amendment IEP team meeting on January 8, 2015, to review a behavior support plan and related testing. Qualified staff, including a school psychologist, performed the testing and devised the behavior support plan. Parents,

along with necessary District staff, participated during the meeting. On this basis, District properly offered Student another behavior goal. The goal was a measurable means to track data and progress in an area of behavior and social interaction.

80. Student demonstrated behavior problems at school, but did better at home. Parents' kept Student busy with private social and athletic activities, and private behavior services. Each Parent testified that Student performed well at home and there was no evidence provided that Student required goals for learning or behavior at home.

81. Consequently, for the 2014-2015 school year, Student failed to prove that he was denied a FAPE because of inappropriate goals in reading, math, or behavior. However, a preponderance of evidence showed that Student had writing difficulty that required a goal. He had trouble forming letters, spacing, and writing between the lines. That information was available to District when the 2014-2015 IEP was offered, yet District overlooked that deficit, as shown by the failure the failure to perform an occupational therapy assessment. Writing samples showed that Student's writing got progressively worse following the September 2014 IEP. For those reasons, District's failure to offer Student a writing goal denied him a FAPE.

#### The 2015-2016 School Year

82. District convened an annual IEP team meeting for Student on October 12, 2015. Parents and necessary District staff met to review Student's present levels of performance. The IEP team determined that Student's primary delays included behavior, reading decoding, writing, and pragmatic language. To address those delays, District offered seven annual, goals: three in behavior; two in pragmatic language; one in reading fluency; and one in writing. Those goals were an appropriate means to measure and track progress in problems areas during the 2015-2016 school year.

83. On April 22, 2016, District amended Student's IEP to include another behavior goal. The new goal was based upon updated behavior reported by qualified

school staff, the school psychologist. District again amended Student's IEP in May 2016, to include additional goals in writing, reading, math, and communication development. The writing goal was based upon an appropriate assessment by a qualified occupational therapist. The academic goals were based upon recent standardized testing by a qualified teacher.

84. Although Student had met just one of four annual goals during the 2014-2015 school year, and just two of seven annual goals during the 2015-2016 school year, that does not mean that the goals were inappropriate. Rather, as discussed herein, evidence illustrated that Student's classroom placement was inappropriate to support his behavior and learning.

85. Student offered little evidence to prove the goals were inappropriate. Dr. Bailey suggested that some goals were inappropriate because achievement levels of 80 percent were too low. However, she offered little insight regarding what goals should have been offered. Dr. Bailey's testimony was less persuasive than testimony from various District witnesses, including Ms. Brosche and Ms. Toth, who supported the appropriateness of the goals.

86. Based upon the foregoing, a preponderance of evidence showed that District denied Student a FAPE during the 2014-2015 school year by failing to offer Student a writing goal. Student failed to meet his burden of proof that District denied him a FAPE by failing to provide goals in behavior or learning at home during the 2014-2015 and 2015-2016 school years; in math and reading during the 2014-2015 school year; and in reading, writing, and math during the 2015-2016 school year.

#### ISSUES 1(T) AND 2(T): EXTENDED SCHOOL YEAR SERVICES

87. Student alleged that he was denied a FAPE because District failed to offer him extended school year services during the 2015 and 2016 summers.

88. California Code of Regulations, title 5, section 3043, provides that extended services shall be provided for each individual with exceptional needs who requires special education and related services in excess of the regular academic year. Students to whom extended programming must be offered under section 3043: . . . shall have disabilities which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her disabling condition.

89. The federal regulations do not specify any factors that must be considered in determining eligibility for extended programming. The IDEA simply provides that extended school year services shall be provided to a student if the IEP team determines that such services are necessary to provide a FAPE. (34 C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3); *N.B. v. Hellgate Elementary School Dist.*, (9th Cir. 2008) 541 F.3d 1202, 1210-1212 [no error in applying a regression/recoupment standard; extended services must be provided if necessary to ensure FAPE].) The purpose of special education during the extended school year is to prevent serious regression over the summer months. (*Hoelt v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1301; *Letter to Myers* (OSEP 1989) 16 IDELR 290.) The mere fact of likely regression is not enough to require an extended school year placement, because all students "may regress to some extent during lengthy breaks from school." (*MM v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 538.)

90. Here, Student abandoned these issues during hearing. He failed to present documentary evidence or clear witness testimony that showed he met the eligibility requirements for extended school year services. While evidence showed that Student regressed, that regression occurred during the regular school year. In contrast, District's

program specialist Mr. Israel testified that Student did not require extended school year services. Reading testing also demonstrated a lack of regression during the summer break. Ms. Brosche used the developmental reading assessment to test Student's reading abilities before, and after, the 2016 summer. Student attained the same score, level 18, in May and August 2016. While the score was far below grade level, it showed that Student's skills had not regressed during the extended school year. Although Parents provided Student private services during the summer, Student failed to establish that he required extended school year services to receive a FAPE.

91. In sum, Student failed to meet his burden of proving that he was denied a FAPE because District failed to offer extended school year services.

#### ISSUES 2(U)(V)(W): PARENTS' PARTICIPATION AND CLEAR IEP OFFERS (2015-2016 SCHOOL YEAR)

92. Student alleges that Parents were denied the opportunity to meaningfully participate in the IEP process because of vague progress reporting and because meetings were not scheduled during a time that was convenient for both Mother and Grandmother. Student also complains that the September 29, 2015 IEP, and its amendments, were not clear, written offers of FAPE.

#### Parental Participation

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



important procedural safeguards." (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

94. A school district is required to conduct, not just an IEP team meeting, but also a meaningful IEP team meeting. (*Target Range, supra*, 960 F.2d 1479, 1485; *Fuhrmann v. East Hanover Board of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036 (*Fuhrmann*)). The IEP team shall consider the concerns of the parent for enhancing the student's education and information on the student's needs provided to or by the parent. (20 U.S.C. § 1414(d)(3)(A) & (d)(4)(A)(ii); 34 C.F.R. § 300.324(a)(1)(ii) & (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(2), (d)(3) & (f).) A parent has meaningfully participated in the development of an IEP when she is informed of her child's needs, attends the IEP team meeting, expresses disagreement with the IEP team's conclusions, and requests revisions to the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP and suggest changes, and whose concerns are considered by the IEP team, has participated in the IEP development process in a meaningful way. (*Fuhrmann, supra*, 993 F.2d 1031, 1036.)

95. A school district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union, supra*, 15 F.3d 1519, 1526.) An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decision based on it. (*Ibid.*) In *Union*, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. (*Ibid.*) The IEP is to be read as a whole. There is no requirement that necessary information be included in a particular section of the IEP if that information is contained elsewhere. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d)(2); Ed. Code, § 56345, subd. (h).)

96. For the 2015-2016 school year, District attempted to hold Student's annual IEP team meeting on September 29, 2015, and agreed to move the meeting to October

12, 2015, to accommodate Grandmother's schedule. Both Mother and Grandmother attended the October 12, 2015 IEP team meeting. District provided Parents a copy of procedural safeguards and invited each to share their concerns with the IEP team. Parents shared concerns about having an ABA trained aide in the classroom and Grandmother shared an article regarding ABA. Parents and the teacher helped compose a checklist of rules for Student's desk. The team, including Parents, discussed Student's present levels of performance, present data, including progress on goals and grades, and behavior strategies. Discussion was robust and informative. Changes were made to the IEP based upon Parent's input, including Grandmother's request to have Student use a break card.

97. The October 12, 2015 IEP team meeting was incorporated into a complete, written IEP document. The document described in detail the IEP accommodations, goals, duration, frequency and type of related services, and the educational placement. The IEP document delineated that Student would be removed from regular education for 15 percent of the school day.

98. Mother attended an amendment IEP team meeting on December 10, 2015, to discuss behavior interventions. Mother and Student's attorney attended an amendment IEP team meeting on February 3, 2016, to modify aide, speech and language, and behavior services. District provided Mother a copy of procedural safeguards and invited Mother and Student's attorney to participate during the meeting. Mother and Student's attorney shared concerns regarding Student's behavior, classroom interventions, and reading.

99. On April 20, 2016, District sent Parents a prior written notice letter denying Parents' request for the next IEP team meeting to be held either before school, at 7:30 a.m., or after school, at 3:30 p.m. Not with standing that letter, District held another amendment IEP team meeting on May 9, 2016, at 3:30 p.m., to accommodate

Grandmother's schedule. Both Mother and Grandmother attended that amendment IEP team meeting, along with a continuation of that meeting, held on May 20, 2016. Student's attorney also attended each meeting. The team reviewed recent academic testing and behavior data. Parents and Student's attorney participated in a vigorous discussion with District staff regarding Student's educational program. Like all of the IEP team meetings, the May 2016 amendment meeting was incorporated into a written document that was easy to understand and detailed the services and placement offered.

100. During hearing, each person who attended the annual IEP team meeting, and its amendments, including Parents, testified that Parents meaningfully participated during the IEP team meetings. They reviewed recent and updated data and testing, and were not inhibited in their ability to ask questions regarding Student's educational plan. Parents had received written copies of the IEPs, and understood the accommodations, goals, services, placement, and amendments, offered by District. There was no evidence submitted that Parents were unable to meaningfully participate during the IEP team meetings or were unable to understand the FAPE offers.

101. In sum, the October 2015 IEP, as amended in December 2015, and February and May 2016, provided a clear written offer of placement and services. The IEP document provided sufficiently clear details as to the proposed placement and services such that Parents could reasonably be expected to understand it and decide whether to accept the offer.

102. Based upon the foregoing, Student failed to meet his burden to prove that District denied him a FAPE, by failing to make a clear, written offer of services at the September 29, 2015 IEP, and any amendments; failing to allow Parents to meaningfully participate in the IEP process by providing vague progress reporting; or by failing to schedule the IEP team meetings at a mutually agreeable date and time.

ISSUES 1(B) AND(Q), 2(B) AND (Q), AND 3(A): EDUCATIONALLY RELATED MENTAL HEALTH SERVICES ASSESSMENT AND SERVICES

103. Student alleges that District denied him a FAPE by failing to offer an educationally related mental health services assessment and educationally related mental health services.

104. School districts are required to assess in all areas of suspected disability, including in the area of mental health, to provide a FAPE. (20 U.S.C § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).)

105. Here, District conducted a psycho-educational assessment in September 2014, which included social and emotional testing. That assessment included informal and standardized testing, and was conducted by qualified staff, including a school psychologist. The assessment was reviewed by Parents during an IEP team meeting. A school psychologist, Ms. Toth, trained in autism and emotional disabilities attended, along with all necessary school staff. There was no indication at that meeting, or any IEP team meeting, that Student required an educationally related mental health services assessment or mental health services. Parents did not request an educationally mental health services assessment or mental health services at any of the 14 IEP team meetings that were held during the time frame in question.

106. During hearing, Dr. Bailey recommended counseling services as a compensatory remedy to make up for Student's behavior regression and resulting social impact. However, she did not clearly recommend an educationally related mental health services assessment or educationally related mental health services. Student failed to provide persuasive testimony or documentary evidence that supported that he required that manner of testing or services.

107. For the foregoing reasons, Student failed to meet his burden of proving that District denied him a FAPE by failing to provide an educationally related mental

health services assessment or educationally related mental health services during the 2014-2015, 2015-2016, and 2016-2017 school years.

ISSUES 2(X), 3(C),(D),(E),(F),(G),(H),(I),(J),(K),(L),(M),(N),(O),(P),(Q),(S),(T),(U),(V), (W), AND 4: THE APPROPRIATENESS OF THE SEPTEMBER AND OCTOBER 2016 ANNUAL IEP, AS AMENDED IN JANUARY 2017; AND THE LEAST RESTRICTIVE ENVIRONMENT FOR STUDENT

108. Student alleges that the 2016-2017 annual IEP, and amendment, was procedurally and substantively defective on various grounds. Student primarily complains that the placement offered, a special day class, was too restrictive. Student also asserts that the 2015-2016 school year placement was not the least restrictive environment for Student.

109. District's sole issue asserts that it offered Student a FAPE in the least restrictive environment pursuant to the annual IEP of September 23, 2016 and October 11, 2016 IEP, as amended on January 26, 2017.

110. District requests an order that it may implement the annual IEP, as amended, without Parents' consent. When a school district seeks to demonstrate that it offered a FAPE, the legal analysis consists of two parts. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

#### Required IEP Team Members

111. An IEP is developed by an IEP team. The IEP team must include: (1) one or both of a student's parents; (2) no less than one general education teacher; (3) no less than one special education teacher or, if appropriate, a special education provider of the

student; (4) a representative of the district who is qualified to provide or supervise specially designed instruction, and is knowledgeable about the general education curriculum and the availability of district resources; (5) an individual who can interpret the instructional implication of assessment results; (6) at the discretion of the parent(s) or district, any other individual who has knowledge or special expertise regarding the student, including related services personnel, as appropriate; and (7) whenever appropriate, the student with exceptional needs. (20 U.S.C. § 1414(d)(1)(B); 34 C.C.R. § 300.321(a); Ed. Code, § 56341, subd. (b).) Required team members may be excused from an IEP meeting if the parent and school district consent in writing, and the excused member provides written input to the IEP team prior to the meeting. (20 U.S.C. § 1414(d)(1)(C); 34 C.F.R. § 300.321(e)(2); Ed. Code § 56341, subd. (f).)

112. The September 23, 2016, and October 11, 2016, IEP team included Mother; Grandmother; Student's attorney; school psychologist Ms. Toth; general education teacher Ms. Rivera; speech pathologist Ms. Garcia; resource specialist program service provider Ms. Brosche; school principal Dr. Lane; board certified behavior analyst Ms. Boland; program specialist Nicki Lewis; and occupational therapist Sara Weingartner. Each service provider was qualified to discuss the area of service she provided. Ms. Toth was a school psychologist with years of experience assessing and treating students with attention disorders and autism. While District had sent Parents a letter declining their request for an autism specialist to attend IEP team meetings, evidence submitted at hearing established that Ms. Toth had sufficient expertise in autism to accommodate that request. Evidence also showed that Parents were informed of her credentials during the IEP team meeting.

113. Further, Ms. Boland was an experienced board certified behavior analyst with experience treating pupils with attention disorders, autism and serious behavior disorders. Ms. Garcia and Ms. Weingartner were experienced professionals in their

respective fields of speech pathology and occupational therapy. Each District team member was familiar with Student and his disabilities. Some, like Ms. Toth and Ms. Garcia, had directly assessed Student. Others, like Ms. Rivera and Ms. Brosche, had directly taught Student. Dr. Lane and Ms. Lewis were knowledgeable of District's various classrooms and curriculum, and were competent to discuss a continuum of placements options for Student. Each team member had reviewed Student's school records and was prepared to discuss how Student's disability impacted his education. Although Grandmother testified that District failed to accommodate her work schedule when setting the IEP team meetings, both she and Mother were able to attend, and did attend, the meetings. By the foregoing authority, District met its obligation to include necessary IEP team members.

#### Procedural Safeguards

114. State and federal law require districts to provide the parent of a child eligible for special education with a copy of a notice of procedural safeguards upon initial referral, and thereafter at least once a year, as part of any assessment plan, and at other designated times. (20 U.S.C. § 1415(d)(1); 34 C.F.R. § 300.504(a); Ed. Code, § 56321, subd. (a).) The notice must include a full explanation of all procedural safeguards and be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent. (20 U.S.C. §1415(d)(2); 34 C.F.R. §§ 300.503(c)(1) & 300.504.) Furthermore, at each IEP team meeting, the district must inform a parent of state and federal procedural safeguards. (Ed. Code, § 56500.1, subd. (b).) District met the foregoing requirement by providing Parents a copy of the procedural safeguards at the beginning of each IEP team meeting.

## Parental Participation and Prohibition Against Predetermination

115. As found herein, special education law places a premium on parental participation in the IEP process. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.501(b); Ed. Code, § 56304, subd. (a).)

116. Predetermination of an IEP offer violates the above requirement. For IEP team meetings, predetermination occurs when an educational agency has decided on its offer prior to the meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-858 (*Deal*); *H.B. v. Las Virgenes Unified School Dist.* (9th Cir. July 3, 2007, No. 05-56485) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP team meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.*, (9th Cir. 2008), 552 F.3d 786, 801, fn. 10.) A school district cannot independently develop an IEP, without meaningful parental participation, and then present the IEP to the parent for ratification. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131, superseded on other grounds by statute; *Target Range, supra*, 960 F.2d 1479, 1484.)

117. Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations, before the IEP is finalized. (*Assistance to States for the Education of Children with Disabilities*, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).) School officials may permissibly form opinions prior to IEP meetings. However, if the district goes beyond forming opinions and becomes "impermissibly and deeply wedded to a single course of action," this amounts to predetermination. (*P.C. v. Milford Exempted Village Schools* (S.D. Ohio, Jan. 17, 2013, No. 1:11- CV-398) 2013 WL 209478, p.7.)

118. Evidence established that Parents actively participated during each IEP team meeting. Although District presented a draft IEP at the September 2016 IEP team



meeting, District also solicited, considered, and incorporated input from Mother, Grandmother and Student's attorney. For instance, District amended Student's present levels in the area of academic and functional performance to address Parents' concerns that Student's had difficulty wanting to attend school. During the January 26, 2017 IEP team meeting, District added assistive technology for reading, the Google Read and Write program, and agreed to assess further in that area, based upon Parents' input. Parents and Student's attorney participated with District staff regarding all aspects of Student's development and education program. They each shared their perspectives on Student's needs, asked questions, proposed changes, and discussed various elements of the IEP, including goals and behavior. In sum, Parents and Student's attorney actively participated in the IEP team meetings. District openly considered and incorporated Parents' input into the IEP offers.

119. District's offer to place Student in a special day class did not establish that District predetermined its offer. District witness testimony established that the special day class offer was not determined until the October 2016 IEP team meeting. District team members permissibly formed an opinion prior to the October meeting that Student required a smaller, more structured placement. This was based in part upon Student's continued problems in Ms. Rivera's regular education classroom. Even so, District engaged in an open discussion with Parents and Student's attorney regarding Student's behavior and needs. District considered that input, along with information provided by its school psychologist, behavior specialist, teachers, and other staff. District carefully analyzed Student's most current data and considered Parents' concerns and Student's attorney's suggestions. District's actions and proposals show that it did not predetermine the September and October 2016, or January 2017, IEP offer.

## Necessary Considerations

120. In developing the IEP, the IEP team must consider the strengths of the child; the concerns of the parents for enhancing their child's education; information about the child provided by or to the parents; the results of the most recent assessments; the academic, developmental, and functional needs of the child; and any lack of expected progress toward the annual goals. (20 U.S.C. § 1414(d)(3)(A), (d)(4)(A)(ii); 34 C.F.R. § 300.324(a), (b)(1)(ii); Ed. Code, § 56341.1, subds. (a), (d).) When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).)

121. School districts, as part of a special education local plan area, must have available a continuum of program options to meet the instructional and service needs of special education students. (34 C.F.R. § 300.115(a); Ed. Code, § 56360.) This continuum of program options must include, but is not limited to, regular education; resource specialist programs; designated instruction and services; special classes; non-public, non-sectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication in the home, hospitals or institutions. (34 C.F.R. § 300.115; Ed. Code, § 56361.) In determining placement, a school district must consider a continuum of alternative placements. (34 C.F.R. § 300.115(b); Ed. Code, § 56342, subd. (b).) A school district is only required to consider those placements in the continuum that may be appropriate for a particular child. There is no requirement that the IEP team members discuss all options, so long as alternative options are available. (*L.S. v. Newark Unified School Dist.*, (N.D.Cal, May 22, 2006, No. C 05-03241 JSW) 2006 WL 1390661, p. 6.)

122. District considered all necessary information during the September and October 2016, and January 2017 IEP team meetings, including Parents' input; the concerns and proposals of Parents and Student's attorney during the team meetings; Student's strengths, needs, and behaviors; the results of recent assessments; and progress towards goals. Student had been fully included and was unable to access his curriculum in the general education environment with the provision of related services. As such, there was a need for the IEP team to discuss more restrictive program options and it did so. Student's behavior was impeding his education or that of others. Therefore, District appropriately reviewed data and revised his behavior support plan. For areas of strength, District appropriately considered general education with his typical peers and agreed to mainstream Student for 30 percent of his school day.

#### Required IEP Contents

123. Federal and State law specify in detail what an IEP must contain. Among other things, it must include a statement of the student's present levels of academic achievement and functional performance, including the manner in which the student's disability affects his involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); 34 C.F.R. § 300.320 (a)(1); Ed. Code, § 56345, subd. (a)(1).) The IEP must contain a statement of measurable annual goals designed to: (1) meet the student's needs that result from his disability to enable the student to be involved in and progress in the general curriculum; and (2) meet each of the child's other educational needs that result from his disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2); Ed. Code, § 56345, subd. (a)(2).) The IEP team develops measurable annual goals that address the student's areas of need and which the student has a reasonable chance of attaining within a year. (Ed. Code § 56344; *Letter to Butler* (OSERS Mar. 25, 1988) 213 IDELR 118; U.S. Dept. of Educ., Notice of Interpretation, Appendix A to 34 C.F.R., part 300, 64 Fed. Reg. 12,406, 12,471 (1999 regulations).) The purpose of

goals is to assist the IEP team in determining whether the student is making progress in an area of need. As such, the IEP must also contain a statement of how the student's goals will be measured and when the parent will receive periodic reports on the student's progress towards his goals. (20 U.S.C. §1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the offered educational services. (Cal. Code Regs., tit. 5, § 3040, subd. (b).)

124. An IEP must also include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, which will be provided to the student, with a projected start date as well as the anticipated frequency, location, and duration of services. (20 U.S.C. § 1414(d)(1)(A)(i)(IV) &(VII); 34 C.F.R. § 300.320(a)(4) and (7); Ed. Code, § 56345, subd. (a)(4)& (7).) Additionally, the IEP must explain the extent to which the student will not participate with non-disabled children in a regular class or other activities; a statement of required program modifications or supports that will be provided to the student to allow him to advance appropriately toward attaining the annual goals, to be involved and make progress in the general education curriculum, and to participate in extracurricular activities and other nonacademic activities; and a statement of individual accommodations necessary to measure the student's performance on State and district-wide assessments. (20 U.S.C. § 1414(d)(1)(A)(i)(IV)-(VII); 34 C.F.R. § 300.320(a)(4)(5)(6) & (7); Ed. Code, § 56345, subds. (a)(4)-(7).)

125. The September and October 2016 IEP document, as amended in January 2017, included all of the statutorily required items. For instance, it included: Student's present levels of academic achievement and functional performance; an analysis of how Student's disability affected his involvement and progress in the general education curriculum; a statement of nine measurable, annual goals designed to meet Student's

unique needs and allow him to make educational progress; a statement of how Student's goal performance would be measured and reported to Parents; a description of related services along with projected start dates and duration, frequency, and location of services, supports, and accommodations; and the percentage of time Student would not be participating in the general education setting with typical peers.

#### Clear Written Offer

126. As found herein, a school district must make a formal written offer in the IEP that clearly identifies the proposed program. An IEP offer must be sufficiently clear that a parent can understand it and make an intelligent decision based on it. (*Union, supra*, 15 F.3d 1519, 1526.)

127. The September and October 2016 IEP, as amended in January 2017, provided a clear written offer of placement and services. The IEP provided Parents sufficiently clear details as to the proposed placement and services such that they could reasonably be expected to understand it and decide whether to accept the offer.

128. District complied with the procedures set forth in the IDEA in developing Student's annual IEP, as amended in January 2017. District provided Parents all of the procedural protections to which they were entitled, and involved Parents in the process of developing Student's program. The proposed IEP included all the content required by law, and the IEP team members took into account necessary considerations. District timely filed a request for due process hearing to defend its offer of FAPE, and to obtain an Order authorizing it to implement the entire September and October 2016 annual IEP, as amended in January 2017. In summary, the IEP, as amended, was procedurally valid.

## SUBSTANTIVE VALIDITY OF IEP OFFER

### Unique Needs

129. A student's unique educational needs are to be broadly construed to include academic, social, health, emotional, behavior, communicative, physical, and vocational needs. (*Seattle School Dist., No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1501, abrogated in part on other grounds by *Schaffer v. Weast, supra*, 546 U.S. 49, 56-58, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) In addition, educational needs include functional performance. (Ed. Code § 56345, subd. (a)(1).) The "educational benefit" to be provided to a child requiring special education is not limited to addressing the child's academic needs, but also social and emotional needs that affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467 (*San Diego*).)

130. The IEP must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) A school district is required to provide educational instruction, specially designed to meet the unique needs of a child with a disability, supported by such services as are necessary to permit the child to benefit from the instruction. (*Rowley, supra*, 458 U.S. 176, 188-189; *San Diego, supra*, 93 F.3d at p. 1468.)

### Evaluating the IEP Offer

131. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams, supra*, 195 F.3d at p. 1149.) An IEP is "a snapshot, not a retrospective." (*Ibid.*) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.* citing *Fuhrmann, supra*, 993 F.2d 1031, 1041.) However, "after-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time the school district rendered its decision." (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1004 [citing *Adams, supra*, 195 F.3d at p. 1149].)

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

133. An IEP need not conform to a parent's wishes to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education designed according to the parent's desires."].) A school district has the right to select the service provider so long as the provider is able to meet the student's needs. The IDEA does not empower parents to make unilateral decisions about programs funded by the public. (*Slama v. Independent School Dist. No. 2580* (D. Minn. 2003) 259 F. Supp.2d 880, 885 [refusal to assign service providers of parent's choice does not result in a denial of a FAPE.]; *N.R. v. San Ramon Valley Unified School Dist.* (N.D.Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323, at p.7; parents are not entitled to their preferred provider.]) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 208.)

134. To be found appropriate under the IDEA, an IEP must not only be procedurally compliant but also substantively appropriate, meaning it was reasonably calculated, at the time it was developed, to enable the student to receive educational benefit.

135. District developed Student's annual 2016 IEP, as amended in January 2017, based upon current assessments; information from Parents and qualified District staff regarding Student's cognitive abilities; academics; social-emotional; behavior; speech and language deficits; occupational therapy; and assistive technology, which represented all areas of suspected need stemming from his disability and related to his education. For example, qualified District staff conducted an occupational therapy assessment in April 2016; academic testing in May 2016; reading testing in August and September 2016; and an assistive technology assessment in December 2016. In addition, the school psychologist and behavior specialist had recently collected behavioral data and updated Student's behavior support plan. Student's triennial multidisciplinary assessment, conducted September 2014 by qualified assessors, including a school psychologist and speech pathologist, was still valid.

136. Along with assessment data, the IEP team reviewed Student's present levels of performance. Student struggled to follow classroom rules and lacked the social skills necessary to interact with adults and peers. The classroom pacing in general education was too much for Student, and he was normally anxious and frustrated. Student learned best in a small group setting and at a slower pace than what was provided in general education. He required multi-modality instruction, including having a task modeled to him with auditory and visual support, and then practicing the task with an aide. He required breaking down of academic tasks, with scaffolding and repetition, to avoid emotional outbursts. He required many prompts and a token reward system to complete tasks. He required constant redirection to maintain focus and did not finish work independently. Student met two of the seven annual goals prescribed in his last annual IEP of September 2015.

137. The team reviewed the functional behavior analysis assessment and updated behavior support plan. The function of Student's behavior was to avoid, or



escape, non-preferred tasks. Student refused work and any request to stop a preferred activity led to crying, kicking, and screaming. The team discussed Student's disruptive behaviors, predictors and circumstances for behavior, and strategies to diminish behaviors. The updated behavior support plan specified persons to implement the plan.

138. The IEP team appropriately reviewed present academic, social, emotional, and behavior issues. Student was well below grade level in reading and his writing was illegible. He required a variety of supports and many days to complete a writing task. Problem behaviors had grown worse. In class, he would yell, scream, lash out, throw things, crawl under the desk, lie on the floor, and elope. After reviewing Student's present levels of performance, the IEP team agreed that Student's primary delays were in behavior, social/emotional, reading, writing, and pragmatic language.

139. To meet those needs, the IEP team prepared nine measurable, annual goals. Each goal included a baseline, a manner to measure progress towards the goal, and designated person responsible for implementing the goal. Student's expert Dr. Bailey was critical of some goals, including a reading goal for being too lofty, and because some outcome percentages were too low. However, this mild criticism was less persuasive than testimony provided by Ms. Toth, Ms. Garcia, Mr. Israel, Ms. Lewis, Ms. Boland, Ms. Weingartner, and Ms. Brosche, who confirmed the appropriateness of each goal. In sum, the goals were a meaningful and measurable way to address Student's delays.

140. To meet those goals, the IEP offered Student the following services: specialized academic instruction in a separate classroom, individually and in a small group, 1,200 minutes weekly, for reading, writing, science, and social studies; speech and language services, thirty minutes, twice weekly, in a small group; occupational therapy, thirty minutes weekly, individually and in a small group; and the updated behavior support plan. Student would spend 70 percent of the school day in Mr. Lazo's

special day class, and the remaining 30 percent in general education. A highly trained individual aide, Ms. Annett, would accompany Student throughout the school day. Along with those services, District offered many accommodations and the assistive technology included in the January 2017 amendment IEP.

141. Ms. Toth, Ms. Boland, Ms. Garcia, Ms., Weingartner, Ms. Brosche, Mr. Israel, Ms., Parker, Ms. Lewis and Ms. Dugger persuasively testified in support of the services. Ms. Garcia's testimony that the level of speech and language services was appropriate went unchallenged by Student. Ms. Dugger persuasively supported the appropriateness of the assistive technology offered in January 2017.

142. Ms. Weingartner's support for the level of occupational therapy services offered was questioned by Ms. Spears, who suggested a higher level of services. However, Ms. Spears also opined that Ms. Campbell's occupational therapy assessment was adequate. The IEP team based the service offer upon Ms. Campbell's assessment, and Ms. Weingartner persuasively supported that decision. Ultimately, Ms. Weingartner and Ms. Spears each concluded that the occupational therapy proposed would help remediate Student's problems in writing, sensory processing, attention, and behavior.

143. Student's experts, Dr. Bailey and Ms. Flores Fiumara objected to the restrictiveness of a special day class and the training of the aide, which will be discussed below. However, they provided little criticism regarding the type and frequency of services offered. Student's experts failed to coherently describe additional or alternative goals or services, including home instruction, which should have been offered in place of District's offer.

144. Based upon the foregoing, a preponderance of evidence showed that the goals and services offered in the annual IEP, as amended in January 2017, were appropriate to meet Student's unique needs.

## Placement in the Least Restrictive Environment

145. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114 (a)(2); Ed. Code, §§ 56031, 56033.5 OR 56040.1, subd. (b) 56342, subd. (b).) The IDEA also requires, to the maximum extent appropriate, that a child with a disability must be educated with children who are not disabled. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2); Ed. Code, § 56040.1, subd. (a).)

146. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: the educational benefits of full-time placement in a regular classroom; the non-academic benefits of full-time placement in a regular classroom; the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and the cost of placing the child with a disability full-time in a regular classroom. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404. (*Rachel H.*))

147. Here, overwhelming evidence shows that Student required a more restrictive placement than a regular classroom. First, standardized academic testing showed that Student performed poorly in regular education. Although District provided Student resource specialist program services, speech and language therapy, social skills, accommodations, modifications, and behavior interventions, Student regressed in reading, writing, and math. District's witnesses, including Ms. Walton, Ms. Toth, Ms. Brosche, Ms. Paradise, Mr. Israel, Dr. Lane, and Ms. Annett, persuasively testified that

Student required a special day class to receive an academic benefit. Secondly, those same witnesses persuasively testified that Student required a special day class to receive a non-academic benefit. Socially, Student was alone in the regular education classroom. He was not receptive to teacher instruction or peer interaction. He grew worse socially and emotionally, growing from a likable young boy who enjoyed school, to being withdrawn and reactive against attending school. Thirdly, Student's behaviors grew worse in regular education. Evidence showed that Student was overly disruptive. His classroom was evacuated, he attacked peers and staff, and required an inordinate amount of the teacher's time to attempt any assignment. Student and his peers missed instruction because of his behavior. The last tier required under *Rachel H.*, the cost of educating Student in regular education, is not at issue. District spared no expense in training Student's aide.

148. Student's witnesses' attempt to shift Student's problems onto the aide was not persuasive. Student received an aide during the 2014-2015 and 2015-2016 school years. That aide was trained by qualified District staff, a school psychologist and autism specialist, including in the area of ABA. For the 2016-2017 school year, District selected a higher trained aide, Ms. Annett. She had vast experience in behavior strategies, including ABA, and had privately provided Student ABA at home. In addition to extensive behavior training and years of experience, District hired a nonpublic agency, supervised by a private board certified behavior analyst, to further train Ms. Annett. Parents were familiar with Ms. Annett and had agreed to her training in August 2016. Student failed to elicit any testimony during hearing which impugned Ms. Annett's training or ability to serve as Student's aide. Overall, there was no persuasive evidence that showed Student would benefit from a regular education classroom if only his aide had more training in ABA. Student's behaviors were too severe and frequent and there were too many antecedents in the regular education classroom. All evidence pointed to

Student requiring a small, structured, and slower paced placement. That fact was cemented by Dr. Bailey and Ms. Flores-Fiumara's testimony that Student was appropriately placed at the Cook Center, a small and highly structured special day class. In sum, the problem was the placement, not the aide.

149. District's provision of a regular education class placement was not sufficiently structured or restrictive to meet Student's behavior and learning needs during the 2015-2016 school year, thereby denying Student a FAPE. (*Neosho R-V School Dist., supra*, 315 F.3d at pp. 1028-1029.)

150. District corrected that problem in the 2016-2017 annual IEP. With Mr. Lazo's special day class, District offered a solid educational plan.

151. Mr. Lazo had 33 years teaching experience, was trained in autism and behavior strategies, and was familiar with Student's unique needs. His special day class comported well with Student's needs and Student had not demonstrated behavior challenges in that class.

152. The mild-moderate special day class was comprised of 10 students and four adults: the teacher, teacher's assistant, classroom aide, and Student's individual aide. Students had moderate disabilities similar to Student, including those with attention disorders, specific learning disabilities, and high functioning autism. Like Student, most were mainstreamed at various times throughout the day. Mr. Lazo followed the regular education curriculum, and differentiated instruction, so that each student was taught at his or her grade level. Instruction was provided in whole group, small group, and individually.

153. The special day class was more structured, slower paced, and less noisy than regular education classes. Research based methodologies were utilized for instruction, including specific reading and spelling programs, multisensory language instruction, and computer based programs. Research based interventions were also used

for behavior, including multisensory approaches, visual schedules, token economy and positive reinforcement, and discrete trial therapy strategies. Mr. Lazo had implemented many behavior support plans for varying degrees of behavior problems. Each District witness that was familiar with Mr. Lazo persuasively recommended his special day class for Student. Student's witnesses did not contradict that testimony. Consequently, District's combined IEP offer for the 2016-2017 school year was substantively valid.

154. Based upon the foregoing, District proved by a preponderance of evidence that the September and October 2016 IEP, as amended in January 2017, offered Student a FAPE in the least restrictive environment. District established that it complied with all necessary procedural and substantive requirements in developing the September and October 2016 IEP, as amended in January 2017, such that it may implement the combined IEP in its entirety without Parent consent.

155. Conversely, Student failed to meet his burden of proof that the September and October 2016 IEP, as amended in January 2017, either procedurally or substantively denied him a FAPE.

## REMEDIES

1. 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)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) This broad equitable authority extends to an Administrative Law Judge who hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, fn. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

2. An Administrative Law Judge can award compensatory education as a form of equitable relief. (*Park, supra*, 464 F.3d at p. 1033.) Compensatory education is a prospective award of educational services designed to catch-up the student to where he should have been absent the denial of a FAPE. (*Brennan v. Regional School Dist. No. 1* (D.Conn. 2008) 531 F.Supp.2d 245, 265.)

3. As equitable relief, parents may be entitled to reimbursement for the costs of a private school 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 district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at pp. 369-71.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. The placement does not have to provide all services required by a special needs student for full reimbursement to be ordered, or meet all requirements of the IDEA. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14. [114 S.Ct. 361, 126 L.Ed.2d 284.]; *C.B. v. Garden Grove Unified School Dist.* (9th Cir. 2011) 635 F.3d 1155, 1159.)

4. District denied Student a FAPE during the 2015-2016 school year, by failing to provide an appropriate placement that supported his behavior and learning. As a result, Student was unable to access instruction, regressed, and did not receive a meaningful educational benefit. In addition, District denied Student a FAPE by failing to assess in assistive technology during the 2015-2016 school year. As equitable compensation for those denials of FAPE, Student is entitled to one regular school year of compensatory education.

5. Amongst other remedies, Parents requested reimbursement for the Cook Center. Ms. Toth, Ms. Brosche, Ms. Walton, and Ms. Boland persuasively testified that Student required a small, structured placement. Dr. Bailey, Ms. Flores-Fiumara, and

Parents persuasively testified that Cook Center provided Student a small, structured placement that met his unique needs and allowed him to access his education. Consequently, it is equitable to order that District shall reimburse Parents for 10months, the equivalent of one regular school year, of tuition at the Cook Center, as compensatory education for District's failure to provide a FAPE for one regular school year, the 2015-2016 school year. Parents failed to present adequate evidence of tuition costs and payment during hearing. Parents shall therefore provide District evidence of tuition and payment to receive reimbursement.

6. District denied Student a FAPE during the 2014-2015 and 2015-2016 school years, by failing to provide assessment and services for occupational therapy, including writing services; and by failing to offer a writing goal during the 2014-2015 school year. Ms. Weingartner and Ms. Spear persuasively recommended direct occupational therapy services for Student. Consequently, it is equitable to order District to provide Student 36 hours of compensatory occupational therapy, representing 30 minutes per week of occupational therapy, for two regular school years.

## ORDER

1. District shall reimburse Parents for 10months of tuition at the Cook Center, or a Parent selected nonpublic school if the Cook Center becomes unavailable, as compensatory education for denying Student a FAPE during the 2015-2016 school year. To receive that reimbursement, Parents shall provide District with written documentation of tuition costs and payment. Parents can attain reimbursement for tuition costs already incurred. Parents shall have one year from the date of this Decision to incur total tuition costs and to provide District with evidence of those costs. The award of reimbursement for tuition is a compensatory award and shall not constitute Student's stay put placement.



2. District shall reimburse Parents' transportation costs for Student's attendance at the Cook Center, or Parent selected nonpublic school if the Cook Center becomes unavailable. Reimbursement shall be based upon one, daily, round trip from Student's residence to the nonpublic school, not to exceed 10 months, at the mileage reimbursement rate established by the United States' Internal Revenue Service.

3. Within 30 days of this Decision, District shall contract with a nonpublic agency of its choosing to provide Student 36 hours of compensatory occupational therapy services, funded by District. Student shall have two years from the date District contracts with the nonpublic agency to utilize those services. District shall not be responsible for transportation costs related to the compensatory occupational therapy.

4. Student's additional claims for relief are denied.

5. District's combined IEP offer of September 23, 2016, October 11, 2016, and January 26, 2017, was appropriate. That combined IEP offer shall constitute Student's educational program upon his return to District, until another IEP is mutually agreed upon or ordered. Should Student return to District, District may implement the IEP without Parents' consent.

## 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 issues 1(a),(g), (l), and (o), and issues 2(a),(c), (g), (i), (l), (o), and (x). District prevailed on issues 1(b), (c), (d), (e), (f), (h), (i), (j), (k), (m), (n), (p), (q), (r), (s), (t), and issues 2(b), (d), (e), (f), (g), (h), (j), (k), (m),(n), (p), (q), (r), (s), (t), (u), (v), (w), and issues 3(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), and issue 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: July 12, 2017

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*/s/*

PAUL H. KAMOROFF

Administrative Law Judge

Office of Administrative Hearings