

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

IRVINE UNIFIED SCHOOL DISTRICT.

OAH Case No. 2016110472

DECISION

Student filed a due process hearing request on November 14, 2016, with the Office of Administrative Hearings, State of California, naming Irvine Unified School District. OAH granted Student's motion to amend her complaint on March 10, 2017. Administrative Law Judge Robert G. Martin heard this matter in Irvine, California on May 4, 9, 10, 16, 17, 18, 22, 23 and 31, 2017.

Timothy Adams and Lauren-Ashley Caron, Attorneys at Law, represented Student. Student's parents attended the hearing on behalf of Student. Student did not attend the hearing. Jennifer Fant, Attorney at Law, represented District. District Program Specialist Lisa Torkzadeh attended the hearing on behalf of District.

At the parties' request, OAH continued the matter to June 26, 2017, for written closing arguments. The record closed on June 26, 2017, upon timely receipt of closing briefs from the parties. On June 29, 2017, with agreement of the parties, OAH extended the timeline for the filing of the decision in this matter for an additional week.

ISSUES¹

1. Did District deny Student a free appropriate public education by failing to make an appropriate offer of placement and services in the individualized education program developed on November 19, 2014, by failing to offer: (a) home-to-school transportation; (b) appropriate services to address Student sleeping at school; and (c) appropriate occupational therapy services?

2. Did District deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on January 22, 2015, by failing to offer: (a) appropriate placement and services to address Student's behaviors of elopement, physical aggression, and property destruction; and (b) appropriate services to address Student sleeping at school?

3. Did District deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on May 5, 2015, by failing to offer appropriate placement and services to address Student's behaviors of elopement, physical aggression, and property destruction?

4. Did District deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on May 20, 2015, by failing to offer appropriate placement and services to address Student's behaviors of elopement, physical aggression, and property destruction?

5. Did District deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on September 23, 2015, by failing to offer:

¹ For clarity of explanation, the issues have been clarified to include the specific sub-issues raised in the complaint and presented at hearing. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

(a) appropriate placement and services to address Student's behaviors of elopement, physical aggression, and property destruction; and (b) offer appropriate services to address Student sleeping at school?

6. Did District deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on February 18, 2016, by failing to offer: (a) appropriate placement and services to address Student's behaviors of elopement, physical aggression, and property destruction; and (b) appropriate services to address Student sleeping at school?

7. Did District deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on June 3, 2016, by failing to offer: (a) appropriate placement and services to address Student's behaviors of elopement, physical aggression, and property destruction; and (b) appropriate services to address Student sleeping at school?

8. Did District deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on September 26, 2016, by failing to offer: (a) appropriate placement and services to address Student's behaviors of elopement, physical aggression, and property destruction; and (b) appropriate services to address Student sleeping at school?

9. Did District deny Student a FAPE by failing to make an appropriate offer of placement and services in the IEP developed on March 2, 2017, by failing to offer: (a) appropriate placement and services to address Student's behaviors of elopement, physical aggression, and property destruction; and (b) appropriate services to address Student sleeping at school?

SUMMARY OF DECISION

This decision finds that District denied Student a FAPE by not offering Student home to school transportation to Student's school of choice, where District knew that

Student needed transportation as a related service, but never made a clear IEP offer of transportation to either her school of choice or her home school. This case is distinguishable from cases in other jurisdictions holding that a district may enforce a facially-neutral policy of requiring parents to transport children as a condition of enrolling them in a school of choice, because the Student in those cases had an IEP clearly offering the transportation necessary to provide a FAPE.

District denied Student a FAPE in Student's November 14, 2014 IEP by failing to provide Student appropriate occupational therapy to address her needs with respect to regression of her writing skills, and increased sensory behaviors of licking non-food objects and picking her nose and gums. District had previously replaced Student's direct occupational therapy services with consultation between the occupational therapist and staff, based on the incorrect belief that Student would continue to make progress without direct occupational therapy.

District denied Student a FAPE in Student's IEP's on and after September 23, 2015, by: (1) failing to change Student's existing IEP to offer Student appropriate placement and services to address Student's behaviors of elopement, physical aggression, and property destruction, where Student was not making progress on her behavioral goals; and (2) failing to assess Student's medical needs or offer any services to address Student's sleeping for as much as four hours out of her six-and-a-half hour school day.

As a remedy, this decision awards Parents reimbursement for past tuition and travel to an out-of-state non-public, non-sectarian school at which Parents placed Student prior to the filing of the complaint, and for tuition and travel costs incurred from the filing of the complaint through August 2017.

FACTUAL FINDINGS

1. Student at the time of filing was a 16-year-old 11th grader placed by her Parents in a residential treatment center in Texas. Parents at all times relevant to this decision resided within District's boundaries.

2. Student was born with Down syndrome, was subsequently diagnosed with autism, and was eligible for special education under the categories of intellectual disability and autism. Student had additional medical diagnoses including cognitive impairment, severe mood disorder/intermittent explosive disorder, attention deficit and hyperactivity disorder, mixed personality disorder, and sleep apnea. Student was working towards a high school certificate of completion followed by transitional vocational and life-skills training, rather than a regular high school diploma. Student had been treated by psychiatrists since she was three years old. She began exhibiting maladaptive behaviors in school when she was seven, and aggressive behaviors in sixth grade.

FEBRUARY 3, 2014 ANNUAL IEP

3. Student's eighth grade 2014 annual IEP team meeting was held on February 3, 2014, when Student was 13 years old and attending District's South Lake Middle School. Student's IEP described her as generally sweet and lovable, with a good sense of humor. She had significantly below average general intellectual functioning and global deficits in adaptive behavior that adversely affected her educational performance and required special education. Student was in a special day class where she received a modified, functional curriculum focused on daily living and vocational skills.

4. Student exhibited strength in reading, but writing was her least favorite activity. She required consistent supervision and prompting to produce work and make progress on her goals, and had a one-on-one behavior tutor throughout the school day.

Student responded best when given control over her environment by being offered choices, and being allowed to choose the order to perform her tasks.

Behavioral Issues

TARGET BEHAVIORS

5. A functional analysis assessment in 2009 found that Student had engaged in several behaviors that impeded her learning and that of others. A behavior intervention plan was developed and included in Student's IEP, and implemented by Student's behavior tutor, teacher, and classroom staff. The plan had been most recently reviewed and modified in February 2013. It defined and targeted for modification the following four target behaviors: (1) Physical Aggression: hitting with a closed fist, slapping with an open hand, kicking her leg towards another person, throwing objects in the direction of another person, pushing or choking another person, or pulling clothing/jewelry from another person; (2) Property Destruction: clearing work space by pushing materials to the ground, knocking over items, and ripping down posters and other decorations off the wall; (3) Eloping: leaving an assigned area without seeking adult approval or leaving an assigned area when directed to stay; and (4) Mouthing Objects: taking any non-staff approved non-food item and placing it in her mouth, or licking objects not intended for the mouth.

6. To address Student's target behaviors, Student's IEP team developed goals to reduce the frequency of Student's target behaviors and a behavior intervention plan that provided strategies to be used by Student's classroom team to achieve the IEP's behavior goals. As Student's eighth grade teacher, Courtney Belzano, testified, the IEP team's ultimate goal was to extinguish and replace Student's target behaviors, not merely to find ways to manage them.

7. As part of the behavior intervention plan, Student's behavior tutor tracked the frequency of Student's four target behaviors, recording them every day as they

occurred. For Student's IEP, her behavior intervention case manager prepared a review of the effectiveness of Student's behavior intervention plan, based on the frequency of Student's target behaviors. The review compared frequency in three periods: March 2009, December 2012 to January 2013, and November 2013 through January 2014.

8. In the first four years of Student's behavior intervention plan, Student's target behaviors of eloping, physical aggression, and mouthing objects had decreased markedly. In March 2009, Student eloped on average 42 times per day, engaged in physical aggression 29 times per day, and mouthed objects 33 times per day. Property destruction was not a target behavior in 2009. When measured from December 2012 through January 2013, these behaviors had been reduced to where Student was eloping an average of five times per week, engaging in physical aggression three times per week, and mouthing objects four times per week. She also engaged in acts of property destructions even times per week.

9. Between November 2013 and January 2014, the average incidence of Student's target behaviors was either the same or had increased over the prior year. Between November and December 2013, prior to winter recess, Student eloped four times per week, engaged in physical aggression nine times per week, mouthed objects seven times per week, and engaged in acts of property destruction three times per week. In January 2014, following the winter recess, Student eloped five times per week, engaged in physical aggression 15 times per week, mouthed objects 10 times per week, and engaged in acts of property destruction seven times per week. Student's classroom team believed that some or all of the January increase in Student's target behaviors was a reaction by Student to a change of her home caregiver.

10. Student's behavior intervention case manager concluded that Student's existing behavior intervention plan continued to have a positive effect on her target behaviors and recommended that it be maintained. She recommended that the classroom team continue behavior intervention strategies staff had found effective, and

reevaluate any strategies that were no longer effective. She also recommended that Student's classroom team continue to closely monitor the areas of physical aggression and property destruction, which had increased after the 2013-2014 winter recess. She did not recommend any changes to Student's behavior intervention plan to address the increase in target behaviors.

11. At the February 3, 2014 IEP team meeting, Student's IEP team decided to continue her behavior intervention plan, and agreed to prepare a revised plan. The IEP team agreed to redefine the target behaviors by developing an intensity scale for each target behavior to better track and describe Student's behaviors.

PICKING AT NOSE AND GUMS

12. In fall 2013, Student began picking at her nose and gums, sometimes until they bled, both at home and at school. Parents and the other members of the IEP team discussed this self-injurious behavior and agreed that it appeared that Student was engaging in the behavior to obtain intense sensory input. Ms. Belzano and Parents did not think the picking behavior was then impeding Student's learning. Parents and the IEP team decided not to formally track this behavior, but to instead collect data informally and begin formal data collection if the self-injurious behavior became more of a concern or pervasive.

MEDICAL TREATMENT AND MEDICATIONS FOR BEHAVIOR

13. Since the fall of 2012, Student had been under the care of her private pediatrician, Rudolf Brutoco, M.D., a highly qualified pediatrician specializing in behavioral and developmental medicine. To treat Student's attention issues, behavioral dysregulation, hormonal imbalance, and tendency to gain weight as a side effect of some of her medications, Dr. Brutoco prescribed a complicated "cocktail" using at least seven medications. Dr. Brutoco periodically changed the medications used, or adjusted

their doses, in response to increases or decreases in the frequency or intensity of Student's behaviors. The IEP listed Student's then-current medications. Parents regularly provided District a list of the medications Dr. Brutoco prescribed, and the quantities and times they were administered each day, so that District was aware of changes in Student's behavior medications. District kept Parents informed of Student's in-school behaviors, and they in turn passed that information to Dr. Brutoco, as well as reports of Student's in-home behaviors.

SLEEPING IN CLASS

14. In January 2014, Student began to fall asleep occasionally in class. The behavior intervention case manager's review noted this behavior, and that it would be discussed with Parents. However, the record does not show that Student's sleeping in class was discussed at Student's February 3, 2014 IEP team meeting. District staff attributed Student's sleeping in class to her behavior medications or lack of sleep at home.

IEP Goals

15. The February 3, 2014 IEP gave Student 16 new goals: one to improve her physical fitness, three in use of speech and language to express herself and interact with peers, two to improve her independence in completing work and transitioning to non-preferred activities, one to improve her ability to correctly pay for items, one to learn to use a calculator to perform addition or subtraction of dollar amounts, one to improve her understanding the relationship between cause and effect, one spelling goal, and six goals in managing behavior and coping strategies.

16. Student's behavioral goals to be achieved by February 3, 2015, were:
(i) reduce the frequency of her aggression towards others to no more than one occurrence per week, for four consecutive weeks, as measured by data collection; (ii)

reduce the frequency of her property destruction to no more than two occurrences per week, for four consecutive weeks, as measured by data collection; (iii) reduce the frequency of elopement to zero occurrences per week, for four consecutive weeks, as measured by data collection; (iv) make an appropriate verbal request to gain access to a desired object rather than engage in maladaptive behavior, an average of 80 percent of opportunities across four consecutive weeks as measured by data collection; (v) instead of eloping, make an appropriate verbal request to escape an activity or area, an average of 80 percent of opportunities across four consecutive weeks as measured by data collection; and (vi) when given a choice between two offered and previously taught coping strategies, engage in the coping strategy independently instead of maladaptive behavior, 50 percent of opportunities across two consecutive weeks.

Occupational Therapy Services Changed from Direct to Consultative

17. The IEP recorded Student's present levels of functional performance in the areas of gross and fine motor development. She used a tripod grasp and maintained appropriate pressure on a pencil. Student's cooperation, motivation, and interest in doing writing activities/assignments varied. Student produced better work in a structured environment, with one-on-one instruction and writing activities of her own choice. She needed frequent verbal prompts to complete a handwriting assignment and could take up to 30 minutes to write a five to seven-word sentence. Student could copy from a paper on her desk, as well as from the board at the front of the class, five to seven-word sentences with 75 percent accuracy.

18. Student was working on writing her spelling words, personal information and up to four sentences, working on quality of work rather than quantity. Her writing skills were functional for participation in her school program. She could write all the uppercase letters of the alphabet and 25 of 26 lowercase letters with correct starting point and sequence. Student had some difficulty forming the letter "g". Student made

case errors within words, but the legibility of her writing samples was not impacted. Student wrote numbers 1-10 with correct starting point and formation. Student could write second to third grade letter size (based on the Handwriting Without Tears program) with one-third-inch lined paper. Student demonstrated the ability to write letters and words within one-eighth-inch of a line with 70-75 percent accuracy. Her spacing between words was at 75 percent accuracy with visual supports.

19. Student's occupational therapist, Debra Cornell, recommended that Student's occupational therapy services be reduced from 30 minutes per week of classroom collaborative occupational therapy, during which the occupational therapist worked directly with Student, to 60 minutes per month of occupational therapy consultation services during which the occupational therapist would consult with Student's teacher and support staff on activities to perfect Student's handwriting skills. Ms. Cornell based her recommendation on Student having acquired the handwriting skills she needed to function in the classroom. Student could write in a one-third of a line size, and write upper and lower-case letters. Student's writing could be read by others. Student could copy both from the classroom board and from books in front of her. Student could carry-over learned skills from one activity to another in the classroom. In making her recommendation to reduce Student's occupational therapy, Ms. Cornell did not discuss whether Student might need occupational therapy to address the recent increase in Student's target sensory-seeking behavior of mouthing inappropriate objects, or the recent development of Student's new sensory-seeking behavior of picking at her nose and gums.

20. Occupational therapy consultation twice monthly for 30 minutes was included as a supplementary service or support in Student's IEP. Student's IEP did not include any specific occupational therapy goals. To support other goals requiring writing, the supplementary services and supports in the IEP included providing Student daily practice with classroom staff for development of fine motor skills, such as

handwriting and coloring activities with monitoring and consultation by the occupational therapist. To support Student's need for sensory input to maintain attention and participation in the classroom, Student's classroom team was to provide sensory strategies such as movement breaks, hand fidgets, oral stimulation (currently chewing on white paper towels), and sitting/bouncing on a gym ball. The occupational therapist was also to support any equipment needs, accommodations, adaptations or modifications Student might need for daily participation in school activities. Parents agreed to the proposed change in occupational therapy services.

Transportation Not Provided to Home School

21. Parents requested home-to-school transportation for Student, which the IEP team declined to provide on grounds that Student was attending her home school, and therefore was not entitled to transportation.

22. Parents consented to all parts of Student's February 3, 2014 IEP.

FEBRUARY 11, 2014: REVISED BEHAVIOR INTERVENTION PLAN WITH INTENSITY LEVELS

23. Following Student's IEP team meeting, Student's behavior intervention plan was revised. For reasons not explained, the target behavior of mouthing inappropriate objects was deleted. Physical aggression, property destruction, and eloping were redefined, with intensity levels assigned to each behavior. The new descriptions for tracking of Student's targeted behaviors were:

(1) Elopement: Leaving an assigned area outside of class without seeking adult approval or leaving an assigned area when directed to stay.

Level 1: Walking to outside area of classroom without permission (e.g., walking to a preferred area).

Level 2: Running outside of classroom without staff permission (e.g., away from staff, down stairs).

Level 3: Running outside of classroom into an area that is a threat to safety (e.g., streets, parking lots).

(2) Physical Aggression: Pulling hair, hitting with a closed fist, slapping with an open hand, kicking her leg towards another person, throwing objects in the direction of another person, pushing another person, pulling clothing/jewelry from another person, grabbing.

Level 1: Light contact (e.g., slap, kick).

Level 2: Hair pulling, grabbing, pushing, impact that leaves marks, (e.g., not letting go of hair or clothes).

Level 3: Any above physical aggression that lasts more than 10 minutes that may also require emergency procedures.

(3) Property Destruction: Clearing workspace by pushing materials on ground, knocking over items, ripping down posters and other decorations off the wall.

Level 1: Swiping items, ripping her paper, throwing small objects.

Level 2: Destroying classroom property (posters from wall, breaking items, other things that do not pose a danger).

Level 3: Flipping, throwing, pushing large/heavy objects that endanger her or others, or engaging in property destruction

for more than 10 minutes; may also require emergency procedures.

MARCH 2014: PARENTS ENROLL STUDENT IN A DISTRICT SCHOOL OF CHOICE INSTEAD OF HER HOME SCHOOL

24. In March 2014, Parents applied, under District's Open Enrollment Board Policy – 5111, for Student to attend ninth grade at Northwood High School as a school-of-choice in the 2014-2015 school year, instead of her school of residence, Woodbridge High School. Parents did not contend that the Woodbridge program was inappropriate. Both schools offered a similar life-skills program providing pre-vocational training for future employment to students with moderate to severe disabilities. Parents preferred the program at Northwood because it was more established, and because Student had friends at Northwood.

25. District's open enrollment board policy was, as its name suggests, a policy adopted by District's board in 1977, and last revised in 2002. The policy allowed parents and students to elect to attend any school in the District, if, among other things, space was available at the chosen school, and the parents agreed to be responsible for transportation to the chosen school. These conditions were met, and District granted Parents' request to enroll Student at Northwood High School for the 2014-2015 school year.

MAY 5, 2014 TRANSITION IEP TEAM MEETING

Occupational Therapy

26. Student's IEP team met on May 5, 2014 to discuss Student's upcoming transition to high school. Parents requested that Student again receive direct one-to-one occupational therapy services, instead of the teacher and staff consultative services provided in Student's February 3, 2014 IEP. District declined to provide such services

without an assessment recommending them, and agreed to include an occupational therapy assessment in the assessment plan for Student's upcoming triennial evaluation.

Transportation Not Provided to School of Choice

27. Parents requested that District provide Student home-to-school transportation to Northwood, explaining that this would make their lives much easier. District Program Specialist Karen Gibbs explained to Parents that District did not transport students to a school of choice. She asked if Parents instead wanted Student to attend her home school, Woodbridge, since transportation to Northridge was not provided, and Parents declined. Ms. Gibbs testified at hearing that District would have provided Student transportation to Woodbridge because she qualified for transportation due to her cognitive impairment, but the IEP does not reflect that District offered Student placement at Woodbridge with transportation. No evidence was presented why, three months before, Student's February 3, 2014 IEP had declined to provide Student transportation to South Lake Middle School on grounds that it was her home school.

Falling Asleep in Class

28. The IEP team discussed that Student had been falling asleep in class an average of approximately one hour per day. Student would fall asleep at various times, including during very preferred activities like eating and listening to stories. Student's teacher and behavior tutor would prompt Student to stay awake but allow her to sleep if she fell asleep. The IEP team made no changes to Student's IEP or behavior plan to address Student's sleep behavior, and took no other immediate action to evaluate the cause or possible solutions for the behavior.

29. Parents consented to the terms of the May 5, 2014 IEP, except that they did not consent to District's refusal to provide transportation to Northwood High School for the 2014-2015 school year.

JUNE 2014 BEHAVIOR INCIDENTS

30. Student's target behaviors tended to cycle up and down in frequency and intensity. In June 2014, Student had several intense behavior incidents. On June 4, 2014, she was playing at home with her nanny when without warning she began pulling the nanny's hair and punched her in the eye. The nanny escaped from Student and locked herself in the bathroom while Student pounded on the door and screamed. When the nanny emerged, Student again became violent, pulling the nanny's hair, hitting, and throwing objects from the kitchen counters. The incident lasted a long while, and left the nanny physically hurt and emotionally distraught.

31. On June 12, 2014, Student at school had what her teacher called a "huge Level 3 behavior" of physical aggression lasting 40 minutes. Student's behavior began with her pulling her teacher's hair while they were engaged in a preferred task. Student had a very difficult time calming down and screamed throughout the episode. At one point, it looked as though she lost all the blood flow to her face and her skin was purple. Teacher and staff monitored her breathing and made sure she was safe. They used environmental blocks and evading techniques to maintain both Student's safety and their own. Student's teacher was concerned that Student's extreme behaviors were occurring even during preferred activities, and asked Parents to let her know if they had any additional insight as to anything internal or otherwise that might be causing her anger or frustration.

32. On June 19, 2014, Student was transitioning to a preferred activity of playing games on an iPad tablet when she suddenly swiped her milk carton off the table and hit her iPad. She began screaming and attempting to grab and hit her behavior

tutor and teacher, knocked items off tables, and attempted to run out of the classroom but was blocked by staff. She de-escalated briefly with verbal and physical prompting, then re-escalated. When she began pulling on window curtains and attempting to climb onto a tall lab table, her teacher decided to perform an emergency intervention for Student's safety by having the teacher, the behavior tutor, and two other trained staff physically place Student in a prone containment by gently guiding Student to the floor and immobilizing her arms and legs. Student continued to scream for five minutes, then calmed down and was slowly released. This episode lasted approximately 25 minutes.

33. On August 4, 2014, Dr. Brutoco modified Student's medications. Parents notified District of the change.

2014-2015 NINTH GRADE SCHOOL YEAR

34. Student entered ninth grade at Northwood High School. Her teacher for most subjects was Elise Flocken, who had also been Student's extended school year teacher. Ms. Flocken was a highly qualified and experienced special education teacher. Student's modified pre-vocational curriculum included life skills (daily living and vocational), functional reading, functional math, social skills, adapted physical education, and art. District did not provide transportation, and Student was transported to and from school by Parents.

Behaviors, Fall 2014

35. Student exhibited minimal targeted behaviors from the start of school through mid-November 2014, and on only one occasion picked at her gums until they bled. Student did frequently fall asleep at school. When she did so, her teacher and behavior tutor allowed her to nap undisturbed. When Student awoke, they would ask Student to complete the task that she was working on before moving towards the next activity.

36. School nurse, Julia Monarch, observed Student's sleep behavior in September 2014. Based on Student's relaxed posture, deep and rhythmic respiratory pattern, and snoring, Ms. Monarch concluded that Student was genuinely asleep. Ms. Flocken and Student's behavior tutor told Ms. Monarch that on most days Student took a 30-minute nap while sitting at her desk. This was usually in the morning, but could occur at different times during the day. Ms. Flocken and Student's behavior tutor thought that Student slept because she was tired and was not sleeping or pretending to sleep to avoid non-preferred activities. Teachers and staff were allowing Student to sleep, and when Student awoke on her own, she was productive and cooperative. Ms. Monarch spoke with Mother, who confirmed that Student had sometimes slept in class in middle school. Mother reported that Dr. Brutoco had recently discontinued one of Student's medications that was a stimulant, and as a result Parents had noticed a marked decrease in Student's aggressive behaviors at home. Parents told Ms. Monarch that it was all right to let Student sleep in class. Teachers and staff continued to allow Student to sleep in class. Ms. Monarch did not contact Dr. Brutoco or otherwise follow-up on Student's sleeping in class.

37. On November 13, 2014, Dr. Brutoco modified Student's medication schedule, eliminating a drug used to limit weight gain and reducing a drug used to maintain attention. On November 14, 2014, Parents forgot to give Student some of her morning medications, some of which were directly related to her ability to control her behavior. In school that day, Student engaged in Level 1 target behaviors of property destruction and aggression. Student kicked over a chair at break, and swiped her food off her chair at lunch. Student also hit her math, reading and life skills teacher, Vince Green. When Student calmed down, she told Ms. Flocken and Mr. Green that she had a headache.

38. Ms. Flocken emailed Parents to tell them about Student's behavior. Mother responded the following day, and apologized for failing to give Student her morning medications on November 14, 2014.

Occupational Therapy Assessment

39. On September 9, 2014, Mother signed an assessment plan for District to assess Student's occupational therapy needs. Mother stated that her areas of concern were Student's handwriting and mouthing of objects. The assessment was to look at Student's needs in motor development, including coordination of small and large muscles and perceptual skills, and in sensory processing.

40. District occupational therapist Ju-Chin Chou conducted Student's occupational therapy assessment and prepared a written report dated September 17, 2014. To prepare the report, Ms. Chou reviewed Student's records, interviewed Ms. Flocken and Mother via email, and conducted a non-standardized ecological/functional assessment of Student's personal care, mobility, and functional fine motor and visual motor skills. Ms. Chou also obtained an adolescent/adult sensory profile of Student based on a questionnaire completed by mother. Mother emailed her concerns to Ms. Chou. She was concerned that Student had not shown progress in the areas of handwriting, mouthing of objects and paper, and oral and tactile sensory seeking behavior in the past five years.

41. Ms. Chou reviewed five previous District assessments of Student's occupational therapy needs, conducted between 2006 and 2012. Each had recommended one to two weekly sessions of direct occupational therapy services. As of Student's February 3, 2014 IEP, District had changed Student's occupational therapy from 30 minutes a week of direct service to 60 minutes a month of consultation services. In her most recent previous assessment in 2012, Student scored in the very low range in the Beery-Buktenica Developmental Test of Visual Motor Integration's measure of how

her visual perceptual and fine motor control systems coordinated with one another. She nonetheless at that time could accurately copy most uppercase and lowercase letters. Her writing skills were greatly improved in 2012 over prior years, but Student continued to become non-compliant and aggressive when asked to write, and could take as long as five minutes to write a four-word sentence. Student in 2012 also had some problems with body awareness, balance, and motion.

42. Student was unable to complete standardized tests, and Ms. Chou assessed her through observation of Student performing classroom tasks involving fine motor and visual motor skills. Ms. Chou observed that Student could on her own write her name in correct orientation and write single letters and numbers. With physical assistance, Student could correctly space her work on paper. Student refused to attempt to copy or write single words, but documents reviewed by Ms. Chou indicated that Student in the past had demonstrated the ability to copy and write single words and a three-to-five-word sentence with physical assistance. Student was resistant to writing tasks. She was unable to fill in a form or application, or complete written work on time. She completed written work by dictating to classroom support staff, who wrote down her answers. Student was unable to use a computer or other keyboard device to complete written work.

43. Ms. Flocken confirmed that Student could complete worksheets that required circling answers, writing numbers, and tracing letters. Occasionally, Student would participate in writing for an assignment. If more than a little writing was to be completed, Student would not write, but instead dictate responses to an adult.

44. At hearing, Parents offered samples of Student's handwritten work at District schools from January 2012, December 2013, and February 2015, and at Bayes from January 2017. Mother testified that the samples from 2012-2015 represented all of Student's written work Parents had received from District. The form of some of the individual letters varies slightly from sample to sample, so it is difficult to know the level

of assistance provided to Student on each sample. However, the handwriting in the samples showed no improvement between 2012 and 2015.

45. Ms. Chou observed Student ask for paper towels to fold and place in her mouth to bite on. Classroom staff reported that Student did this as a calming strategy to regulate her emotional state. Ms. Chou also observed Student licking non-food items, such as glue and paint. Ms. Chou's report did not mention Student's behavior of picking at her nose or gums.

46. Ms. Chou did not include any specific recommendations in her occupational therapy assessment. She concluded that Student might continue to need occupational therapy services, but Student's IEP team would determine the appropriate needs and therapy services.

November 19, 2014 IEP Team Meeting

47. Student's IEP team met on November 19, 2014 to review Ms. Chou's occupational therapy assessment. Parents, Student's teachers Ms. Flocken and Mr. Green, Ms. Chou, school psychologist Casey Kramer and District administrator Eric Keith attended the meeting.

48. The meeting began with a discussion of Student's behaviors. Parents said Student had a new afterschool nanny, and was demonstrating more aggressive behavior at home with the change. Dr. Brutoco was reducing Student's dose of a medication used to control mood swings. Parents also reported that Student had been sleeping more at home. Ms. Flocken said that Student was falling asleep in class during preferred activities and that she did not think that Student was using sleep to avoid tasks. The IEP team took no action with respect to Student's sleep behavior.

49. Ms. Chou discussed Parents' occupational therapy concerns. Student was frequently chewing on paper at home, and was chewing on paper approximately once per week at school. At home, especially around bed time, Student frequently picked her

gums until they bleed. At school, Student also picked her gums, but had only once picked them until they bled. The IEP and record do not reflect any discussion at the IEP meeting of whether or how to address these behaviors.

50. Parents were also concerned that Student's writing skills had not improved; that she wrote her name at age 14 the same as she had when she was six. The IEP notes state that Ms. Chou "discussed why it is that her skills appear as if they had not improved." More specifically, Ms. Chou told Parents that Student's writing skills had plateaued at a level equal to her abilities. Parents were concerned that Student had regressed because she used to take spelling tests and would write more. Parents asked to see Student's worksheets that required her to write in the classroom. They were told Student sometimes wrote and sometimes dictated her work to her aide, and that she would work for about 30 minutes in reading and math but after that was falling asleep.

51. Ms. Chou recommended that Student continue to receive occupational services of twice weekly consultation between the occupational therapist and Student's classroom team. She recommended that Student's IEP team review her progress at her upcoming triennial IEP in January 2015.

52. No changes were made to Student's IEP at the November 19, 2014 IEP team meeting. Parent consented to the IEP.

January 2015 Multidisciplinary Assessment

53. For her upcoming triennial IEP in January 2015, in addition to Ms. Chou's occupational therapy assessment, District assessed Student's progress and needs in the areas of health, intellectual development, social-emotional development, adaptive behaviors, academic achievement, speech and language, motor development, and transition from high school to an adult transition program teaching daily living skills and vocational skills. All these assessments, including Ms. Chou's occupational therapy

assessment, were compiled in a Multidisciplinary Assessment dated December 2014, but actually completed in January 2015 for review by Student's IEP team.

HEALTH

54. School nurse Julia Monarch completed Student's health assessment. Student weighed 142 pounds, which qualified her as obese at her height of four feet, eight inches. She needed hearing aids and glasses, but would not tolerate either. The health assessment noted that Student often had bouts of extreme fatigue. As of January 2015, staff allowed her to nap at school for about 45 minutes almost daily to allow her to refresh and complete her school day. Student's behavior tutor was keeping a log of the dates and times when Student fell asleep to provide feedback to Parents and Dr. Brutoco.

55. Mother emailed District on January 19, 2015 with current health information regarding Student. Because Student's behaviors at school were "180-degrees from what we saw in middle school," Parents were working with Dr. Brutoco to continue to phase Student down and hopefully off the behavioral medications she was taking, both of which tended to cause weight gain.

SLEEP APNEA DIAGNOSIS

56. In January 2015, Student participated in a sleep study that found Student had sleep apnea, a sleep disorder, sometimes associated with weight gain, which caused Student to repeatedly stop breathing while she slept, depriving her of oxygen and disrupting her sleep. During the sleep study, Student experienced 17 episodes of apnea per hour. Her ear, nose and throat doctor recommended that she have a tonsillectomy to reduce the incidence of sleep apnea.

INTELLECTUAL AND SOCIAL-EMOTIONAL DEVELOPMENT, AND ADAPTIVE BEHAVIORS

57. School psychologist AnnMarie Simmons assessed Student's intellectual and social-emotional development, and adaptive behaviors. Ms. Simmons assessed Student's intellectual development using the Comprehensive Test of Nonverbal Intelligence-2, a norm-referenced test that used pictures of familiar objects and unfamiliar geometric designs to Student's ability to categorize and reason. The test measured Student's full-scale IQ as 43, which was lower than previous tests in 2009 and 2012 that had rated Student's IQ from 49 to 52.

58. Ms. Simmons assessed Student's social-emotional status using teacher rating forms for the Autism Spectrum Rating Scales. Student received elevated or very elevated scores on all scales, indicating that she likely had symptoms associated with autism spectrum disorder. Student's score on the sensory sensitivity scale was particularly high, indicating that Student tended to overreact to certain experiences sensed through touch, sound, vision, smell, or taste. Student also exhibited: (i) a limited willingness and capacity to successfully engage in activities that develop and maintain relationships with others; (ii) spoken communication that was repetitive, unstructured, or unconventional; (iii) apparently purposeless and repetitive behaviors; (iv) difficulty tolerating changes in routine, activities, or behavior; (v) disorganization and trouble focusing attention on one thing while ignoring distractions, deficits in motor/impulse control and a tendency to be argumentative; and (vi) difficulty using verbal and non-verbal communication appropriately to initiate, engage, in, and maintain social contact.

59. Ms. Simmons used responses from Mother and Ms. Flocken to the Adaptive Behavior Rating System-Second Edition, to evaluate Student's skills in the home and school setting in communication, community use, functional academics, school living, health and safety, leisure, self-care, self-direction, and social functioning. Mother and Ms. Flocken both scored Student's skills as very low in all areas, except that

Mother scored Student “low” in the area of leisure, a measure of skills needed for playing with others, engaging in recreation at home, and following rules in games.

ACADEMIC ACHIEVEMENT

60. Ms. Flocken administered the Woodcock Johnson III Normative Update to Student to measure her academic achievement. When compared to others at her grade level, Student’s standard scores were very low in broad reading, brief reading, broad mathematics, math calculation skills, brief mathematics, broad written language, written expression, and brief writing. Her fluency with academic tasks and her ability to apply academic skills were both within the very low range.

61. Student performed at kindergarten and first grade levels in math and writing, respectively. She showed comparative strength in reading, where she performed at third grade levels, and particular strength in letter-word identification, where she performed near her grade level in her ability to identify individual letters and read a list of words of increasing difficulty.

ADAPTED PHYSICAL EDUCATION

62. Student’s adapted physical education teacher Vanessa Fadden assessed Student’s gross motor ability and needs. Student’s adapted physical education class met every other day for a total of 15 hours per month. Student frequently missed adapted physical education, either because she was asleep when the class was scheduled to start, or because she was unwilling to make the long walk from her regular classroom to the physical education class. When Student came to physical education class, she participated with 1:1 assistance from staff. During group games Student preferred to perform the task by herself or with staff, rather than with peers.

63. Student performed some gross motor abilities below average for female adolescents her age and some gross motor abilities at the level of her same age peers.

She showed strengths in object control skills such as striking, kicking, dribbling, and rolling. She also showed strengths in locomotor skills such as galloping, leaping and sliding. Student performed poorly in running, throwing and catching, and exhibited some regression in her abilities in those areas. On the California Fitness Test, Student scored below the "Healthy Fitness Zone" in the areas of cardiovascular endurance, core strength, upper body strength, shoulder flexibility and body mass index.

SPEECH AND LANGUAGE

64. District speech pathologist Andrea McGehee assessed Student's speech and language skills. Student presented with below average speech production and articulation skills. She was 80 percent intelligible to Ms. McGehee as a skilled listener speaking in a known context, but significantly less intelligible to unfamiliar communication partners or when the context of the conversation was unknown. Student had a limited phonemic inventory of sounds and continued to exhibit difficulties with /r/, /s/ and /z/ sounds.

65. Student had below average receptive language skills, testing at the fourth percentile. Student had difficulty comprehending a variety of sentences, including: prepositional phrases, relative clauses, compound sentences, subordinate clauses, negation, and passive sentence. Student could follow simple commands and answer simple questions.

January 22, 2015 IEP Team Meeting

66. Student's annual and triennial IEP team meeting was held January 22, 2015. Mother, teachers Ms. Flocken and Mr. Green, behavior specialist Kim Kapur, school psychologist Ms. Simmons, occupational therapist Ms. Chou, speech and language pathologist Ms. McGehee, adapted physical education teacher Ms. Fadden, school nurse Ms. Monarch, and a District representative attended.

67. The IEP team reviewed the Multidisciplinary Report. The team agreed that Student continued to qualify for special education under the categories of autism and intellectual disability.

BEHAVIOR PLAN

68. Student's IEP acknowledged that Student's behavior impeded her learning or that of others, and provided for behavioral goals and a behavior intervention plan. The IEP team reviewed a proposed behavior plan prepared by Ms. Kapur and dated January 22, 2015. The plan included charts prepared from data collected by Student's behavior tutor during 2014-2015 school year to date showing the frequency of Student's target behaviors. Student demonstrated significant progress in reducing these behaviors. In January 2014, Student had eloped an average of five times per week, engaged in physical aggression 15 times per week, and engaged in acts of property destruction seven times per week. In January 2015, Student had eloped an average of 0.75 times per week, engaged in physical aggression 0.5 times per week, and engaged in acts of property destruction one time per week. None of Student's incidents of target behavior in the 2014-2015 school year to date had exceeded Level 1.

69. Student's reduction of target behaviors was so significant that Ms. Kapur considered whether Student's behavior intervention plan should be discontinued. However, Ms. Kapur ultimately concluded that a behavior intervention plan was still warranted, due to the history of Student's engagement in target behaviors, and the potential severity of the behaviors.

70. Ms. Kapur proposed that Student's updated 2015 behavior intervention plan contain the same operational definitions of target behaviors and Levels 1, 2 and 3 as Student's 2014 behavior intervention plan.

71. As of February 2015, Student's classroom team found that the following interventions from Student's 2014 behavior intervention plan were most successful at

managing her target behaviors: (i) having a written schedule of the daily activities/expectations; (ii) ripping paper or paper towels; (iii) choosing the order in which to complete tasks; (iv) "first, then" language given with a visual prompt; (v) using the language "I understand, we can pick between x and y" (guided choice); (vi) task analysis for longer assignments or academics that need to be broken down into steps; and (vii) chunking work into smaller components (for example, breaking the work into three parts and having frequent reinforcement after the completion of each part).

72. Student's classroom team had faded and discontinued several intervention strategies because they were no longer effective. These included: (i) working outside the classroom as part of a guided choice (change location options); (ii) reading social stories every morning; (iii) "chance prize" behavior contract and rewards; and (iv) using a timer.

73. The proposed behavior intervention plan hypothesized that, for Student, the function (purpose) of each of her target behaviors was to obtain social negative reinforcement from another person in the form of the person allowing Student to escape from a loud or non-preferred environment, or from a difficult or non-preferred task. The plan called for staff to reinforce Student's use of acceptable but functionally-equivalent replacement behaviors of making verbal requests to escape from the loud or non-preferred environment, or the difficult or non-preferred task, instead of eloping, becoming aggressive, or destroying property.

74. The proposed behavior intervention plan provided Student's classroom team a detailed description of proactive and reactive strategies for reducing the incidence of Student's target behaviors, and detailed instructions for managing target behaviors if they occurred. For example, as a proactive strategy to reduce the likelihood that Student would use elopement to get staff to let her escape from loud or non-preferred environments, staff was instructed to continue to reinforce Student's use of functional communication to escape from the environment. The plan called for any appropriate verbal request by Student to escape an environment to be

reinforced. Staff was to use the natural reinforcer and allow Student a short break from the environment - she could leave the room or area and go to a quieter place. If she was working on a task, Student would take the task with her and work on it the quieter environment. She would not be given access to preferred items during that time. After the break, staff was to encourage Student to return to the original environment, and if she was receptive, use priming to transition her back to the environment at the end of the break. Breaks were to be brief: ideally between one and three minutes.

75. Another suggested proactive strategy to reduce the incidence of elopement was to modify the environment, if possible. For example, to seat Student in the quietest area of the room, away from peers or items that might be loud. A third proactive strategy was to offer Student a choice of a previously taught coping strategy; for example, deep breathing or engaging in a sensory activity such as ripping and shaking strips of paper.

76. As one of several reactive strategies detailed to reduce the likelihood that Student would use physical aggression or property destruction to get staff to let her escape from a difficult or non-preferred task, staff was instructed to implement "escape extinction." Staff was instructed not to allow Student to escape the task once she engaged in a target behavior. If possible, staff was to prompt Student through the task, even if it was a reduced portion of the task. If immediate prompting was not feasible for safety reasons because Student's behaviors were escalated and/or she was engaging in physical aggression at a high rate or intensity, staff was still required to follow through with the task demand (even if only a small portion of the original demand) after Student calmed down to a manageable level - it was imperative not to allow escape.

77. If Student appropriately requested a break during the task (before physical aggression occurred), staff was to grant the break, then require that Student return to the task and complete it when her break was over. If Student requested a break following

the onset or during the occurrence of physical aggression, staff was instructed, "DO NOT grant the request. Follow through with the task demand or at least a portion of it if possible."

78. The behavior intervention plan included no punishment-based or aversive behavior control strategies. The plan provided that staff could employ "response blocking" and physically prevent Student's physical aggression when necessary to reduce potential injury to Student or others. If staff had demanded that Student perform a task before Student attempted physical aggression, staff was to follow through with that task without delay, if possible, and prompt Student through the task, if necessary.

79. The behavior intervention plan instructed staff to manage attempts by Student to employ physical aggression to escape a task by "utilizing escape extinction after ensuring SAFETY FIRST." Staff were to: (i) move themselves or other students away from Student to decrease the chances that she would make physical contact; (ii) block, evade, and parry all attempts at aggression; (iii) limit the use of verbal and physical interaction and not give unnecessary attention to the behavior (no reprimands or soothing words) by speaking only the simple directives being used to prompt Student through the task; (iv) if possible, repeat the instruction and increase the prompt level to prompt Student through the activity; (v) if Student's behaviors continued to escalate, utilize district-approved behavior emergency procedures described in the plan; and (vi) after the emergency situation had subsided, require that Student return to the task she was originally presented with (even if only a small portion of the original demand) - it was imperative not to allow escape.

PROGRESS ON 2014 GOALS

80. The IEP team reviewed the progress Student had made over the last year on the annual goals from her 2014 IEP. Student had met 12 of her 16 goals, including all

three goals in using speech and language to express herself and interact with peers, both of her goals to improve her independence in completing work and transitioning to non-preferred activities, her goal to learn to use a calculator to perform addition or subtraction of dollar amounts, her goal to improve her understanding the relationship between cause and effect, and five of her six goals in managing behavior and coping strategies. Student had made significant progress on her remaining four goals in physical fitness, counting money to pay for items, spelling of grocery words, and reducing her target behavior of elopement. Student's elopement behavior had been reduced from five times per week to 0.75 times per week, but had not met the goal of zero occurrences.

NEW GOALS

81. Student's IEP team proposed 13 new annual goals: two functional math skills goals (counting money and using a calculator to add dollar amounts), one functional reading and life skills goal (reading package labels to identify gluten-free foods), one reading comprehension goal (comprehension of key elements in a passage of second grade text), one life skills mobility and social skills goal (learning to physically deliver messages and appropriately greet recipients), one functional writing goal (copying sentences), three behavior goals (reduce target behaviors), one cardiovascular endurance goal (walking for 15 minutes), one gross motor goal (combining two gross motor skills, such as catching and then throwing a ball), and two social pragmatics goals (inviting a peer to play, and initiating conversation and responding to peers).

82. Student's three behavioral goals to be achieved by January 22, 2016, were: (i) reduce the frequency of her aggression towards others to no more than one occurrence per week; (ii) reduce the frequency of her property destruction to no more than two occurrences per week; and (iii) reduce the frequency of elopement to zero occurrences per week.

INDIVIDUAL TRANSITION PLAN

83. Student's IEP team reviewed a proposed individual transition plan for Student's transition to adult life after school. Student's work preferences were to work alone in a clean, quiet environment. She preferred standing to sitting, and staying in one place rather than moving around frequently. Student wanted to perform to different types of work throughout her day rather than the same repetitive tasks, in a fast-paced environment under supervision. Student wanted to be shown how to do activities at work and to wear regular clothes to work as opposed to a suit, dress, or uniform. Student completed a pre-vocational interest inventory in which she showed the most interest in watering plants, feeding animals, making copies, setting tables, and cleaning homes.

84. Student's transition goals upon completion of school were to enroll in a class of interest at a local community college or adult day program to continue working on independent living skills in areas of interest, work with an adult service provider in cooperation with Regional Center and/or Department of Rehabilitation to secure suitable supported employment in a preferred work environment, and explore transportation options to reach a variety of destinations including community education, employment, and independent living options.

85. District offered Student continued placement in the life-skills program at Student's school of choice, Northwood High School, and continuation of her current services of a full-time one-to-one behavior tutor, 50 minutes per week of group speech and language, 15 hours per month of adapted physical education, 90minutes per year of career awareness services including vocational interest inventories and job exploration, and 60 minutes per month of occupational therapy consultation services.

86. The IEP team agreed to the proposed placement, services, goals, accommodations, behavior intervention plan, and individual transition plan. Parents consented to all parts of the IEP.

February-April 2015 Increase in Target Behaviors

87. In February 2015, Student began engaging more frequently in her target behaviors. On February 10, 2015, apparently upset that a preferred food item was not available for lunch, Student hit and kicked her behavior tutor, her teacher, and another staff member. After lunch, she hit her behavior tutor again, several times, for no apparent reason. This was Level 1 behavior (light contact slap or kick). The following day, again for no apparent reason, she threw a container lid at another student, pulled her behavior tutor to the ground and pulled her hair, and kicked and hit her teachers. Student's classroom team was puzzled by the increase in behaviors, because Student's school environment and program had not changed.

88. Student's target behaviors continued to escalate in frequency and intensity. On April 22, 2015, Ms. Flocken emailed Mother, "Behaviors that we have seen this month have been most intense and frequent to date. It appears to be taking longer for Student to redirect/de-escalate/move on." Ms. Flocken wrote that Student's behaviors had been inconsistent, not always with a foreseen antecedent, and not just once or twice in isolation like earlier in the school year. Ms. Flocken wrote that Student's behavior specialist had recently implemented more copious antecedent-behavior-consequence data collection to look for possible antecedents for the behavior. Staff did not recommend a formal assessment of the reasons for the increase in Student's behaviors, nor did District convene an IEP team meeting to discuss them.

May 5, 2015 IEP

89. District prepared an IEP amendment dated May 5, 2015, offering Student extended school year services and transportation to the extended school year program at District's University High School. District sent the proposed IEP amendment to Parents for their review and signature. Parents signed and returned the IEP amendment.

May 2015: Continuing Escalation of Target Behaviors

90. On May 7, 2015, Student hit her behavior tutor and hit and kicked her teacher. On May 8, 2015, while laughing and playing with a classmate, Student suddenly, without warning, threw a ball at her classmate, grabbed her classmate's hair, and pushed the classmate in the chest with her foot. On May 9, 2015, after school, Student pulled her nanny's hair and hit her nanny while the nanny was driving. On May 13, 2015, Student sat in the street and refused to get into her caregiver's car to be taken to school, then pulled her caregiver's hair badly. On May 14, 2015, while being driven home by a caregiver, Student attacked the caregiver, then fled the car into traffic. The police came and took Student to Children's Hospital of Orange County. After her Parents took her home, she became physically aggressive with them; kicking, hitting, pulling hair, and throwing games and objects.

May 20, 2015 IEP Team Meeting re: Educationally Related Mental Health Services Assessment

91. On May 13, 2015, Parents requested an IEP team meeting to discuss Student's escalating behaviors, and assessing Student for educationally related mental health services. On May 18, 2015, school psychologist Ms. Simmons emailed Dr. Brutoco a release executed by Parents authorizing the District and Dr. Brutoco to exchange educational, psychological, and medical records. Ms. Simmons explained that Student's behaviors were significantly different from earlier in the school year, and that District hoped to collaborate with Dr. Brutoco and Parents to develop a plan to support Student. Ms. Simmons wrote that District was collecting daily data on Student's behaviors to share with Dr. Brutoco to look for possible patterns related to changes in Student's medication or environment.

92. Ms. Simmons collected information from Parents about changes to Student's prescriptions since the start of the 2014-2015 school year. She collected data

from Student's teacher and behavior tutor on Student's target behaviors and changes in her environment, such as the assignment of a new behavior tutor, or deviations in routine, such as arriving late to school. Ms. Simmons prepared a chart dated May 20, 2015, showing Student's medicine changes, environment changes, and target behaviors by date from September 19, 2014, through May 15, 2015. The chart did not reveal any clear correlation between Student's behaviors and changes to her medication or environment.

93. On May 20, 2015, Parents met with Student's teacher, behavior intervention specialist and school nurse, two school psychologists, District's educationally related mental health services coordinator, District's program specialist, and a representative from Regional Center of Orange County. The IEP team discussed Student's recent incidents of physically aggressive behavior. Parents provided a brief history of Student's psychiatric treatment and maladaptive behaviors. They explained that Student's psychiatrist, Dr. Brutoco, was not sure if Student's behaviors were caused by neurological or psychiatric conditions, but he had increased her behavior medications. Parents thought that Student's aggressive behavior at home had decreased after the higher drug dosage.

94. Parents wanted an educationally related mental health services assessment to help the IEP team understand what was happening in Student's brain. The IEP team agreed that District would conduct the assessment. The team noted that denial of preferred activities and attention seemed to be triggering some of Student's target behaviors, but the antecedents to other incidents were not clear. Parents, also, were unsure what triggered aggression at home. Some incidents seemed to be triggered by loud noises, others by requests to bathe and practice self-care. Mother said that Student sometimes exhibited a glassy stare and lack of communication before a behavior incident, and that after the incident she often could not recall what happened. Student often looked bewildered and confused right after a significant behavioral incident and

was often apologetic, then took a nap. The school nurse wondered if these events might be symptoms of Student having seizures, and suggested that Parents have Dr. Brutoco look at that possibility.

95. Student's behavior intervention specialist, Ms. Kapur, was collecting data on Student's behavior and would observe Student. When the mental health assessment was complete, Ms. Kapur would review it and the data collected on Student's behaviors and revise Student's behavior intervention plan.

96. Ms. Kapur noted that Student had functional communication sufficient to communicate her needs, but was hard to calm once her behavior escalated. Ms. Kapur said that Student needed to feel that she was in control in situations. The team discussed interventions that could be added to Student's behavior intervention plan, including debriefing Student on her behavior after using existing de-escalation strategies to calm down.

May 21, 2015 School Psychologist Conversation with Dr. Brutoco

97. School psychologist Ms. Simmons sent Dr. Brutoco an email on May 21, 2015, updating him on the items discussed at Student's IEP team meeting the previous day. She believed that it was significant that District staff and Student's support providers and family could not identify an antecedent to Student's behavioral outbursts. She noted that the team had looked at Student's sleeping/napping routine at school and saw a possible correlation between behavioral incidents being followed by a nap. Ms. Simmons offered to examine the sleep log being kept by Ms. Flocken to confirm whether a correlation existed. Ms. Simmons asked Dr. Brutoco if he would find other information helpful.

98. Ms. Simmons spoke with Dr. Brutoco later on May 21, 2015, and prepared notes of the conversation. Dr. Brutoco believed Student was in a cycle of erupting behaviors that would take some time to bring down. To address the primary concern of

her safety and the safety of others, Dr. Brutoco was going to try to limit the eruptions by continuing to adjust the doses of Student's various medications, including transitioning Student to a new medication to treat her behavioral dysregulation associated with autism. Dr. Brutoco believed these medication changes would cause Student to become more settled and might increase her need to sleep. Dr. Brutoco expected that this medication adjustment period would be difficult for Student and those working with her, but was the only way to make the needed changes to arrive at the correct balance of medication. He would be making adjustments, but could not accurately predict each behavior eruption. He asked to be kept informed about significant behavior incidents such as Student's jumping out of the car in traffic.

99. Regarding the possibility of seizures, Dr. Brutoco said that he was ordering an electroencephalogram (EEG) to check Student's brain activity, but thought that seizures were unlikely. He said that Parents had requested exploration of hospitalization as a means of addressing Student's behaviors. Dr. Brutoco was not in favor of that option for her due to the possibility that the hospital would sedate Student as a means of lowering the aggressive behaviors.

100. Dr. Brutoco asked to see the results of Student's mental health assessment when completed. He was skeptical of the IEP team's proposal to debrief Student after a behavior incident. He doubted that Student could provide reliable insights to causes for her behavior in light of her limited cognitive and language abilities, and the current ongoing changes to her medications.

101. Dr. Brutoco strongly suggested that Student's school day stay as stable as possible since any stressors or changes in her routine could be a trigger for behaviors. He appreciated the behavior data District was collecting on Student and the team's collaboration to support her. He said that he would be willing to attend future IEP team meetings in person or by phone.

102. Dr. Brutoco testified that he recommended that Student be placed in a residential treatment center, although Parents were not ready for such a placement at that time. However, Dr. Brutoco's recollection is contradicted by Ms. Simmons, and not corroborated by other evidence. Ms. Simmons' contemporaneous notes of the conversation do not reflect a recommendation of residential treatment, and she testified that she did not recall Dr. Brutoco making such a recommendation. No evidence was offered of a letter to District from Dr. Brutoco or Parents following up on a recommendation of residential treatment. Nor was there any evidence, other than Dr. Brutoco's testimony, of communications between Dr. Brutoco and Parents regarding a recommendation as of May 2015 that Student be placed in a residential treatment center. For these reasons, the evidence offered by the contemporaneous notes and testimony of Ms. Simmons are more persuasive than Dr. Brutoco's recollection, and support the finding that Dr. Brutoco did not recommend to District in May 2015 that Student be placed in a residential treatment center.

2015 EXTENDED SCHOOL YEAR: MUCH SLEEP, FEW TARGET BEHAVIORS AT SCHOOL

103. In June and July 2015, Student attended the extended school year program at University High School – 19 days for four hours per day. Student's behavior tutor tracked Student's target behaviors and times when Student slept in class. Over the course of the extended school year, Student slept a majority of the time, an average of approximately two hours and 20 minutes of each four-hour school day. Student engaged in a total of four acts of aggression, four of property destruction, and no eloping. Student's behavior never escalated above Level 1. Most days Student exhibited no target behaviors at school.

104. At home, Student exhibited frequent acts of property destruction and aggression, including an incident in which Student attacked Mother at home, kicking,

pulling her hair, and throwing objects from the kitchen counter at her, including a knife. Mother called the police, who considered having Student placed on an involuntary psychiatric hold. Parents kept Student mildly sedated for the last part of the summer and into the beginning of the school year.

105. Dr. Brutoco's updated August 24, 2015 prescription list for Student showed she was receiving a new behavioral dysregulation medicine, an increased dose of the medication used to control her weight gain, and a new prescription for a sedative to be used as needed.

2015-2016 10TH GRADE SCHOOL YEAR

106. Student's 10th grade school year started on August 26, 2015. That first day, she exhibited all three of her target behaviors, including seven acts of physical aggression that escalated as high as Level 2, six acts of property destruction that escalated as high as Level 3, and two Level 1 acts of elopement. The day began without incident. Student greeted new classmates appropriately, transitioned to math, and completed her work. She then became upset and cried when a preferred snack was unavailable but accepted a substitute. She fell asleep during break time for an hour, woke up, used the bathroom and was prompted to transition to adapted physical education class. Instead of going to class she requested a cold juice. Staff brought Student a juice but she said it was "the wrong one" and eloped to the kitchen to attempt to open the locked refrigerator. When Student could not get the refrigerator open she pressed the water/ice button to spill water and ice cubes on the floor. When her teacher Ms. Flocken blocked her from pressing the button, Student became physically aggressive. She hit Ms. Flocken in the face multiple times, bit her arm and then pulled her shirt.

107. Student eventually grew tired and sat on the kitchen floor, but then got up and went after her behavior tutor, yelling, "I want to pull your hair." The behavior tutor

evaded Student, who kicked over a trash can and then threw backpacks on the floor as she ran into another classroom, where she pulled items from a shelf and threw them on the floor. Student attempted to elope from the classroom but was blocked and redirected. She sat on the floor, took off her shoes, and threw them towards Ms. Flocken. Student began to cry and apologize. She again requested juice and hash browns and stated she was hungry. It took Student approximately 20 minutes to de-escalate because she became agitated again while cleaning up. She calmed down again and continued cleaning up but appeared groggy. Student prepared appropriately for the end of the school day and walked outside to meet her nanny without further incident. As was usually the case when Student exhibited significant behaviors at school, one of Student's teachers emailed Mother the same day, and Mother forwarded the email to Dr. Brutoco.

108. After the first day of school, Student continued to exhibit target behaviors through September 2015. From August 26, 2015, to her September 23, 2015 IEP team meeting, Student exhibited one or more target behaviors at school on most days, averaging 0.9 occurrences of physical aggression per day, 1.2 occurrences of property destruction per day, and 0.4 occurrences of eloping per day. On September 16, Student exhibited physical aggression escalating to Level 2 (pushing and grabbing teacher), and on September 17 she exhibited property destruction escalating to Level 3 (pushed a computer off a teacher's desk). Student exhibited Level 2 elopement behavior on two days (running from the classroom but not to an unsafe area).

109. During the same period from August 26 to September 23, 2015, Student also slept in class every day except September 10 and 11. She slept an average of 3.8 hours of her 6.5 hour school day during the first week of school, and from one to four hours most days after that.

110. On September 22, 2015, Student, for the first time since starting high school, inappropriately removed her clothing, taking off her shorts and underwear.

When she arrived home after school, she became very aggressive when her Mother told her there was no yogurt to eat, and hit Mother and pulled Mother's hair. Mother emailed Dr. Brutoco regarding Student's behavior, and noting that Student's obsession and aggression over food was escalating and that she was noticeably heavier.

Educationally Related Mental Health Services Assessment

111. District educationally related mental health services counselor Kelly Cohen began an educationally related mental health services assessment of Student in June 2015, completed it in September 2015, and issued a report dated September 23, 2015. To prepare the assessment, Ms. Cohen observed Student in class, interviewed Student twice, and interviewed Mother, Student's teachers, school psychologist and behavior specialist, and Dr. Brutoco. She also reviewed Student's prior psycho educational assessments and behavior intervention plans.

112. Ms. Cohen found that Student struggled with aggressive behaviors both at school and at home, but that it was difficult to pinpoint the source of these behaviors because of the complicated features of both her Down syndrome and autism spectrum disorder diagnoses, which limited her ability to process and regulate her emotions. Ms. Cohen observed that Student struggled to even recall a problematic situation to be able to attempt to talk with a therapist about it.

113. Ms. Cohen observed that Student interacted minimally with others in the classroom, generally not making eye contact with others and providing one-word answers to questions. Ms. Cohen's attempts during her interview of Student to elicit insights from Student into her emotions obtained minimal information not available from an observation of Student. For example, when Ms. Cohen asked what caused Student to feel frustrated, Student replied "a lot of noise." Prompted to identify additional triggers for frustration, Student replied "no boys allowed." Student could not

clarify what she meant by that statement. Ms. Flocken speculated that Student was referring to the noise caused by her male classmates.

114. Mother told Ms. Cohen that Student was often stubborn and defiant at home. Transition times, such as from computer time to her bath, were often difficult. Student's sleep was frequently restless, she had trouble falling asleep, and the quality of her sleep was poor. Student often engaged in physical aggression when fatigued. Following violent incidents at home during the summer, Dr. Brutoco had changed Student's medications on August 13, 2015, and Student had been mildly sedated since then.

115. Ms. Flocken told Ms. Cohen that Student slept almost four hours per day during the first week of 10th grade, and as a result her instruction time had been limited. Student appeared lethargic and disconnected from staff, classmates, and her surroundings.

116. Dr. Brutoco told Ms. Cohen that Student had displayed hyper-aggressive behaviors since he began treating her in 2012. He had seen some improvement in Student's behaviors since the beginning of treatment, but her behaviors were cyclical, and Student often regressed. During periods of regression, he would change medications to address her needs at that time. Dr. Brutoco had changed Student's medication in August 2015 as a response to her aggression at home.

117. Dr. Brutoco believed that Student became frantic with anxiety when she was asked to perform a non-preferred task. Because of her inability to control and utilize functional ways to cope with those feelings, she became angry and aggressive. Dr. Brutoco believed that Student responded this way to non-preferred activities because she felt incompetent with new or uncomfortable tasks.

118. Dr. Brutoco expressed concern that he had seen behavioral improvements in Student over the past three years, but no improvement in developmental skills. He believed that Student's lack of flexibility was inhibiting her ability to learn new skills. He

suggested that staff implement incremental and supported introductions to new activities to aid Student in reaching some of her developmental milestones. Dr. Brutoco did not mention residential placement for Student.

119. Ms. Cohen ultimately concluded that Student did not have sufficient awareness of, or insight into, her emotions, or ability to communicate with another person about her feelings, to be able to benefit from educationally related mental health therapy. She recommended that staff continue modeling appropriate ways for Student to cope with her anxiety. She also recommended that staff find more activities that Student could succeed in to help reduce her frustration caused by feelings of incompetency. Ms. Cohen also suggested that Student should be gradually exposed to new functional skills to aid her in growing emotionally and help her build self-esteem and competency through success.

120. Ms. Cohen testified that she considered whether Student required a more restrictive placement, such as a residential treatment center. Because Student had been making progress at on her non-behavioral goals, despite her target behaviors and sleeping in class, Ms. Cohen concluded that a more restrictive placement would not be appropriate. However, she did not include this analysis in her written assessment, or mention it at the subsequent IEP team meeting to discuss the assessment.

September 23, 2015 IEP Team Meeting

121. Student's IEP team met on September 23, 2015, to review Ms. Cohen's mental health services assessment, and proposed revisions to Student's behavior intervention plan. Mother, Ms. Simmons, Ms. Flocken, Ms. Cohen, educationally related mental health services coordinator Amil Alzubaidi, and District program specialist Daniela Olausen attended. Ms. Cohen presented her mental health services assessment. Mother and District IEP team members agreed with the contents of the report and the

finding that Student would not benefit from educationally related mental health therapy.

122. The team discussed current triggers to Student's target behaviors. Mother and staff noted Student's growing fixation on obtaining food. At home, Student's behavior frequently escalated when she was denied food. At school, staff had also noted Student's difficulty regulating her desire for food, and had stopped using food to reinforce positive behavior by Student. Student also exhibited target behaviors when denied access to a preferred object or staff member.

123. The team discussed Student's extended naps at school. Staff continued to collect data on Student's sleep each day and the activity Student was engaged in before she fell asleep. Staff did not see evidence that Student was avoiding tasks. Mother said Student did not take extended naps at home on weekends and had exhibited very intense behaviors at home that might be related to the lack of naps.

124. The team reviewed an updated behavior intervention plan for Student prepared by Ms. Kapur and dated September 20, 2015. The descriptions of Student's three target behaviors, Levels 1, 2 and 3 for each behavior, and behavior emergency procedures, remained unchanged from Student's previous January 22, 2015 behavior intervention plan. Student's teachers, Mr. Green and Ms. Flocken, agreed that Student's physical aggression and property destruction had increased in frequency and intensity since her January 22, 2015 behavior intervention plan, and that the functions of those two behaviors had shifted from the previous function of escape. The probable function of Student's physical aggression and property destruction had shifted to a primary function of access to tangibles such as food, preferred items and places, and a secondary function of attention, mostly from preferred adults. The changes in function were noted, and the revised behavior intervention plan included some slightly modified replacement behaviors, proactive strategies, reactive strategies, and occurrence

management strategies for acts of physical aggression or property destruction to obtain access to tangibles or attention.

125. The team reviewed the most effective interventions from Student's prior behavior plan. These were: (i) reinforcing Student's appropriate requests to escape from loud/non-preferred environments or from difficult or non-preferred tasks by granting the requests; (ii) allowing Student to work on tasks in a quieter environment; (iii) modifying Student's environment, when possible (for example, seating Student in the quietest part of the room, away from loud peers or items; (iv) providing ample choice-making opportunities throughout the day; and (v) chunking work into smaller components (for example, breaking the work into three parts and having frequent reinforcement after the completion of each part). Four previous strategies had been faded because they were no longer effective: (i) ripping paper or paper towels; (ii) "first/then" language given with a visual prompt; (iii) encouraging Student to return to the original environment (if she had been granted a break from a loud/non-preferred environment after making an appropriate request to escape); and (iv) encouraging Student to engage in a previously taught coping strategy such as deep breathing or engaging in a sensory activity when she wanted to escape a loud/non-preferred environment.

126. Mother agreed with the content and findings of the educationally related mental health services assessment and to the addition of the updated behavior intervention plan to Student's IEP.

September-December 2015: Increased Target Behaviors, Decreased Sleeping in Class

127. In the fall of 10th grade, to help control Student's weight gain, Parents and Dr. Brutoco reduced Student's anxiety and behavior dysregulation medicines and eliminated her sedative. During the same period, Student's target behaviors increased

slightly. According to the behavior logs prepared by Student's behavior tutor, in September 2015 Student exhibited 10 target behaviors of physical aggression, 22 of property destruction, and 10 of elopement. In October, there were, respectively, 19, 29 and 9 such target behaviors, in November there were 22, 24 and 5, and in December's 14 school days before winter break there were 26, 21, and 7 target behaviors. Student escalated to Level 2 behavior on three days in September, three days in October, and one day each in November and December. She escalated to Level 3 behavior twice: on September 17, 2015, when she pushed over a computer, and on October 6, when she again attempted to throw a computer but was blocked from doing so.

128. The sleep log data collected by Student's behavior tutor indicated that Student slept in class an average of 2.6 hours per day in September, 1.8 hours per day in October, 1.4 hours in November, and 0.8 hours in December.

January-February 2016: Increased Target Behaviors and Sleeping in Class

129. Over winter break, Student began working with a new nanny at home. To control her weight gain, her behavior dysregulation medicine was further reduced, and Parents began phasing carbohydrates out of Student's diet. In a January 3, 2016 email to Ms. Flocken, Mother stated that Parents' top priority was to control Student's aggression associated with denying Student food or offering Student alternate food choices. Mother advised, "This is going to be very hard for all of us, but essential to determine whether we can address both behaviors and weight gain."

130. School resumed on January 4, 2016, following winter break. In January, Student exhibited 68 acts of physical aggression and 49 acts of property destruction, and she eloped nine times. Student escalated to Level 2 behavior on five days, but exhibited no Level 3 behaviors. Student's sleep in class more than doubled from December 2015, and Student slept an average of 1.7 hours per day from January 4,

2016, through January 15, 2016. Sleep logs from January 15, 2016, to May 9, 2016, were not in evidence.

131. In February 2016, Student exhibited 86 acts of physical aggression and 48 acts of property destruction, and again she eloped nine times. Student again escalated to Level 2 behavior on five days, but exhibited no Level 3 behaviors.

132. Student's sole instance of Level 3 behavior since her September 23, 2015 IEP occurred on October 6, 2015, when she attempted to throw a computer but was blocked from doing so. Student exhibited some Level 2 behaviors every month. These included eloping to another classroom without permission, breaking crayons and a maraca, crushing a plastic cup, throwing a chair to the ground, attempting to grab her behavior tutor's backpack off the tutor's shoulder, eloping from her classroom to locate a friend, throwing her headphones, moving and hitting a table and moving the chairs, hitting and kicking her behavior tutor and teacher, grabbing the cords of her speech and language pathologist's computer, grabbing the leg of her teacher and attempting to bite her foot, throwing her backpack and then attempting to grab it from her behavior tutor, throwing classmates' backpacks, and kicking the bus seat in front of her on a community outing.

February 18, 2016 IEP Team Meeting

133. Student's 10th grade annual IEP team meeting was held on February 18, 2016. Parents' pre-meeting survey identified their areas of concern regarding Student's home life as: aggressive and destructive behavior, crying and whining, and lack of independent living skills. Parents' concerns regarding school included: Student's lack of social skills, lack of friends, and lack of desire to participate in high school activities such as sports events and dances. Parents' goals for Student for the coming year were to reduce her aggressive and destructive behaviors, increase her socialization and participation in school events, and improve Student's self-care skills.

GOALS

134. The IEP team reviewed Student's progress on her 13 annual goals from her January 22, 2015 IEP. Student had met three of her goals, and made progress on another five. Student had regressed in her remaining five goals, including all three of her behavior goals. Compared to her January 2015 baseline, Student in January 2016 was exhibiting 17 acts of physical aggression per week compared to 0.5, 12 acts of property destruction per week compared to 1, and 6 acts of elopement per week compared to 0.75.

135. The IEP team proposed 10 new annual goals: one reading comprehension goal; one pre-vocational skills goal; two functional math skills goals; two social pragmatics goals, one fitness goal, and three behavior goals.

136. Student's three behavioral goals to be achieved by January 18, 2017, were to reduce her aggression towards others and her property destruction both to zero occurrences over five consecutive school days, and reduce her elopement to zero occurrences over four consecutive weeks.

137. The IEP team discussed the increase in Student's target behaviors, and concluded that it might be because Student was sleeping at school much less and therefore had more time to engage in behaviors. Mother said that Student's aggressive behaviors at home had increased following her medication changes and the start of in-home therapists. The team also discussed Student's reluctance to get out of the car and come to the classroom when dropped off in the morning. As a strategy for addressing Student's refusal to exit the car, the behavior intervention specialist suggested having a person Student liked meet her when she arrived at school, without reinforcing negative behavior. The IEP team also discussed rewarding Student with a video of her favorite behavior tutor once in class.

BEHAVIOR INTERVENTION PLAN

138. The IEP team reviewed an updated behavior intervention plan for Student prepared by Ms. Kapur and dated February 18, 2016. Ms. Kapur noted the significant increase in Student's physical aggression, property destruction, and elopement since the September 20, 2015 behavior intervention plan was implemented, and theorized that medication changes, as well as more time spent awake while at school, might have contributed to the increase. The data that had been collected on antecedents, behaviors, and consequences indicated that the functions of Student's target behaviors had not changed. Based on input from Student's teachers and the behavior tutor, Ms. Kapur revised slightly the target behavior definitions, and definitions of Levels 1, 2, and 3 for each behavior, which had been in effect since February 11, 2014. The new descriptions for tracking of Student's targeted behaviors were:

(1) Elopement: Leaving an activity in progress (either while inside the classroom/activity area, or outside/away from the classroom/activity area), without staff permission.

Level 1: Walking away from an activity in progress (either while inside the classroom/activity area, or outside/away from the classroom/activity area), without staff permission.

Level 2: Running away from an activity in progress (either while inside the classroom/activity area, or outside/away from the classroom/activity area), without staff permission.

Level 3: Running away from an activity in progress (either while inside the classroom/activity area, or outside/away from the classroom/activity area), without staff permission, into an area that is a threat to safety (e.g., streets, parking

lots) AND requires the use of district-approved emergency procedures.

- (2) Physical Aggression: Any of the following behaviors directed at another person: Pulling hair, hitting with a closed fist, slapping with an open hand, kicking, scratching, throwing objects at the person, pushing, pulling on their clothing/jewelry, grabbing their body.

Level 1: Any of the behaviors listed above; does not leave a mark on the other person.

Level 2: Any of the behaviors listed above; leaves a visible mark on the other person (e.g., reddened skin, bruising, bump/welt, blood drawn, etc.).

Level 3: Any of the behaviors listed above; leaves a visible mark on the other person (e.g., reddened skin, bruising, bump/welt, blood drawn, etc.), AND requires the use of district-approved emergency procedures.

- (3) Property Destruction: Any of the following behaviors: Pushing materials off table onto ground, knocking over items, ripping items off the wall, tearing up/breaking/shattering items, scribbling/writing on tables/floor/walls, throwing items (not directed at a person).

Level 1: Any of the behaviors listed above; does not pose a danger of physical harm to self or others.

Level 2: Any of the behaviors listed above; does pose a danger of physical harm to self or others.

Level 3: Any of the behaviors listed above; does pose a danger of physical harm to self or others, AND requires the use of district-approved emergency procedures.

139. Ms. Kapur proposed no changes to the replacement behaviors, proactive strategies, reactive strategies, and occurrence management strategies identified in Student's existing behavior management plan.

OFFER OF PLACEMENT AND SERVICES

140. District offered Student placement in the life-skills program at Student's school of choice, Northwood High School; full-time services of a one-to-one behavior tutor; 15 hours per month of collaboration by special education staff in a general education physical education class, plus 60 minutes per week of adapted physical education in a separate classroom; 60 minutes per week of group speech and language; 90 minutes per year of career awareness services including vocational interest inventories and job exploration; and 60 minutes per month of occupational therapy consultation services. Student's existing transition plan remained unchanged. District also offered Student an extended school year program for June-July 2016.

141. The IEP team agreed to the proposed placement, services, goals, accommodations, behavior intervention plan, and individual transition plan. Parents did not suggest any changes to Student's placement or services, and consented to all parts of the IEP.

March 2016: District Denies Parent Requests for Independent Evaluations, Private Placement, and Transportation

142. Despite their consent to the February 18, 2016 IEP, Parents were disappointed that it offered Student the same placement and services as her previous IEP, and were concerned that Student would not make educational progress unless

changes were made. Parents engaged Counsel Timothy Adams, Esq. to represent Student.

143. In his March 1, 2016 letter to District, Mr. Adams contended that District's January 2015 multidisciplinary assessment and September 2015 educationally related mental health services assessment did not accurately represent Student, and he requested that District fund independent educational evaluations in those areas by assessors chosen by Parents. Mr. Adams also contended that District's February 18, 2016 IEP denied Student a FAPE by failing to offer her an appropriate placement and services, and gave notice that Parents reserved their right to privately place Student, and to seek reimbursement for a private placement and for services obtained by Parents, including transportation.

144. In her March 9, 2016 response to Mr. Adams, District program specialist Lisa Torkzadeh stated District's belief that Student's February 18, 2016 IEP offered Student a FAPE in the least restrictive environment appropriate for Student. District therefore denied Student's request that District fund a private placement for Student. Ms. Torkzadeh suggested some dates at the end of March and beginning of April for Student's IEP team to meet to discuss Parents' concerns.

145. On March 11, 2016, Parents met informally with Student's teacher, behavior specialist, and the school psychologist to discuss concerns over "drop-off strategies" implemented since the February 18, 2016 IEP team meeting discussion of Student's refusal to exit the family car when it arrived at Northwood High School. Student often required 10 to 30 minutes to transition from Parents' car to her classroom. Parents proposed a trial where District would provide transportation as a means of identifying triggers to Student's maladaptive behaviors and alternative behavioral interventions. Staff told Parents that the IEP team could not authorize transportation to Northwood because it was Student's school of choice.

146. On March 25, 2016, Ms. Torkzadeh again wrote to Mr. Adams. District denied Parents' request for independent educational evaluations on grounds that its multidisciplinary assessment and educationally related mental health services assessment were appropriate. District denied Parents' request for transportation to Northwood High School on grounds that Parents, not District, had placed Student at Northwood, pursuant to District's intra district open enrollment guidelines that required Parents to agree to provide transportation to Northwood. Ms. Torkzadeh stated that District could meet Student's unique needs in the comparable program available at Student's school of residence, Woodbridge High School, and that Parents could revoke the transfer to Northwood to have Student attend Woodbridge. Ms. Torkzadeh did not state that Student would then receive transportation to Woodbridge, only that, when Parents revoked the transfer to Northwood, "the IEP team could consider [transportation to Woodbridge.]"

March – June 2016: Continuing Behaviors at School and Home

147. Student's target behaviors at school increased in March 2016 to 212 acts of physical aggression, 62 of property destruction, and 19 of elopement. Student escalated to Level 2 behavior on two days, and on March 17, 2016, escalated to Level 3 elopement when she ran out of the building (staff followed and remained near until Student de-escalated). During her spring recess vacation, Student exhibited challenging behavior with Parents. For no reason Parents could identify, Student kicked, hit, spit and pulled Parents' hair on the airplane. She obsessed over food throughout the vacation, grabbing and hoarding handfuls of food at restaurants, from her plate and others'. She demanded to be taken to the hotel pool in a stroller, screaming and spitting if asked to make the short walk herself.

148. In April 2016, Student in school exhibited 36 acts of physical aggression, 57 of property destruction, and 16 of elopement. Student escalated to Level 2 behavior on two days.

149. After declining in April 2016, Student's behaviors increased again in May 2016. Student exhibited 108 acts of physical aggression, 199 of property destruction, and 10 of elopement. Student escalated to Level 2 behavior on six days.

150. Student also continued to refuse to exit the family car and come to class when she arrived at Northwood High School. A video taken on May 3, 2016 showed Student riding to school with Father. For the first three minutes of the six and one-half minute drive to school, Student complained loudly from the back seat, mostly saying "no!" about nothing in particular, and sometimes "I don't like it!" about the new shoes she was wearing. Student kicked once or twice – not very hard – at the back of Father's seat, and hit him in the back with her headphones several times – again not very hard. She also hit Father twice in the head hard enough to be startling and dangerous while driving, but without causing physical harm. When Father and Student arrived at school, Father got out of the car and opened the back door for Student. Student refused to get out of the car, repeatedly yelling "not ready!" and "don't want to go!" "I'll hit you!" she threatened Father. After three and a half minutes, Student's two teachers and behavior tutor arrived and, standing near the car, invited Student with friendly voices to join them. Father tried to have a conversation with Student about why Student did not want to go to class. Student was unmoved by these efforts to engage her. She shouted, "I don't want to!" and "go away" for another 11 minutes while Father and staff suggested choices of activities that Student might prefer to sitting in the car. Finally, Student calmed down, 15 minutes after arriving at school, and left the car in a sullen mood to join her excited, happy teachers and behavior tutor to go to class.

151. On May 18, 2016, Student became extremely aggressive towards the family's respite care provider. She threw and broke silverware, china, and crystal, pulled

the respite worker down by her hair, and at one point obtained a butcher knife from the kitchen sink that the respite worker could safely get away from her.

May 2016: Continued Sleeping In Class

152. District's sleep data from May 9 through June 2, 2016 indicated Student slept on 12 of 18 school days. Student slept an average of 1.6 hours per day, or about 24 percent of her 6.5-hour school day.

June 3, 2016 IEP Team Meeting

153. On June 3, 2016, Student's IEP team met to discuss Student's behavior trends at morning drop off and throughout the school day. Parents and Mr. Adams attended, as did Ms. Flocken, Ms. Simmons, Ms. Torkzadeh, and District behavior intervention specialist Richaun Hendricks. After reviewing Student's morning routine of refusing to leave the family car to go to class, Parents and Mr. Adams again requested that District provide Student home-to-school transportation to Northwood. Ms. Torkzadeh again declined on grounds that Student was not eligible for transportation to a school of choice, under District's open enrollment board policy.

154. IEP team meeting notes state that Ms. Hendricks proposed and reviewed new proactive strategies and reinforcement activities to be added to Student's existing behavior intervention plan, but these strategies and reinforcement activities, and the revised behavior intervention plan, were not offered in evidence.

155. The team reviewed Student's progress towards the goals in her February 18, 2016 IEP. Student had met her short-term benchmark in reading comprehension (pre-vocational skills); social pragmatics; and one of two functional math skills benchmarks. Student had partially met her second functional math benchmark and fitness benchmark.

156. Student had not met any of her behavioral goal benchmarks towards extinguishing her physical aggression, property destruction, and elopement. Parents told the IEP team that in the community, Student would hit strangers, and they were concerned that Student's classroom team was mitigating Student's behaviors instead of teaching her appropriate behaviors.

157. Student's sleeping in class had increased in the two weeks prior to the IEP team meeting. The IEP team discussed that Student did not seem to be sleeping, or pretending to sleep, to avoid activities or tasks.

158. Mr. Adams told the IEP team that Parents did not believe that Student's June 3, 2016 IEP offered Student a FAPE, and Parents had therefore decided to place Student in a residential treatment center. Parents gave notice that they would be placing Student at Bayes Achievement Center in Texas between June 13 and June 17, 2016.

159. The IEP team did not discuss whether Student required residential placement to receive a FAPE, or whether another program, other than Student's then-current placement in a District special day class, might be appropriate. No changes were made to Student's IEP.

160. On June 14, 2016, Ms. Torkzadeh wrote Mr. Adams that District felt that the June 3, 2016 IEP offered Student a FAPE, and District therefore denied Parents' request to fund a private school placement.

JUNE 17, 2016: PARENTS PLACE STUDENT AT BAYES ACHIEVEMENT CENTER

161. On June 16, 2016, Parents flew with Student to Texas, and the next day admitted her to Bayes Achievement Center, Inc., a residential treatment center located in Huntsville, Texas. Bayes was established in 1993 to serve special needs students ages 6-22, with significant behavioral difficulties, including aggression, and diagnoses including autism, Down syndrome, traumatic brain injury, intellectual disability, and oppositional defiant disorder. Bayes employed approximately 170 staff, including 16 instructors. All

the instructors were certified by the Texas Education Agency to provide special education. Bayes served 71 residential students and 24 day-school students.

162. The California Department of Education certified Bayes as a nonpublic, nonsectarian school (NPS) on September 26, 2016. This certification approved Bayes to educate special needs students enrolled in California's public school system, and to contract with California school districts to provide education and related services to special education students in accordance with their IEP's. The Department of Education cautioned that its certification should not be construed as an evaluation, accreditation, approval, recognition, or endorsement of any nonpublic school.

163. Student was assigned to a residence house with one roommate and seven housemates. She was assigned to teacher Nicole Daugherty's class, with six classmates. Ms. Dougherty taught the class with the assistance of several instructional assistants and one teaching parent from a residence house. Student did not have a one-on-one aide. Ms. Daugherty taught Student the same classes that Student took at Northwood: life skills, functional reading, functional math, social skills, art, and adapted physical education. Student's educational program at Bayes adopted and worked towards the goals from Student's February 18, 2016 IEP.

164. Parents advised Bayes that their treatment goals for Student were that she learn alternative coping strategies, minimize physically aggressive behaviors, gain anxiety control, and learn to live independently, or in the least restrictive environment possible. To collect information to be used to develop a formal treatment plan for Student, Bayes observed Student's behaviors at school and in Student's residence. Staff identified target behaviors of: (i) physical aggression; (ii) non-compliance (refusal to comply with an adult directive within five seconds); (iii) verbal aggression (cursing, threats, name-calling); (iv) property destruction; and (v) leaving an assigned area. Non-compliance and verbal aggression were not new behaviors for Student, but had not been tracked or targeted by District. Bayes staff did not differentiate between levels of

each behavior when collecting data on Student's behaviors at school and in her residence.

165. Bayes collected data on Student's target behaviors at school and in her residence. During the first 30 days after Student arrived at Bayes, she exhibited 13 acts of physical aggression on the first day, and none thereafter. Physical aggression was described as grabbing, hitting, kicking, or jerking away from staff. Student exhibited 965 acts of non-compliance in the first 30 days, 28 acts of verbal aggression, 7 acts of property destruction, and 9 instances of leaving an assigned area. Teachers and staff did not observe any instances of Student sleeping in class. Bayes attributed this to the activity level, structure, and staff supervision during the school day that gave Student no opportunity to sleep. Ms. Dougherty kept Student actively engaged in class work using reminders, verbal prompts, and a variety of activities. Ms. Dougherty and classroom staff had observed that Student would attempt to put her head down on the desk, if a fast pace of activity was not maintained.

166. Based on its observation of Student and data collection, Bayes developed a treatment plan dated July 18, 2016. To reduce Student's target behaviors, the Bayes program emphasized positive behavior supports to modify Student's behavior, with reactive aversion or punishment strategies sometimes used in conjunction with positive reinforcement. Approved interventions for each of Student's five target behaviors included: (i) contingency management (managing consequences of target behaviors); (ii) differential reinforcement of incompatible behavior (DRI); (iii) differential reinforcement of other behaviors (DRO), (iv) loss of reinforcers; (v) physical redirection; (vi) response cost (punishment such as loss of tokens); (vii) reward for approximations of behavior; (viii) compliance training; (ix) supervised separation; (x) token economy; and (xi) verbal redirection.

AUGUST 11, 2016 LETTER FROM DR. BRUTOCO

167. In response to a request from Student's counsel for a referral of Student for a special education/training program, Dr. Brutoco prepared a letter to counsel dated August 11, 2016, that reviewed Student's medical and behavioral history, and her educational progress and recommended continued placement at Bayes. Counsel sent a copy of Dr. Brutoco's letter to District, and requested that District schedule an IEP team meeting to discuss it.

168. Dr. Brutoco characterized Student as an extremely complex individual of singularly special need. His clinical "problem list" of issues he attempted to address in four years of treating Student included Down syndrome, cognitive impairment, autism, generalized anxiety disorder with panic syndrome, severe mood disorder – including anger, aggression, violence and rage (intermittent explosive disorder), selective mutism, ADHD, deep vein thrombosis, mixed personality disorder with features of avoidant personality, obsessive/compulsive syndrome, and borderline personality disorder, hypothyroidism, morbid obesity, compulsive binge eating disorder, amenorrhea, and asthma and bronchospasm.

169. Dr. Brutoco described Student's biggest problem as unmanageability, resulting from Student's use of aggression, violence, and avoidance to exert control. He explained that because Student was seriously lacking in intellectual capacity, insight, and compassion, she did not hesitate to use inappropriate means to manipulate and exploit situations and caretakers. This opinion was consistent with that of District's mental health assessor, Ms. Cohen, who concluded in 2015 that Student lacked awareness of, or insight into, her emotions, or ability to communicate with another person about her feelings. In Dr. Brutoco's opinion, Student's present state was not the result of psychological pathology, but was almost entirely the result of her extreme deficiency in self-control, and her complete lack of motivation for success or conformity. He

emphasized that the solution for Student's unmanageability was training, more specifically sophisticated, highly-integrated "round-the-clock", residential, high-quality behavioral modification used to appropriately and effectively increase expectations for her behavior, interaction and cooperation. He described Student's teachers and staff as heroic in their patience and efforts on Student's behalf, but ultimately overmatched with the complex issues presented by Student.

170. Dr. Brutoco admitted that since undertaking Student's care in September 2012, he had been attempting to use medications that had transient or limited effectiveness on what was primarily a behavioral problem. He had done so, with misgivings, because Parents had resisted his suggestions that they consider placing Student in residential treatment. Because they were not ready to consider residential treatment, Parents continued to work with District to support Student at school, and Regional Center of Orange County to support Student at home, while Dr. Brutoco worked to develop a more sophisticated drug treatment approach for Student. Dr. Brutoco wrote that he had been cautiously optimistic in early 2015 that his revised medication regimen might allow Student to make sustained developmental progress. His optimism faded when Student began exhibiting increased target behaviors.

171. Dr. Brutoco's opinion regarding the causes of Student's aggression, property destruction and elopement behaviors and the approach needed to address them was credible and persuasive. He had been a practicing physician since 1977, was a board-certified pediatrician, and a former chief of the Division of Behavioral & Developmental Medicine at Children's Hospital of Orange County. He had specialized for almost 40 years in pediatric behavioral and developmental medicine treating patients from infancy to their late 20's who had complex medical problems with psychiatric components. Also, Dr. Brutoco's expert opinion was not based on a one-time assessment, or brief experience, with Student, but on four years' hands-on experience as her treating physician. During that time, he had worked closely with Parents, and,

through them, with District, in the effort to regulate Student's dysfunctional behaviors, and he was intimately familiar with Patient's medical and behavioral treatment history, and its effectiveness in addressing Student's behaviors at school and at home.

172. Dr. Brutoco's opinion regarding the cause of Student's sleep behavior was disputed by others and ultimately not persuasive. He wrote that what teachers, the school nurse, and Parents had viewed as Student sleeping was in fact Student exhibiting extreme avoidance behavior by "playing possum" and feigning sleep to avoid an activity or exercise passive-aggressive control over others. Dr. Brutoco's explanation of this opinion was not sufficient to establish by a preponderance of the evidence that Student's sleep was an avoidance behavior. Dr. Brutoco testified that he based this conclusion on Student rarely sleeping at home on the weekends, on her waking up alert when she "slept" at his office, and on Student never exhibiting sleep behavior at Bayes, an outcome he attributed to behavior modification. However, Dr. Brutoco had not previously told District that he believed Student was pretending to sleep. For example, when speaking with school psychologist Ms Simmons on May 21, 2015, he had told her to anticipate that his adjustments of Student's medications might increase her need to sleep. Parents on several occasions attributed an incident of target behavior at home to a lack of sleep at home. Student's teachers, behavior tutor, school nurse, behavior intervention specialist, and school psychologist, among others, had all observed Student's sleep behavior and concluded that she was genuinely sleeping. Finally, Bayes had never observed feigned sleep or targeted it as a Student behavior to be modified, although Student continued to exhibit other avoidance behaviors at Bayes. The preponderance of the evidence is that Student was actually sleeping in class, not pretending to sleep.

173. Dr. Brutoco's characterization of the intensity and effect of Student's behaviors in the classroom was also not persuasive. For example, he wrote that Student "terrorized" teachers and classmates at school, and was "obsessively aggressive and

violent, often in unprovoked rage and reflexive, controlling manipulation and exploitation of situations and caretakers." However, Dr. Brutoco never observed Student in the classroom. Student's behavior logs showed that she had never escalated to Level 3 physical aggression during the 2015-2016 school year, and only twice exhibited Level 2 property destruction. Similarly, Dr. Brutoco stated that there was "no indication that the present school system for training is helping [Student] in any phase of her life," and that Student "has not been able to learn in recent years," when, in fact, she had made some progress on most of her non-behavioral IEP goals.

SEPTEMBER 22, 2016 BAYES TREATMENT PLAN REVIEW

174. Student's 11th grade school year at Bayes started in August 2016. Bayes reviewed Student's treatment plan in September, and prepared a treatment plan review dated September 22, 2016. A copy was provided to District.

175. Student's health appeared to be improving. She had lost 26 pounds since arriving at Bayes, and now weighed 138 pounds, at her height of four feet, four inches. Student was participating in daily physical activities.

176. Student's educational program was proceeding on a similar track as at Northwood. Student loved to read in class, and did so at about a third grade level. She could print her name, write simple sentences with assistance, and complete basic addition up to 10. Student was working on completing office tasks such as shredding, filing, hole punching, and sorting. To address Student's struggles with handwriting, her teacher was slowly introducing more handwriting into Student's daily work. Student required prompting to interact with peers and close supervision to achieve appropriate interactions. To develop her social skills, Student participated successfully in 20 community outings, which included shopping at local stores, eating at local restaurants, going to local parks and the movies, getting her nails done, and going camping. Student was making slow progress on functional independence. She was being encouraged to

complete activities of daily living as independently as possible, but required prompts and reminders to complete hygiene related activities thoroughly, and assistance for thoroughness. She participated in age-appropriate activities, and in her free time enjoyed reading, playing games with staff, and watching movies. Student was responsible for routine chores in the teaching home and school settings, including wiping counters, changing the laundry, and dusting. She required prompting for thoroughness when doing chores, and required close supervision due to her tendency to try to sit down or hide while doing chores. Student was picky with her food, and required assistance to prepare snacks and simple meals and to use the microwave. She required supervision in the community and home setting due to her lack of awareness of some environmental dangers and impulsivity.

177. Bayes' treatment plan and treatment plan review did not provide detailed definitions of Student's target behaviors. Instead, they incorporated descriptions of specific acts of physical aggression, property destruction, and elopement (leaving an assigned area) that Student had displayed during the review period. These descriptions differed from the definitions in District's February 18, 2016 behavior intervention plan for Student. Bayes described physical aggression as including grabbing, hitting, kicking, or pushing staff. Property destruction was described as including tearing and throwing her paper, hitting the wall, making a hole in her pants bigger, throwing items, throwing a pan of food, and breaking a toy during class. Leaving an assigned area was described as including attempting to run away from staff, leaving one room to lie down in another room without permission, getting out of her seat without permission, and leaving her assigned chore area without permission.

178. Data collected by Bayes for the period from June 17, 2016, through September 16, 2016, indicated that Student's physical aggression, property destruction, and elopement during the school day had all declined markedly from their levels at Northwood in the spring. In class at Bayes, Student exhibited three acts of physical

aggression, eight acts of property destruction, and 13 acts of leaving an assigned area, compared to 366 acts of physical aggression, 159 acts of property destruction, and 37 of elopement in January-March 2016 at Northwood.

179. On the other hand, Student exhibited 1,176 acts during her school day of the newly-added target behavior of non-compliance. These included refusing to follow directions, not responding to staff correctly, ignoring staff, touching others without permission, telling staff "no," refusing to do a chore, not working during class, refusing to stand up during transition, talking under her breath after being redirected, and not having quiet mouth when directed. Student also exhibited five acts of verbal aggression, including cursing at staff, threatening to hit staff, threatening to pull staff's hair, and calling staff names. At Bayes, Student exhibited a greater number of each of her five target behaviors in her residence than during her school day.

SEPTEMBER 26, 2016 IEP TEAM MEETING

180. Student's IEP team met on September 26, 2016, to review Dr. Brutoco's August 11, 2016 letter, Bayes' September 23, 2016 treatment plan review, and Parents' continued request that District fund Student's placement at Bayes.

181. District team members at the IEP disagreed strongly with Dr. Brutoco's descriptions of Student's behaviors and lack of progress in District's program, both of which they believed were overstated. The IEP team discussion of Dr. Brutoco's letter focused on disagreement over the intensity of Student's target behaviors and the degree to which they affected Student's ability to make progress on her non-behavioral goals. The team did not discuss Dr. Brutoco's analysis of the cause of Student's target behaviors, or his conclusion that Student required training in the environment of a residential placement to make progress on her existing IEP goals of reducing and eventually eliminating the target behaviors.

182. The IEP team discussed Student's sleep behavior. Parents and Student's attorney argued that Student had spent too much time sleeping in class at Northwood to have received an appropriate education, but at Bayes Student was not sleeping and was able to complete and benefit from a full academic day. Student had only been observed twice to be drowsy after lunch, but had been able to attend to task after her teacher asked her to stand up and talk for a short time. Student's attorney noted that Dr. Brutoco considered Student's sleeping in class to be more of an avoidance behavior.

183. District defended its response to Student sleeping in class, noting that Parents had told District to expect increases in Student sleeping at school due to medication changes and her sleep apnea. Parents responded that District's review of Student's sleep and behavior data had found no correlation between medication changes and sleep behavior or behavior changes.

184. Behavior intervention specialist Ms. Kapur stated that District had looked at whether Student's sleep was an escape behavior and concluded that it was not. Ms. Kapur noted that Student would sleep during preferred activities. Her eyes would get droopy, and look like she was falling asleep, at which point Student's behavior tutor would try to arouse her with preferred activities and reengage her. School psychologist Ms. Simmons said that sleep behavior at school was not common, and District had therefore followed Dr. Brutoco's direction on how to approach it. She noted that Dr. Brutoco had not suggested until recently that Student's sleep was an avoidance behavior.

185. Student's attorney asked why District had not done further assessments of Student's sleep behavior for the IEP team to consider. District's attorney replied that the IEP team had received regular updates from Parents, and Ms. Simmons had been in communication with Dr. Brutoco. Ms. Simmons noted that Dr. Brutoco had told her that Student was sensitive to little changes to her medication. Also, the school nurse had

communicated with Parents and made sure the team was monitoring Student to ensure her safety.

186. District had some questions for Parents concerning Bayes' treatment plan review, but did not review the plan in detail, or discuss what it showed about the effectiveness of Student's program at Bayes. The District team members stated that they wished to communicate with Bayes and Regional Center of Orange County, and possibly observe Student at Bayes, before responding to Parents' funding request. No changes were made to Student's IEP.

NOVEMBER 2016: DISTRICT BEHAVIOR SPECIALIST OBSERVES STUDENT AT BAYES ACHIEVEMENT ACADEMY

187. District behavior specialist Ms. Hendricks traveled to Bayes on November 16-18, 2016, to observe Student's program at Bayes. Ms. Hendricks observed Student twice in her teaching home environment, and twice at school. Ms. Hendricks had concerns regarding Bayes' program that she transmitted to District, but these were not conveyed to Parents or Bayes prior to hearing. Ms. Hendricks prepared written notes of her observations, but these were never provided to Parents, nor offered as evidence at trial. Ms. Hendricks testified to what she observed at Bayes in November 2016. Ms. Hendricks did not observe any inappropriate techniques being applied to Student, but did see several other techniques being used that she found objectionable. For example, Ms. Hendricks saw another student being punished by being forced to stand facing a wall for 20 minutes. She also observed another student pushed into a chair and restrained by all four limbs by four staff members.

DECEMBER 29, 2016 TREATMENT PLAN REVIEW

188. Bayes reviewed Student's treatment plan in December 2016, and prepared a treatment plan review dated December 29, 2016. The plan review covered the period September 17, 2016, to December 16, 2016. A copy was provided to District.

189. Student had lost an additional 5.6 pounds since September, and was down to 132.4 pounds. She was participating in daily physical activities.

190. Data collected by Bayes for the period from September 17, 2016, through December 16, 2016, indicated that Student's at-school target behaviors of property destruction and leaving an assigned area had decreased from their levels during Student's first three months at Bayes. Physical aggression, non-compliance and verbal aggression had increased. At school, Student exhibited 16 acts of physical aggression, four acts of property destruction, five acts of leaving an assigned area, 1,881 acts of non-compliance, and 14 acts of verbal aggression, compared to three acts of physical aggression, eight acts of property destruction, 13 of leaving an assigned area, 1,176 of non-compliance, and four of verbal aggression from June 17, 2016, through September 16, 2016. Despite the increases, the frequency of acts of physical aggression and leaving an assigned area remained well below their levels at Northwood.

191. Instances of physical aggression, non-compliance, verbal aggression, and leaving an assigned area had all decreased when Student was in her residence environment. Property destruction had increased. During a visit with Parents, Student swept the dishes off the table at a restaurant.

192. During this review period, Student required three emergency behavioral interventions in which staff physically restrained Student to control her escalated physical aggression in which she presented as a danger to herself and others. Staff exhausted all other means of intervention prior to initiating the restraint.

193. The review concluded that Student demonstrated a positive response to treatment, but required continued treatment at Bayes to develop and progress toward treatment goals, and to generalize appropriate behavior in all settings. Student's target behaviors continued to be significant areas of need, and Student continued to require high levels of supervision due to her impulsivity and needed assistance with activities of daily living. Student had historically demonstrated an inability to maintain appropriate behaviors when in a less restrictive setting.

MARCH 2, 2017 ANNUAL IEP TEAM MEETING

194. Student's 11th Grade Annual IEP team meeting was held on March 2, 2017. To prepare for the meeting, District staff reviewed Bayes' treatment plan review dated December 29, 2016, and a Bayes IEP progress report of the same date that was not offered in evidence. Ms. Torkzadeh contacted three local non-public schools to see if they would accept Student if the IEP team thought Student required a NPS placement. One did not respond. The other two, Speech and Language Development Center and Port View, said they would accept Student. The IEP notes state District contacted Bayes to invite them to participate in the IEP, but did not hear back from them. Testimony from District and Bayes clarified that District contacted Bayes the day before the meeting, and no one from Bayes was available to participate on short notice.

195. The meeting began with a review of Student's progress towards her 10 annual goals from her February 18, 2016 IEP. Based on information in Bayes' December 29, 2016 treatment plan review that covered the period September 17, 2016 to December 16, 2016, and in Bayes' IEP progress report that presumably covered the same period, District concluded that Student had met only two of her 10 annual IEP goals – her reading comprehension goal of identifying character traits of a central character in a second-grade level story, and her functional math skills goal of adding the prices of five items using a calculator. However, the information District relied on was

outdated and did not reflect Student's progress after December 17, 2016. If District had contacted Bayes and obtained current data as of the February 17, 2016 IEP anniversary date, it would have found that Student had met all but two of her annual goals – her pre-vocational skills goal of answering questions about her personal information, interests, education, and work experience; and her elopement goal of reducing her elopement to zero occurrences over four consecutive weeks. Student had met her remaining annual goals in functional math skills social pragmatics, fitness, and behavior.

196. The IEP team reviewed 10 new proposed goals developed by District. Student's three new behavioral goals were: (i) refrain from engaging in physical aggression for seven consecutive school days; (ii) refrain from engaging in property destruction for six consecutive school days; and (iii) refrain from engaging in elopement for seven consecutive school days.

197. The IEP notes stated that the team discussed the range of services and placement, and that Ms. Torkzadeh noted that the team should consider the full continuum of placements including residential treatment center, non-public school, and District Placement. However, the notes said nothing more about the placement discussion. District IEP team members testified they did not believe that Student required either residential or NPS placement to meet her needs, especially considering Student's improved behavior at Bayes. District's FAPE offer to Student continued to be placement in the Northwood moderate/severe program, with some changes to the services. District changed its occupational therapy offer to a total of 60 minutes monthly (as opposed to specifying 2 x 30 minutes monthly) to add flexibility to how the services were delivered. Adapted physical education consultation was added to support activities during specially designed physical education. Speech and language was changed from both sessions pull-out to one pull-out, one push-in to increase the opportunity for direct instruction, and career awareness was reduced from 90 minutes to 45 minutes for the school year because Student would likely also have off-campus work experiences as

a senior. Parents did not believe that District's offer constituted a FAPE, and stated that they would keep Student at Bayes. They indicated that their goal was to have Student return to Northwood in August 2017, if Student's classroom team would replicate the Bayes program on the Northwood campus.

198. Parents did not consent to District's March 2, 2017 IEP offer. Student's amended complaint was filed March 10, 2017.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA²

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006)³ et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C.

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

³ All subsequent references to the Code of Federal Regulations are to the 2006 version.

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

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) In *Endrew F. v. Douglas County School District* (201727) 580 U.S. __, __ [137 S.Ct. 988], the Court considered the meaning of the phrase “some educational benefit” for a child not being educated in a general education classroom. The Court

rejected the contention that the IDEA was satisfied by a program providing “merely more than *de minimis*” progress, and clarified FAPE as “markedly more demanding than the ‘merely more than the de minimus test’. . . To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”(*Id.*, 137 S. Ct. at p. 1001.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code, § 56505, subd. (h).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) Student filed the complaint in this matter, and therefore had the burden of persuasion.

ISSUE1(A): TRANSPORTATION TO SCHOOL OF CHOICE – NOVEMBER 19, 2014 IEP

5. Student contends District denied her a FAPE by refusing to provide her transportation to her school of choice because: (i) Student required home to school transportation services in her IEP to address her behaviors of refusing to enter or exit the car when driven to school by her parents; and (ii) Parents placed Student at Northwood because it was a more appropriate program than her home school,

Woodbridge, and District's parent transportation agreement for placement at a school of choice therefore should not apply. District contends that Parents chose to place Student at Northwood for reasons of preference, rather than educational need, and District may enforce its facially-neutral policy of requiring parents to transport children as a condition of enrolling them in a school of choice.

Applicable Law

6. A district must make a formal, written, and specific IEP offer showing when placements were offered, what placements were offered, and what related services were offered to supplement a placement. (*Union School Dist. v. Smith* (1994) 15 F.3d 1519, 1526, cert. denied, 513 U.S. 965 (*Union*).) *Union* requires "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal." (*Glendale Unified School Dist. v. Almasi* (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108.)

7. The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a).) The IDEA's implementing regulations define transportation as: (i) travel to and from school and between schools; (ii) transportation in and around school buildings; and (iii) specialized equipment (such as adapted busses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16)(2006).) A school district must adopt policies setting forth the criteria for meeting the transportation needs of special education pupils, and describing how special education transportation is coordinated with regular home to school transportation. (Ed. Code, § 56195.8, subd. (b)(5).) Decisions regarding transportation services are left to the discretion of the IEP team. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46576 (August 14, 2006).) However, in making its placement recommendations, the IEP team must consider local transportation policies and criteria developed pursuant to

Education Code section 56195.8, subdivision (b)(5). (Ed. Code, § 56342, subd. (a).) A district must provide transportation or other related services only if a student with a disability requires it to benefit from his or her special education. (20 U.S.C § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code, § 56363, subd. (a).)

8. The Ninth Circuit has not addressed whether a school district may have a policy that gives all students within the district the opportunity to choose to attend a school that is not their home school, on condition that no student, including a student with an IEP, receives district transportation to such a school of choice. The Eighth Circuit has held that district may apply a facially neutral transportation policy to deny a disabled child transportation without violating the IDEA, when the parents' request for deviation from the policy is not based on the child's educational needs, but on the parents' convenience or preference. (*Timothy H. v. Cedar Rapids Cnty. Sch. Dist.* (8th Cir.1999) 178 F.3d. 968, 972 (*Timonthy H.*); *Fick v. Sioux Falls School Dist.* 49-5 (8th Cir. 2003) 337 F.3d 968, 970 (*Fick*).) *Timothy H.* involved the parents' request to transport a disabled child to a school outside a neighborhood school boundary. The student's IEP offered placement in a class for students with severe and profound disabilities at her neighborhood high school. The IEP also provided the student special transportation services to her neighborhood school. Student applied to transfer to a different high school, under a district program which allowed all students to attend schools outside their assigned attendance areas, with permission from the district and with transportation to be provided by the participating students' parents. The school district granted the student's request to transfer schools, but advised the parents that they would be required to transport the student to the new school pursuant to the intra-district transfer policy, which provided, "[p]arents shall be responsible for the transportation of students not attending their resident area school. . . ."

9. The parents did not bring an action under the IDEA, but instead under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.), which provides in

part: "No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." (29 U.S.C. § 794(a).) The court held the district did not violate Section 504 by refusing to pay to transport the student to a school outside the neighborhood boundaries. The student's educational needs could be met by the school within the neighborhood boundaries, and the request for transportation to a school outside the boundaries was "for reasons of parental preference" only. *Id.* at 973.

10. The court in *Fick* held that the principles set forth in *Timothy H.*, which was brought under Section 504, applied equally to cases brought under the IDEA, because the pertinent obligation of a district under Section 504 is the same as its obligation under the IDEA: "To provide disabled students with a free appropriate public education." *Fick*, 337 F.3d at p. 970, citing *Gill v. Columbia93 Sch. Dist.* (8th Cir.2000) 217 F.3d 1027, 1034. In *Fick*, the student suffered from epilepsy, which caused seizures that required an immediate shot of medication administered by a qualified nurse. To address this need, the student's IEP included the related service of transportation to and from school in a taxi accompanied by a qualified nurse. *Id.* at p. 969. The district had created geographical areas within the district determining each Student's school of attendance based on the student's address in the district. District transportation policy allowed students to designate one pick-up address before school and one drop-off address after school. The addresses did not have to be the same, but both had to be located within the student's geographical area. The district would, however, transport a disabled student outside her designated geographical area when the transportation was necessary for the student to benefit from her IEP. When the parent asked the district to change the student's drop off location from her home to a day-care center outside the student's geographical boundary, the district refused because the day care center lay outside the student's geographical boundary. The court, citing *Timothy H.*, held that the district did not have to

deviate from its transportation policy to accommodate the parent's request to transport the student to a more convenient or preferred day care center.

Analysis

11. Student's November 19, 2014 denied her a FAPE by offering her placement at Northwood without the transportation that District acknowledged Student required to assist her in benefitting from her education. Although District referenced its transportation policy as the reason for not offering Student transportation to Student's school of choice, it never made a clear FAPE offer providing Student transportation to her home school, Woodbridge. To the contrary, District suggested, both before and after the November 19, 2014 IEP, that Student was not, or might not be, eligible for transportation to Woodbridge.⁴ Prior to her November 19, 2014 IEP, Student's February 3, 2014 IEP declined to provide her transportation to South Lake Middle School on grounds that it was her home school. Following Student's November 19, 2014 IEP, when Parent's renewed request for transportation to Northwood in March 2016, District again indicated that Student was not, or might not be, entitled to transportation to her home school. Writing on March 25, 2016, Ms. Torkzadeh denied Parents' renewed request for transportation to Northwood on grounds that Parents, not District, had placed Student at Northwood. She stated that District could meet Student's unique needs in the comparable program available at Student's school of residence, Woodbridge, and that Parents could revoke the transfer to Northwood to have Student attend Woodbridge. Ms. Torkzadeh did not say that Student then would receive transportation to Woodbridge, only that, when Parents revoked the transfer to Northwood, "the IEP team could consider [transportation to Woodbridge.]" The facts in this case are thus

⁴Student was offered transportation when her IEP team placed her in 2014 and 2015 in an extended school year program not located at her home school.

distinguishable from those in *Timothy H.* and *Frick*. In each of those cases, the student had an existing, implemented IEP that included the related service of transportation to and from the student's home school that was necessary to offer the student a FAPE.

ISSUES 1(B), 2(B), 5(B), 6(B), 7(B), 8(B) AND 9(B): SLEEPING AT SCHOOL – IEP'S DATED NOVEMBER 19, 2014, JANUARY 22, 2015, SEPTEMBER 23, 2015, FEBRUARY 18, 2016, JUNE 3, 2016, SEPTEMBER 26, 2016 AND MARCH 2, 2017

12. Student contends District denied her a FAPE by failing to offer her appropriate services to address her behavior of sleeping at school. District contends that Student slept at school because she was tired because of her medical condition of sleep apnea, and because of the effects of her behavior medication prescriptions. District contends that it was not required to address Student's sleep behavior in its IEP because neither Student's sleep apnea nor prescriptions would have been influenced by changes in Student's behavior plan, and, in any event, Student made progress on her IEP goals despite her sleep behavior.

Applicable Law

13. 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.*) An IEP does not have to 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), and 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.*)

14. An IEP for a disabled child is measured at the time that it was created. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Dept. of Educ., State of Hawaii* (D. Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d

431, 439.) Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801.) In reviewing the sufficiency of an IEP's offer of FAPE, the snapshot rule looks at what is reasonable given the information available to the team at the time.

15. A student may be eligible for special education and related services in the category of other health impairment if he is a pupil with limited strength, vitality, or alertness, due to chronic or acute health problems which adversely affect his educational performance (Cal. Code Regs., tit. 5, § 3030, subd. (b)(9).) A school district is required to provide related services "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).) Related services under the IDEA and Education Code include school health services, school nurse services, and diagnostic and evaluative medical services. (20 U.S.C. § 1401(26)(A); 34 C.F.R. § 300.34(a); Ed. Code 56363, subd. (a).)

16. When a student has a diagnosis of a chronic illness, the student may be referred to the school district for a health assessment. (5 Cal. Code Reg. § 3021.1, subd. (a).) A health assessment focuses on diagnoses, health history, and those specific health needs while in school which are necessary to assist a child with a disability. The IEP team must review: the type of chronic illness; possible medical side effects and complications of treatment that could affect school functioning; and educational and social implications of the disease and treatment. (*Id.*, § 3021.1, subd.(b).)

17. An IEP team "shall meet" whenever "[t]he pupil demonstrates a lack of anticipated progress." (Ed. Code, § 56343, subd. (b).) The IEP team must revise the IEP as appropriate to address "any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate." (20 U.S.C. § 1414 (d)(4)(A)(ii)(I); 34 C.F.R. § 38 300.324(b)(2).)

18. In *L.J. v. Pittsburg Unified School District* (9th Cir. 2017) 850 F.3d 996 (*L.J. v. Pittsburg*), the court addressed the issue of whether a student had demonstrated a

need for special education services to address needs arising from medical conditions and treatment. The student had been diagnosed with bipolar disorder, oppositional defiant disorder, and attention deficit hyperactivity disorder. His physician had prescribed a cocktail of serious medications for these conditions. (*Id.* at p. 999.) The student continually had needs associated with his medication and treatment. He relied on psychotropic medications to be able to attend school, and his ability to function declined when he was not medicated or when the medication was ineffective. Staff were concerned that his medications were not being managed properly. (*Id.* at p. 1007.)

19. Without assessing the student for possible medical side effects and complications of treatment that could affect school functioning, the district provided a behavior support plan and mental health services. With the assistance of medication and specially designed instruction, the student had periods of temporary behavioral and academic gain. The student's teachers, service providers, and mother all reported that he had made good progress in academics and improved his social skills with his classmates during the snapshot period. The court noted that the student's academic performance could have been even more improved with appropriate specially designed instruction, and focused instead on the Student's behavioral and academic difficulties that interfered with his education. The student frequently acted out at school, and continued to have needs associated with his medication regimen. He threatened and attempted to kill himself three times, and was hospitalized three times, missing school. The court found it "hard to imagine how an emotional disturbance so severe that it resulted in repeated suicide attempts would not interfere with school performance," and found that the student's disabilities interfered with his education and required special education services. (*Id.* at p. 1006.)

20. The court also found that the district should have assessed the student's health, and the effects of his medications, to consider alternatives to the services it was providing the student. The court found that the district's failure to conduct a health

assessment effectively made it impossible for the district to address the student's needs: "Because his health and the impacts of his medication were never assessed, no matter what assistance [the student] received, the school district would remain unable to appropriately address those needs." (*Id.* at p. 1008.)

Analysis

ISSUE 1(B): SLEEPING – NOVEMBER 19, 2014 IEP

21. Student began sleeping in class in January 2014. As of Student's November 19, 2014 IEP, District staff, Parents, and Student's psychiatrist, Dr. Brutoco, all believed that Student's sleeping in class was a side effect of the medications prescribed by Dr. Brutoco to control her target behaviors of physical aggression, property destruction, and elopement. With Parents' consent, District had informally accommodated Student's sleeping behavior by allowing her to sleep. This informal accommodation was made without a District assessment of Student's health or the effect of her medications, and was not made part of her IEP. As with other behaviors of Student, the frequency and duration of her sleeping would rise and fall. As of November 2014, Student was sleeping an average of about 30 minutes per day. On waking, Student was productive and cooperative. Student's target behaviors were greatly reduced, and Student was making progress on her goals. The amount of class time lost to sleep was less than eight percent of Student's 6.5-hour school day. Student at that time was not exhibiting sleep behaviors that adversely impacted her progress on her goals. District did not deny Student a FAPE by failing to change the placement or services in Student's November 19, 2014 IEP to address Student's sleeping in class.

ISSUE 2(B): SLEEPING - JANUARY 22, 2015 ANNUAL IEP

22. As of January 2015, Student was sleeping slightly more in class; a nap averaging about 45 minutes (or about 12 percent of her school day), almost daily. Staff

was now keeping a log of the dates and times when Student fell asleep to provide feedback to Parents and Dr. Brutoco. The IEP team was also aware that Student had participated in a sleep study that found Student had sleep apnea, a sleep disorder that caused Student to stop breathing while she slept, depriving her of oxygen and disrupting her sleep.

23. District, Parents, and Dr. Brutoco were now aware of two potential medical causes of Student's sleep behavior: her sleep apnea and side effects from the prescription medications prescribed by Dr. Brutoco. If Student's sleep behavior at that time had been adversely impacting Student's performance, District would have been required under the principles set forth in *L.J. v. Pittsburgh* to assess the effects of Student's sleep apnea and her behavior medications on Student's school functioning. However, as of January 2015, Student had made such significant progress on her target behavior goals that her behavior intervention specialist considered recommending the phase-out of Student's behavior intervention plan. Student had also met 12 of her 16 annual IEP goals from 2014, and had made significant progress on her remaining four goals in physical fitness, counting money to pay for items, spelling of grocery words, and reducing her target behavior of elopement. Although Student was now losing over 10 percent of her school day to her naps, overall Student's sleep behaviors did not appear to be adversely impacting her progress on her goals. District did not deny Student a FAPE by failing to assess the effects of Student's sleep apnea and her behavior medications on Student's school functioning, or failing to change the placement or services in Student's January 22, 2015 IEP to address Student's sleeping in class.

ISSUES 5(B), 6(B), AND 7(B): SLEEPING - SEPTEMBER 23, 2015, FEBRUARY 18, 2016 AND JUNE 3, 2016 IEP'S

24. As of Student's September 23, 2015 IEP, Student was sleeping an average of 2.6 hours per day – almost half of her 6.5-hour regular school day. This sharp increase

in Student's sleep time had begun seven months earlier, in February 2015, along with an escalation of Student's target behaviors. Student slept through more than half of her extended school year program in June and July 2015 – an average of two hours and 20 minutes of each four-hour school day. She slept for an average of 3.8 hours of her first week of school, and appeared lethargic and disconnected from staff, classmates, and her surroundings. Her teacher, Ms. Flocken, told mental health assessor Ms. Cohen that Student's instruction time had been limited. Parents told the IEP team Student did not take extended naps at home on weekends and exhibited very intense behaviors at home that might be related to the lack of naps.

25. Sleeping in class was now clearly a major behavioral issue, not merely an accommodation to the effects of medications used to control Student's other behaviors. As in *LJ v. Pittsburgh*, it is "hard to imagine" how a sleep disturbance so severe that it resulted in Student missing nearly half of her school day would not interfere with her school performance. At the same time, Parents' information that Student might exhibit intense behaviors if staff simply curtailed her naps indicated that the issue would not easily be resolved. District was proceeding on a best guess that Student's sleeping in class was a side effect from her behavioral medications and to her sleep apnea, but District was now obligated under the principles set forth in *LJ v. Pittsburgh* to assess Student's health, and the effects of her medications, and consider alternatives to the services it was providing Student. District's failure to conduct such an assessment effectively made it impossible for District to appropriately address Student's needs. As of Student's September 23, 2015 IEP, District's failure to assess the effects of Student's sleep apnea and her behavior medications on Student's school functioning, and modify the placement or services in Student's IEP based on the results of such an assessment, denied Student a FAPE.

26. Sleeping in class remained a major behavioral issue as of Student's February 18, 2016 and June 3, 2016 IEP's. Student was sleeping about 1.7 hours per day,

or 26 percent of her school day, as of her February IEP team meeting, and about 1.6 hours per day, or 24 percent of her school day, as of her June IEP team meeting. District did not attempt to assess the effects of Student's sleep apnea and her behavior medications on Student's school functioning. Neither IEP made any changes to Student's placement or services to address Student's sleep issue, and neither provided Student a FAPE.

ISSUES 8(B) AND 9(B): SLEEPING – SEPTEMBER 26, 2016 AND MARCH 2, 2017 IEP'S

27. Two significant events relating to Student's sleep behavior occurred between Student's June 3, 2016 and September 26, 2016 IEP's. The most significant event was that Student had almost completely stopped sleeping in class after she arrived at Bayes on June 17, 2016. The reason for this change was unclear, but it had occurred as a result of Student's general educational and residential program at Bayes, and not as a result of goals, services or accommodations specifically directed towards Student's sleep behavior.

28. The second event was District's receipt of Dr. Brutoco's August 11, 2016 letter opining that Student's sleep behavior in class was not actually sleep, but was instead extreme avoidance behavior, with Student "playing possum" and feigning sleep to avoid an activity or exercise passive-aggressive control over others, which sometimes led to actual sleep. District and Parents were now aware of at least three possibly interacting factors that might be involved in Student's sleep behavior: reaction to behavior medications, sleep apnea – possibly associated with weight gain, and avoidance.

29. Thus, as of Student's September 26, 2016 and March 2, 2017 IEP's, the information available to District was that, for reasons unclear, Student was no longer sleeping in class. District did not have an obligation under *LJ v. Pittsburgh* to consider alternatives to the services it was offering Student, or to assess Student to determine

why Student's former sleep behavior had stopped and was no longer a behavior that impeded her learning. Student did not present evidence establishing that it was more likely than not that Student's sleep behavior would return under the placement and services offered in Student's September 26, 2016 and March 2, 2017 IEP's. On the contrary, the evidence suggested that Student's sleep behavior would not return: Student had lost weight, which would tend to reduce her sleep loss due to sleep apnea; her current medication regimen was not making her sleep in class, and she was not sleeping or pretending to sleep as an avoidance behavior, although she was exhibiting other avoidance behaviors.

30. Student did not prove by a preponderance of the evidence that District denied Student a FAPE in Student's September 26, 2016 and March 2, 2017 IEP's by failing to offer placement or services to address a possibility of Student sleeping in class.

ISSUE1(C): OCCUPATIONAL THERAPY – NOVEMBER 19, 2014 IEP

31. Student contends District denied her a FAPE by refusing to provide her appropriate occupational therapy services to address her needs handwriting, mouthing of objects, and picking at her nose and gums. District contends that its IEP offer of occupational therapy consultation between teachers and the occupational therapist, twice monthly for 30 minutes as a supplementary service or support, was appropriate to address Student's needs.

Applicable Law

32. The term "related services" means transportation, and such developmental, corrective, and other supportive services (including . . . occupational therapy . . . , that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26) (A); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).)

33. An IEP team “shall meet” whenever “[t]he pupil demonstrates a lack of anticipated progress.”(Ed. Code, § 56343, subd. (b).) The IEP team must revise the IEP as appropriate to address “any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate.” (20 U.S.C. § 1414 (d)(4)(A)(ii)(I); 34 C.F.R. § 38 300.324(b)(2).)

Analysis

34. The history of Student’s handwriting, and sensory behaviors of mouthing inappropriate objects and picking her nose and gums shows that District’s November 19, 2014 IEP denied Student a FAPE when it maintained occupational therapy services for Student as a twice-monthly 30-minute consultation between teachers and the occupational therapist. From 2006 until February 2014, District had continuously provided Student occupational therapy services that included direct interaction with the therapist to work on Student’s needs in fine motor skills and sensory processing. By 2012, Student’s motor skills were greatly improved over prior years. Student did not like writing, and would become non-compliant and aggressive when asked to write, but would write a four-word sentence in five minutes or less.

35. By Student’s February 3, 2014 IEP, although the appearance of Student’s handwriting had not substantially changed since 2012, Student’s occupational therapist reported that Student had acquired the handwriting skills she needed to function in the classroom. Student could write in a one-third of a line size and write upper and lower-case letters. Student’s writing could be read by others. Student could copy both from the classroom board and from books in front of her. With frequent verbal prompts, Student could complete a handwriting assignment, but now required as long as 30 minutes to write a five to seven-word sentence, compared to the five minutes or less it had taken her to write a four-word sentence two years before. Student was working on writing her spelling words, personal information and up to four sentences, to gain best

quality of work rather than quantity. Student was also working on a technique of spacing her words by touching her pencil tip twice between each word.

36. However, by the time Ms. Chou assessed Student's occupational therapy needs in September 2014, seven months after occupational therapy consultation with staff had replaced direct collaborative occupational therapy with Student, Student had plainly regressed. Student was barely writing in class. Student generally refused to attempt to copy or write single words, and would at most complete worksheets by circling answers, writing numbers, and tracing letters. Ms. Chou relied on documents to confirm that Student at one time had been able to copy and write single words and a three to five-word sentence with physical assistance. Student was unable to fill in a form or application, or complete written work on time. She completed written work by dictating to classroom support staff, who wrote down her answers. Student was unable to use a computer or other keyboard device to complete written work.

37. At the November 19, 2014 IEP team meeting to discuss her occupational therapy assessment, Ms. Chou attributed Student's lack of progress in written work to her having plateaued at a level corresponding to her ability. This conclusion was not included in Ms. Chou's written occupational therapy assessment, and the IEP itself refers only to Ms. Chou having "discussed why it is that [Student's] skills appear as if they had not improved." The rationale for this conclusion was nowhere explained, and, in any event, Student's writing ability was not on a level plateau, but was instead regressing following the termination of direct occupational therapy services. Student was simply being accommodated by no longer being required to write. Instead, Student would dictate responses to an adult.

38. Additionally, the September 17, 2014 occupational therapy assessment and November 19, 2014 IEP team meeting only mentioned and did not address Student's ongoing sensory behaviors of licking glue and paint, and picking her nose and gums. The deletion of mouthing of objects as a target behavior in Student's February 11,

2014 behavior plan was never explained. The closest to an explanation available to Parents and the IEP team on November 19, 2014 was the observation in the occupational therapy assessment that Student chewed paper towels as a calming strategy to regulate her emotional state, which suggested that a decision had previously been made to allow Student to self-regulate in this way. The IEP team discussed that Student had reduced her chewing of paper towels at school to once a week. That behavior therefore did not appear to need to be addressed through additional occupational therapy services beyond those offered in the IEP. However, no explanation was offered why Student was permitted to continue licking non-food objects such as glue and paint. At the February 3, 2014 IEP team meeting, the team had agreed to begin formal data collection if Student's self-injurious behavior of picking at her nose and gums became more of a concern. Parents raised that concern at the November 19, 2014 IEP team meeting. The concern was noted in the IEP, and that was all. No data collection was initiated, and no change was made to the existing IEP.

39. Student's November 19, 2014 IEP failed to provide Student appropriate occupational therapy to address her needs with respect to the regression in Student's writing skills, and Student's ongoing sensory behaviors of licking non-food objects and picking her nose and gums. For that reason, the IEP denied Student a FAPE.

ISSUES 2(A), 3, 4, 5(A), 6(A), 7(A), 8(A), AND 9(A): PHYSICAL AGGRESSION, PROPERTY DESTRUCTION, AND ELOPEMENT – IEP'S DATED JANUARY 22, 2015, MAY 5, 2015, MAY 20, 2015, SEPTEMBER 23, 2015, FEBRUARY 18, 2016, JUNE 3, 2016, SEPTEMBER 26, 2016 AND MARCH 2, 2017

40. Student contends District denied her a FAPE by failing to offer her an appropriate placement and services to address her behaviors of physical aggression, property destruction, and elopement. District contends Student's behaviors were appropriately addressed by District's offers of placement and services, and did not impede her ability to access her education.

Applicable Law

41. Educational benefit is not limited to academic needs. Behavioral and emotional needs are properly addressed through an IEP when they affect academic progress, school behavior, and socialization. (*County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467 (*County of San Diego*).

42. When a child's behavior impedes his 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).) An IEP that does not appropriately address behaviors that impede a child's learning denies the child a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029; *County of San Diego, supra*, 93 F.3d at pp. 1467-68.)

43. In any particular case, the student's IEP defines what goals are relevant in providing the measure of whether a student is getting an educational benefit in the placement. The correct standard for measuring educational benefit under the IDEA is not merely whether the placement is "reasonably calculated to provide the child with educational benefits," but rather, whether the child makes progress toward the goals set forth in her IEP. (*County of San Diego, supra*, 93 F.3d at p. 1467 (holding that a program that had little effect, if any, on helping a student achieve IEP goals of controlling her anger, reducing her tendency to truancy, or diminishing her frustration over academic work denied the student a FAPE).)

44. While every effort is to be made to place a student in the least restrictive environment, it must be the least restrictive environment which also meets the child's IEP goals. (*County of San Diego, supra*, 93 F.3d at p. 1468.)

Analysis

45. Each of Student's annual IEP's acknowledged that Student's target behaviors of physical aggression, property destruction, and elopement affected her academic progress, school behavior, and socialization, and impeded her learning or that of others. Student's IEP teams appropriately included behavioral goals and a behavior intervention plan. In doing so, the IEP team's ultimate goal was to extinguish and replace Student's target behaviors, not merely to find ways to manage them indefinitely at some level of frequency and intensity her classroom team could tolerate.

46. In addition to interfering with Student's and other's learning in other areas, Student's behaviors were inconsistent with her goals for her post-education transition to adult life. Student needed to stop or nearly stop her physical aggression and property destruction, especially, to achieve goals of enrolling in a class of interest at a local community college, working on independent living skills, and securing suitable supported employment in a preferred work environment.

47. From the fall of 2012 until June 2016, District, through Parents, worked with Student's treating physician, Dr. Brutoco, to achieve Student's IEP behavioral goals through a combination of behavioral medications managed by Dr. Brutoco and Parents, and behavioral intervention strategies implemented by District teachers, behavior tutors, and staff. District was in constant communication with Parents regarding Student's target behaviors in school and at home, and Dr. Brutoco was in constant communication with Parents about changes to Student's numerous medications. Parents promptly and consistently shared information provided by District with Dr. Brutoco, and vice-versa.

ISSUE 2(A): PHYSICAL AGGRESSION, PROPERTY DESTRUCTION, AND ELOPEMENT – JANUARY 22, 2015 IEP

48. As of Student's IEP team meeting on January 22, 2015, the IEP team's approach of behavioral medications managed by Dr. Brutoco and Parents, and

behavioral intervention strategies implemented by District teachers, behavior tutors, and staff, appeared to be working. From 2009, when Student's first behavior intervention plan was developed, to January 2013, Student's then-target behaviors of eloping, physical aggression, and mouthing objects had decreased markedly. In March 2009, Student on average eloped 42 times per day, engaged in physical aggression 29 times per day, and mouthed objects 33 times per day. During December 2012 and January 2013, these behaviors had been reduced to where Student on average was eloping five times per week, engaging in physical aggression three times per week, and mouthing objects four times per week. She also engaged in acts of property destruction seven times per week.

49. After a slight increase in January 2014 compared to January 2013, and a spike at the end of Student's 2013-2014 school year that included Level 3 behavior, Student's target behaviors dropped markedly, and seemed to be on the verge of elimination. In January 2014, Student had eloped an average of five times per week, engaged in physical aggression 15 times per week, and engaged in acts of property destruction seven times per week. In January 2015, Student had eloped an average of 0.75 times per week, engaged in physical aggression 0.5 times per week, and engaged in acts of property destruction one time per week. None of Student's incidents of target behavior in the 2014-2015 school year had exceeded Level 1.

50. Student's reduction of target behaviors was so significant that Student's behavior intervention specialist considered whether Student's behavior intervention plan should be discontinued. However, the specialist and Student's IEP team ultimately concluded that a behavior intervention plan was still warranted, due to the up-and-down history of Student's target behaviors, and the potential severity of the behaviors.

51. Student was making progress on her behavioral goals as of her January 22, 2015 IEP. District's offer of placement and services was appropriate to address her target behaviors, and did not deny Student a FAPE in that regard.

ISSUES 3 AND 4: PHYSICAL AGGRESSION, PROPERTY DESTRUCTION, AND ELOPEMENT –
MAY 5, 2015 AND MAY 20, 2015 IEP'S

52. As of Student's May 5, 2015 and May 20, 2015 IEP's, Student's target behaviors had sharply increased, but it was unclear whether the increase was a short-term setback in a path leading toward success in Student's IEP behavioral goals, or an indicator that Student's current program was not working and needed to be modified. In February 2015, when Student began engaging more frequently in aggressive behavior towards her teacher, behavior tutor, staff, and classmates, Student's classroom team was puzzled by the increase in behaviors, because Student's school environment and program had not changed. When the behaviors continued to escalate through April 2015, and staff could not identify antecedents to many of Student's instances of aggression, Student's behavior specialist implemented more copious antecedent-behavior-consequence data collection to look for possible antecedents for the behavior.

53. In May 2015, with Student continuing to escalate in her target behaviors at school and at home, and District unsure why, District reached out to Dr. Brutoco. School psychologist Ms. Simmons on May 18, 2015 wrote Dr. Brutoco, explaining that Student's behaviors were significantly different from earlier in the school year, and that District hoped to collaborate with Dr. Brutoco and Parents to develop a plan to support Student. At Parents' request, District also conducted an educationally related mental health services assessment of Student to determine whether Student's target behaviors were related to emotional issues that could be addressed through educationally related mental health therapy.

54. District's decisions to attempt to collaborate with Dr. Brutoco on developing new approaches to addressing Student's behaviors, and to conduct an educationally related mental health services assessment to explore mental health therapy as an option for helping Student were reasonable steps towards developing a new IEP. District did not deny Student a FAPE by waiting for information from its

collaboration with Dr. Brutoco and the results of Student's assessment instead of making changes to Student's placement or services in May 2015.

ISSUE 5(A): PHYSICAL AGGRESSION, PROPERTY DESTRUCTION, AND ELOPEMENT –
SEPTEMBER 23, 2015 IEP

55. As of Student's September 23, 2015 IEP, it had become clear that Student was not making progress towards her behavioral goals under her existing program, and District modified Student's behavior intervention plan. On her first day of 10th grade, Student had exhibited all three of her target behaviors, including seven acts of physical aggression that escalated as high as Level 2, six acts of property destruction that escalated as high as Level 3, and two Level 1 acts of elopement. Though September, she continued to exhibit one or more target behaviors at school on most days, averaging 0.9 occurrences of physical aggression per day, 1.2 occurrences of property destruction per day, and 0.4 occurrences of eloping per day. On September 16, Student exhibited physical aggression escalating to Level 2 (pushing and grabbing teacher), and on September 17 she exhibited property destruction escalating to Level 3 (pushed computer off teacher's desk). Student exhibited Level 2 elopement behavior on two days (running from the classroom but not to an unsafe area).

56. Student exhibited this frequency of behaviors despite sleeping in class on all but two days. She slept an average of 3.8 hours of her 6.5-hour school day during the first week of school, and from one to four hours most days after that.

57. The day before her IEP, Student for the first time since starting high school inappropriately removed her clothing, taking off her shorts and underwear. Student's obsession and aggression over food was escalating and she was becoming overweight.

58. Student's IEP team needed to take action and it did. It revised Student's behavior intervention plan to indicate that the functions of Student's physical aggression and property destruction had shifted from the previous function of escape,

to a primary function of access to tangibles such as food, preferred items and places, and a secondary function of attention, mostly from preferred adults. And it included in the behavior intervention plan some slightly modified replacement behaviors, proactive strategies, reactive strategies, and occurrence management strategies for acts of physical aggression or property destruction whose purpose was to obtain access to tangibles or attention. Because mental health assessor Ms. Cohen had concluded that Student did not have sufficient awareness of, or insight into, her emotions, or ability to communicate with another person about her feelings, to be able to benefit from educationally related mental health therapy, no counseling services were added to Student's IEP.

59. Given the scope of behavioral issues exhibited by Student at the start of 10th grade, the changes made by Student's IEP team to her behavior intervention plan were modest. However, based on the information available to Student's IEP team at the time, the September 23, 2015 IEP was reasonably calculated to address Student's target behaviors and allow her to make progress on her behavioral goals, and did not deny Student a FAPE.

ISSUE 6(A): PHYSICAL AGGRESSION, PROPERTY DESTRUCTION, AND ELOPEMENT –
FEBRUARY 18, 2016 IEP

60. As of Student's February 18, 2016 Annual IEP team meeting, it was clear that Student's educational program was having little effect, if any, on helping Student achieve her IEP behavioral goals of controlling her physical aggression, property destruction and elopement. Additionally, Student had met only three of 10 non-behavioral goals from her January 2015 IEP.

61. Student in September 2015 exhibited 10 target behaviors of physical aggression, 22 of property destruction, and 10 of elopement. In October, there were, respectively, 19, 29 and 9 such target behaviors, in November, 22, 24 and 5, and in

December's 14 school days before winter break there were 26, 21, and 7 target behaviors. When school resumed in January, Student exhibited 68 acts of physical aggression and 49 acts of property destruction, and she eloped nine times. In February 2016, Student exhibited 86 acts of physical aggression and 48 acts of property destruction, and again eloped 9 times.

62. In the fall of 2015, Student escalated to Level 2 behavior on three days in September 2015, three days in October, and one day each in November and December. She escalated to Level 3 behavior twice: on September 17, 2015, when she pushed over a computer, and on October 6, when she again attempted to throw a computer but was blocked from doing so. In both January and February 2016, Student escalated to Level 2 behavior on five days, but exhibited no Level 3 behaviors.

63. Student had regressed in all three of her behavior goals and two of her 10 non-behavioral goals. Compared to her January 2015 baseline, Student in January 2016 was exhibiting 17 acts of physical aggression per week compared to 0.5, 12 acts of property destruction per week compared to one, and six acts of elopement per week compared to 0.75. Student had also regressed with respect to her cardiovascular endurance goal. Student also regressed in her one gross motor goal of combining two gross motor skills.

64. Student had met just three of her 13 goals: her life-skills goal her reading comprehension goal, and her social pragmatics goal. Student had made progress on another five non-behavioral goals.

65. In response to Student's failure to meet her previous behavioral goals, Student's IEP team re-wrote them to make them more difficult for Student to meet. Student's three behavioral goals to be achieved by January 22, 2016, had been: (i) reduce the frequency of her aggression towards others to no more than one occurrence per week; (ii) reduce the frequency of her property destruction to no more than two occurrences per week; and (iii) reduce the frequency of elopement to zero occurrences

per week. Student's new behavioral goals to be achieved by January 18, 2017 were: (i) reduce the frequency of her aggression towards others to zero occurrences over five consecutive school days; (ii) reduce the frequency of her property destruction to zero occurrences over five consecutive school days; and (iii) reduce the frequency of elopement to zero occurrences over four consecutive weeks.

66. District made no changes to Student's placement or services to help Student to achieve these more ambitious goals. Based on input from Student's teachers and the behavior tutor, Ms. Kapur revised slightly the target behavior definitions, and definitions of Levels 1, 2, and 3 for each behavior, which had been in effect since February 11, 2014. District proposed no changes to the replacement behaviors, proactive strategies, reactive strategies, or occurrence management strategies identified in Student's existing behavior management plan.

67. As of Student's February 18, 2016 annual IEP, Student was not meeting her behavioral goals but was instead showing regression in her target behaviors, and was meeting only three of 10 non-behavioral goals. District's existing educational program was not helping Student achieve her behavioral IEP goals, but District failed to modify its offer of placement and services to address Student's failure to make progress on her behavioral and other goals. District's February 18, 2016 IEP denied Student a FAPE.

ISSUES 7(A), 8(A) AND 9(A): PHYSICAL AGGRESSION, PROPERTY DESTRUCTION, AND ELOPEMENT –JUNE 3, 2016, SEPTEMBER 26, 2016 AND MARCH 2, 2017 IEP'S

68. Student's June 3, 2016 and September 26, 2016 IEP's made no changes to the February 18, 2016 IEP. District's June 3, 2016 and September 26, 2016 IEP's denied Student a FAPE.

69. Preparing for Student's March 2, 2017 Annual IEP, District relied on outdated information in Bayes' December 29, 2016 treatment plan review that covered the period September 17, 2016 to December 16, 2016, and in Bayes' IEP progress report

that presumably covered the same period. The information available to District – if District had contacted Bayes and obtained current data as of the February 17, 2016 IEP anniversary date – was that Student had met all but two of her 10 annual goals: her pre-vocational skills goal of answering questions about her personal information, interests, education, and work experience; and her elopement goal of reducing her elopement to zero occurrences over four consecutive weeks. Student had met her remaining annual goals in functional math skills, social pragmatics fitness, and behavior (reducing her aggression towards others and property destruction to zero occurrences over five consecutive school days).

70. Considering the progress Student had made under her residential treatment program at Bayes, District's revised behavioral goals were appropriate: (i) refrain from engaging in physical aggression for seven consecutive school days; (ii) refrain from engaging in property destruction for six consecutive school days; and (iii) refrain from engaging in elopement for seven consecutive school days. It was not appropriate, however, to leave unchanged District's existing offer of placement and services that had been unsuccessful while Student was attending her day school program at Northwood.

71. The only changes District made to its offer of placement and services were to: (i) change occupational therapy offer to 60 minutes monthly (as opposed to 2 x 30 minutes monthly); (ii) add adapted physical education consultation to support activities during specially designed PE; (iii) change speech and language services from both sessions pull-out to one pull-out, one push-in to increase the opportunity for direct instruction; and (iv) reduce career awareness services from 90 minutes to 45 minutes for the school year because Student would likely also have off campus work experiences as a senior. These changes offered Student no behavioral supports beyond those that had been unsuccessful previously when Student attended school at Northwood.

72. District's June 3, 2016, September 26, 2016, and March 2, 2017 IEP's failed to provide Student appropriate placement and services to address her target behaviors and therefore denied Student a FAPE.

REMEDIES

1. Student prevailed on Issues 1(a) and (c), 5(a) and (b), 6(a) and (b), 7(a) and (b), 8(a) and 9(a). District prevailed on issues 1(b), 2(a) and (b), 3, 4, 8(b) and 9(b). As a remedy with respect to the issues on which Student prevailed, Student requests that District be ordered to reimburse Parents for out-of-pocket costs they incurred to privately place Student at Bayes Achievement Academy, including tuition, related services, and transportation expenses. District contends that it is barred from paying for costs incurred at Bayes because Bayes employed aversive behavior interventions that were contrary to California law and public policy. District also contends that the requested reimbursement for Parent travel is excessive and should be limited to amounts typically approved by District IEP teams offering residential placement.

Applicable Law

2. Courts have broad equitable powers to remedy the failure of a school district to provide a 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] (*Burlington*)). This broad equitable authority extends to an ALJ who hears and decides a special education administrative due process matter. (*Forest Grove, supra*, 557 U.S. 230, 244, n. 11.)

3. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for

the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Id.*, *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1496.)

4. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that the district had not made a FAPE available to the student in a timely manner prior to the placement, and that the private placement was appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *Burlington, supra*, 471 U.S. at pp. 369-370 [reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE].) The private school placement need not meet the state standards that apply to public agencies to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 11, 14 [114 S.Ct. 361, 126 L.Ed.2d 284] [despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement found to be reimbursable where it had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade, and where expert testimony showed that the student had made substantial progress].)

5. The IDEA does not require that a private school placement provide all services that a disabled student needs as a condition to full reimbursement. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction. (*C.B. v. Garden Grove Unified Sch. Dist.* (9th Cir. 2011) 635 F.3d 1155, 1158-1159 (*Garden Grove*); see also, *S.L.*

v. Upland Unified Sch. Dist. (9th Cir. 2014) 747 F.3d 1155, 1159; *Doug C. v. Hawaii Dept. of Educ.* (9th Cir. 2013) 720 F.3d 1038, 1048.)

Analysis

6. Parents have demonstrated that Bayes “provides educational instruction specially designed to meet [Student’s] unique needs . . . supported by such services as are necessary to permit [her to benefit from instruction.” (*S.L. v. Upland Unified Sch. Dist.*, *supra*, 747 F.3d at p. 1159; *Garden Grove*, *supra*, 635 F.3d at p. 1159.) Bayes is certified by the California Department of Education NPS, approved to educate special needs students enrolled in California’s public school system, and to contract with California school districts to provide education and related services to special education students in accordance with their IEP’s. (See Ed.Code, § 56505.2, subd. (b).)

7. Bayes provides Student specially designed instruction and services through instructors certified by the Texas Education Agency to provide special education. Student is taught in a small class with a high staff to student ratio, in the same subjects that Student took at Northwood: life skills, functional reading, functional math, social skills, art, and adapted PE. Student’s educational program at Bayes adopted and worked towards the goals from Student’s February 18, 2016 IEP.

8. The evidence showed that Student was benefiting from her placement at Bayes. Almost immediately after starting the Bayes academic and residential program in June 2016, Student stopped the sleep behavior that she had exhibited in her District placement since January 2014. After seven months at Bayes, as of January 2016, she had met eight of her 10 annual goals from her January 22, 2015 District IEP, including her goals of reducing her behaviors of physical aggression and property destruction. She made progress in her behavioral goals and relationships to other students and teachers. The evidence therefore showed that Bayes is an appropriate unilateral placement under

School Committee of Town of Burlington, supra; Florence County School Dist. Four, supra; S.L. v. Upland Unified Sch. Dist., supra, and Garden Grove, supra.

9. District argues that it is barred from reimbursing Parents for Bayes, or paying Bayes directly, by Education Code section 56521.2, subdivision (a), which prohibits a district from authorizing, ordering, consenting to, or paying for: "(1) [a]ny intervention that is designed to, or likely to, cause physical pain, including, but not limited to, electric shock," or "(5) restrictive interventions that employ a device, material, or objects that simultaneously immobilize all four extremities, including the procedure known as prone containment, except that prone containment or similar techniques may be used by trained personnel as a limited emergency intervention." District's arguments are based on the observations of District behavior specialist Ms. Hendricks, who traveled to Bayes on November 16-18, 2016, to observe Student's program at Bayes. Ms. Hendricks observed Student twice in her teaching home environment, and twice at school. Ms. Hendricks had concerns regarding Bayes' program that she transmitted to District, but these were not conveyed to Parents or Bayes prior to hearing. Ms. Hendricks prepared written notes of her observation, but these were never provided to Parents, nor offered as evidence at trial. Ms. Hendricks testified to what she observed in November 2016. She did not observe any inappropriate techniques being applied to Student, but did see another student being punished by being forced to stand facing a wall for 20 minutes. Ms. Hendricks also observed a student being pushed into a chair and restrained by all four limbs by four staff members who had not first attempted verbal redirection before employing the restraint.

10. There are at least two significant problems with District's argument that it is barred from paying for Bayes. First, District did nothing in November 2016 to warn Parents that it believed Student was being subjected to interventions at Bayes that could injure Student or cause her physical pain. It would be inequitable to allow District to keep such beliefs to itself while Parents continued to incur costs for a program causing

pain or injury to their daughter, only to assert them to avoid a responsibility to reimburse Parents for the costs of the program. Second, being forced to stand facing a wall may be punishment, but is not an intervention that is "designed to, or likely to, cause physical pain." Similarly, being pushed into a chair and restrained by all four limbs by four staff members is not prone containment, nor "intervention *employing a device, material, or objects* that simultaneously immobilize all four extremities." The techniques observed by Ms. Hendricks do not fall within the prohibited interventions in Education Code, section 56521.2.

11. Student has proved that District had not made a FAPE available to Student prior to her placement at Bayes, that her placement and program at Bayes provided her educational instruction designed to meet her unique needs, and that she had in fact made progress on her IEP goals. District did not prove by a preponderance of the evidence its affirmative defense that Bayes employed against Student prohibited interventions that barred District from reimbursing Parents for Student's placement at Bayes. Parents are entitled to reimbursement for costs they incurred for that placement.

12. For Student's placement at Bayes, Parents requested total reimbursement of \$114,753.54. This amount consists of tuition paid by them for the period June 2016 through March 2017 (\$100,800); and travel on Student and Parents' admission trip to Bayes in June 2016, Parents' nine trips to Bayes to visit Student, and two Student trips home from Bayes with one Parent accompanying her, during the period from June 2016 through April 13, 2017 (\$13,953.54). Travel costs included airfare and extra bag fees, lodging, car rental and parking, and food. Mother testified Student's exhibits admitted in evidence included invoices, receipts, and bank and credit card records sufficient to prove payment of Parents' tuition and travel expenses.

13. District argues that Parents should be limited to a travel reimbursement of no more than \$2,000.00, based on District's practice of paying for no more than two parent trips per year to a student placed in residential treatment by District, with a

maximum reimbursement of \$1,000 per trip. District did not place Student at Bayes, and Parents risked receiving no reimbursement for any of their incurred costs. It would therefore be inappropriate to apply travel reimbursement limits dictated by District for a District placement. However, 12 trips to or from Bayes in 10 months is excessive, and it would not be inappropriate to limit travel to or from Bayes to no more than two trips per quarter, or seven trips in the 10-month period from June 2016 through April 13, 2016. The average cost of Parents' and Student's trips to and from Bayes was \$1,162.80. This per-trip amount was only slightly more than District's guidelines, and the individual itemized costs of airfare, extra bag fees, lodging, car rental, parking, and food were reasonable. Seven such trips would cost \$8,140.00, which is the amount by which Parents shall be reimbursed for travel.

14. Student did not request any specific remedies for District's failures to provide Student transportation or adequate occupational therapy services. Student presented no request for reimbursement or evidence of Parent's costs of transporting Student to school. Student also presented no request for reimbursement or compensatory education for occupational therapy, or evidence of the type, amount, duration or need for compensatory education. Student's remedies with respect to transportation and occupational therapy are included in the remedy of reimbursement for costs of Student's placement at Bayes, and no additional separate remedies are awarded.

ORDER

1. District will reimburse Parents the sum of \$108,940.00 within 60 days of the date of this Decision. The documentary evidence of payment Parents provided at hearing, supported by Parents' testimony, is sufficient evidence of costs incurred by Parents and no further documentation is required.

2. As compensatory education for the violations and denial of FAPE prior to Student's placement at Bayes, upon receipt of proof of actual out-of-pocket costs incurred by Parents, District shall, within 60 days of receipt, reimburse Parents for the costs of Student's tuition at Bayes for the months of April through August 2017, and for travel costs not to exceed \$3,488.00 for three additional trips to or from Bayes. (3 x \$1,162.80).

3. All of Student's other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issues 1(a) and (c), 5(a) and (b), 6(a) and (b), 7(a) and (b), 8(a) and 9(a). District prevailed on issues 1(b), 2(a) and (b), 3, 4, 8(b) and 9(b).

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 17, 2017

/s/
ROBERT G. MARTIN
Administrative Law Judge
Office of Administrative Hearings