

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

OXNARD SCHOOL DISTRICT.

OAH Case No. 2016091036

DECISION

Student filed a Due Process Hearing Request on September 22, 2016, with the Office of Administrative Hearings, State of California, naming Oxnard School District. On November 4, 2016, OAH granted a continuance for good cause.

Administrative Law Judge Clifford H. Woosley heard this matter in Oxnard, California, on February 21, 22, 23, 24, and March 7, 2017.<sup>1</sup>

Attorneys Shawna L. Parks, Stuart Seaborn, and Janeen Steel appeared on behalf of Student. Mother attended portions of the hearing.<sup>2</sup> Attorney Lawrence Joe represented District. Director of Special Education Services, Amelia Sugden, and Manager of Special Education, Nadia Villapudua, attended on behalf of District.

At the parties' request, OAH granted a continuance to April 3, 2017, for the filing of written closing arguments. In light of recent appellate decisions, OAH again

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<sup>1</sup> The last day of hearing was conducted via telephonic conference.

<sup>2</sup> Mother excused herself from much of the hearing, providing permission for the hearing to proceed in her absence.

continued the matter to April 17, 2017, to allow the parties additional briefing time. On April 17, 2017, the parties submitted their final written closing briefs, the record was closed, and the matter submitted for decision.

## ISSUES<sup>3</sup>

1. Has District denied Student a free appropriate public education when it failed to meet its child find obligations by not evaluating Student in all areas of suspected disability, and not finding Student eligible for special education placement and related services, from (a) August 2013 and (b) fall 2014, to the filing of the complaint?

2. Has District denied Student a FAPE by failing to offer Student an individualized education program that met Student's unique needs and that was reasonably calculated to offer education benefit to Student, from (a) August 2013 and (b) fall 2014, to the filing of the complaint?

## SUMMARY OF DECISION

Student proved by a preponderance of the evidence that District denied him a FAPE by failing to meet its child find duties and refer Student for special education assessment in the fall of 2014. If Student had been assessed, he would have been found to have met the eligibility criteria for other health impairment. District's failure to timely assess denied Student's right to a FAPE, because he should have been found eligible and otherwise entitled to a FAPE and because he was deprived the educational benefit of the related services and placement that he should have received in an IEP. Therefore,

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

District's failure to assess Student in the fall of 2014 was a procedural violation that denied Student a FAPE. Student prevailed on Issue One (b).

Student did not prevail on his assertion in Issue One (a) that District's child find duty was triggered as early as August of 2013. The reason for Student's chronic absences and Mother's repeated early removals from school remained a mystery throughout Student's first grade year. The evidence convincingly demonstrated that District did not have knowledge of or reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability until the fall of 2014 when District was informed of Student's possible sleeping disorder as the cause of his poor attendance. Therefore, District's failure to assess resulted in a denial of FAPE for two years, not three as Student contends.

Student also demonstrated that District denied him a FAPE because he had not timely received an IEP which would have addressed his unique needs as a child with a disability, and conferred educational benefit so he could make progress appropriate for his circumstances, since fall 2014, thus prevailing on Issue Two (b). Student did not prevail on his assertion in Issue Two (a) that District's denied Student a FAPE as early as August of 2013.

## FACTUAL FINDINGS

1. At the time of the hearing, Student was nine years old and in fourth grade at District's Sierra Linda Elementary School. He was eligible for special education services with a primary eligibility of emotional disturbance and a secondary eligibility of other health impairment. Student first qualified for special education in November 2016 and, at all relevant times, attended District schools.

## 2012-2013 SCHOOL YEAR: KINDERGARTEN

2. Student started kindergarten at District's Emilie Ritchen Elementary School for the 2012-2013 school year. Mother felt that the kindergarten teacher was abusive. She said the teacher referred to Student as a "Mama's boy," ridiculed Student in front of the class, and generally had a mean-spirited demeanor whenever interacting with her son.

3. As a consequence, Mother said she could not get Student to go to school. Student did not want to go to class and, when attending, would become anxious and upset because of the teacher's conduct. Student was chronically absent and, when he did attend, Mother repeatedly checked Student out of school before the end of the day. While at Ritchen, Student was absent 30 days and tardy 11 times, not including Mother's frequent early removals from school.

4. District granted Mother's request to transfer Student out of Ritchen. Student started attending kindergarten at Sierra Linda in May 2013, about five weeks before the end of the school year. Armondo Arreguin was Student's new kindergarten teacher; he testified at the hearing. Student was a happy child, with no behavior issues. Mr. Arreguin talked with Mother daily. He had a good working relationship with Mother, who told him that Student was having a difficult time transitioning to kindergarten and did not much care for school.

5. Student was clingy with Mother and Mother wanted to be close to Student. Mother acknowledged this, noting that Father had encouraged Mother to "cut the apron strings," but Mother said it was hard. Mr. Arreguin knew that Student had missed a lot of school at Ritchen. Even though kindergarten attendance was not mandatory, Mr. Arreguin wanted Student to attend regularly.

6. Student was in afternoon kindergarten, from 11:30 a.m. to 3:00 p.m. Mr. Arreguin persuaded Mother to drop Student off at class each day, and not return to

check on him. When Mother confirmed that Student did fine after the first week, she did not come to the school during class for the remainder of the school year. Mother thanked Mr. Arreguin that Student did well in his class, noting that she was finally able to do her chores. While attending Mr. Arreguin's class, Student was once absent, never tardy, and never checked out early. Mother thought Mr. Arreguin was a very good teacher.

7. Mr. Arreguin did not see any signs that Student was in need of referral for special education assessment. Student did not appear tired. He was shy at first, but soon adjusted and was involved. Student worked on assignments, was responsive, participated in small groups, and made friends. Mr. Arreguin did not suspect a disability. Mother never told Mr. Arreguin that Student was receiving, or needed to receive any type of services; she only talked about Student's struggles in transitioning from home to kindergarten. Mother never said Student was anxious. Mother said that Student had a hard time with the prior kindergarten teacher and did not like being in her class, making it hard for Mother to get Student to school and to remain in class.

8. During testimony, Mr. Arreguin was referred to notations put on the cumulative file by Student's prior kindergarten teacher. Under a section entitled "referrals to school services," the prior kindergarten teacher wrote "Tier I RTI." "RTI" referred to a Response-to-Intervention model of tiered instructional processes. The tier model was typically composed of three educational tiers, with some models using four tiers or subdividing the tiers. Tier 1 instructional program was the same as the core reading or math curriculum. Tier 1 intervention would normally be used to assist a student who required some small group or one-on-one instruction. Tier 2 usually consisted of children who fell below expected benchmarks, were at some risk of academic failure, and needed more intense intervention. Tier 3 intervention was for children at high risk for failure and often considered likely to be identified for special

education. Mr. Arreguin did not know what tier model or the areas of the curriculum to which the prior kindergarten teacher was referring. Mr. Arreguin did not ask anyone about the RTI.

9. During his testimony, Mr. Arreguin reviewed Student's Individual Student Report, which included a section entitled "DIBELS Next Benchmark – Kindergarten (2012-2013)." DIBELS, Dynamic Indicators of Basic Early Literacy Skills, was a series of short tests that assessed early childhood literacy. Mr. Arreguin noted that District had not used the DIBELS since 2013, that the third trimester scores were not on the report he was shown, and that he was confident he had done the test with Student. The test was a one-on-one oral assessment of Student by the teacher consisting of words, sentences, and syllables.

10. At the beginning of kindergarten, Student's literacy scores were average preschool level. In the middle of year, the composite scores showed that there had not been growth. Mr. Arreguin thought this may have been a result of Student's poor attendance. Mr. Arreguin did not understand what some of the prior kindergarten teacher's scores meant. These scores did not provide reliable insight into Student's abilities.

11. Mr. Arreguin said that if a child received poor scores on the early literacy skills tests, he would start some interventions, such as preteaching or reteaching, in a small group or individually. He believed that this was similar to the "Tier 1 RTI" that the prior kindergarten teacher may have started.

12. On the final report card, Student was Basic in nine academic areas consisting of language arts and math. Student was Proficient in number sense, history/social science, science, physical education, visual arts, and music. He demonstrated satisfactory effort and attitude in homework, citizenship, and behavior. Mr. Arreguin commented that Student was progressing well in all areas, followed

classroom rules, and was a nice boy. Student needed to practice his rhyming, reading, and number writing. He encouraged reading over the summer to better prepare Student for first grade.

#### 2013-2014 SCHOOL YEAR: FIRST GRADE

13. Student attended first grade at Sierra Linda for the 2013-2014 school year. Georganna Pauley was Student's teacher; she testified at the hearing. Ms. Pauley had been teaching first grade for almost 20 years. Ms. Pauley demonstrated a clear recollection of her interaction with Student and Mother, often providing detailed descriptions of conversations and events. She obviously cared about Student and was concerned about his performance in first grade. Generally, Ms. Pauley was a credible and persuasive witness.

14. Student's first grade class had 20 students. Mother volunteered at the school and was on campus very often, if not daily. Ms. Pauley talked to Mother a lot. In the first trimester, Student had eight absences and, when at school, Mother frequently removed Student early. In the first trimester progress report, Student was Below Basic in all three math sections. He was Basic in the four language arts measures, history/social science, science, and physical education. Ms. Pauley repeatedly explained to Mother that absences and early removals were negatively affecting Student's academics. He was missing group time and tests, which affected his grades.

15. On November 22, 2013, Ms. Pauley had a parent-teacher conference and provided Mother with a letter, formally indicating that Student was performing below grade level standards in Math. Ms. Pauley proposed, and had already started, interventions of continuing small group support and the use of the Success maker computer program, for improving math skills. Mother signed the letter and acknowledged receipt. Ms. Pauley had started Student on Success maker earlier in the

year. Student used the program, but would not spend additional time. His absences diminished the program's effectiveness.

16. Student's absences increased to 18 in the second trimester. Ms. Pauley continued working with Student one-on-one and in small groups. Student performed best and improved academically in small groups, which were usually in the afternoon. However, when Student was at school, Mother sometimes removed him after lunch. Missing group time significantly contributed to Student's lack of improvement. Early removal on Friday caused Student to miss his weekly math tests. The interventions had little opportunity for success because Student was absent or taken home early.

17. When in school, Student generally appeared bored. Student often had trouble focusing on work because he recurrently said he wanted to see Mother, who he knew was on campus. Ms. Pauley encouraged him to wait, at least until after lunch. When Student did see Mother, Mother usually removed him from school. This pattern repeated throughout the year. Mother acknowledged Ms. Pauley's concerns, but continued to keep Student home or remove him early.

18. When in class the entire day, Student talked to friends on the playground and got some class work done. About two or three times, Student got angry in class, as if he "just had it." Ms. Pauley called for assistance. The principal or outreach coordinator came and took Student for a walk or talk. Student soon returned. Ms. Pauley had other students with similar outbursts, who just needed some additional space or a break. Student's angry outbursts were not a typical behavior for Student.

19. Every morning, Ms. Pauley devoted a portion of her class to social training, helping her pupils understand their place in the community and home, their relationships with each other, and how to care for others. Socialization was part of first grade: talking sincerely, asking to play, taking turns, looking at someone when speaking, attending, and participating in class. Teaching these skills and characteristics was part of



first grade curriculum. This class instruction included Student, who Ms. Pauley tried to include conversationally, without singling him out.

20. Ms. Pauley was not responsible for following up with parents regarding pupils' absences. The school's office, administration, and outreach coordinator were responsible for maintaining records and contacting parents if the absences were excessive. For example, Mother had to sign Student out at the front office whenever she removed him early. Ms. Pauley repeatedly talked with Mother about how the absences were affecting Student's opportunity.

21. Despite these numerous conversations, Mother never indicated any specific, ongoing problem that contributed to the absences. Mother did not tell Ms. Pauley that Student was diagnosed as chronically ill, had insomnia, or was taking medication. Mother did not explain why the absences more than doubled in the second trimester. Ms. Pauley thought that Student and Mother had an extraordinarily close bond that made it difficult to disengage from each other. Ms. Pauley repeatedly encouraged Mother to bring Student to school and to encourage Student to stay in school. However, though Mother would say "yeah, we'll work at that," Student's attendance did not improve and the pattern of early withdrawal continued.

22. Mother testified that during first grade, Student screamed and cried in the morning. He did not want to go to school because he would be bullied and was afraid. Mother said that Student was not sleeping, sometimes staying awake until 2 a.m. Student's doctor prescribed medicine to help Student sleep, but managing the medicine so Student would sleep was difficult. Mother claimed that Student said he was worried about school. Mother insisted that she told the school about Student's insomnia and medication. Mother complained that the school provided no help or support. These general contentions regarding first grade were contradicted by testimony and documentation. Mother said that she told Ms. Pauley about the insomnia and that

Student was on medication, at the parent-teacher conference; Ms. Pauley credibly testified that Mother did not. Ms. Pauley remained perplexed all year as to why Student was regularly absent and removed early. Ms. Pauley's parent-teacher conference and letter, proposing interventions, and Mother's signature, contradicted Mother's testimony that no one provided any help or support in first grade. Mother's testimony regarding informing Ms. Pauley and others of Student's insomnia and medication in first grade was not convincing.

23. Susana Luna-Gamez was the Outreach Coordinator at Sierra Linda from October 2001 to September 2014, when she became the school counselor. As the outreach coordinator, Ms. Luna worked with families regarding attendance issues. The school's attendance policy was that the school focused on pupils who had five or more unverified absences, by meeting with parents. Such meetings included the outreach coordinator, the school principal, and sometimes the attendance clerk. She also arranged meetings with parents of students who had excessive excused absences. The school considered an absence excused if a parent gave a reason, such as being sick, going to doctor, or family emergency. The school did not require verification of a pupil's illness.

24. Ms. Luna learned of Student's frequent absences and talked to Mother. Eventually, Ms. Luna arranged for a formal meeting with her, the school principal Sally Wennes, and Mother, to inform Mother that Student was absent too much, advise Mother of the state and District attendance policies, find out how to support Student, and explain the consequences of letting absences continue. One of the consequences was for Parents to be referred to the School Attendance Review Board, which had statutory authority to impose penalties upon parents who failed to have their children attend school, as mandated by law. After 14 excused absences, the school principal was empowered to refer a family to the attendance review board.

25. In preparation for the April 2, 2014 meeting, Ms. Luna prepared a form School Attendance Contract for Mother's signature, documenting her awareness of the situation and potential consequences of continued absences. However, Mother did not appear for the meeting. Ms. Luna called Mother, who said she was not coming in because "they were sick"; Ms. Luna made a note on the unsigned attendance contract.

26. Mother attended a rescheduled meeting, which Ms. Luna recalled in some detail, although she was uncertain of the date. At the meeting, Mother said that Student had a bad experience in kindergarten and was not coming to school as a result. Mother did not say what Student disliked about school. Mother did not tell Ms. Luna and Ms. Wennes that Student had a sleeping disorder, anxiety, or was taking medication. Mother did not say anything about her son worrying. Ms. Luna said that she and Ms. Wennes were trying to get a sense if Student's absences were a parent or student issue. Mother was not positive or open, did not want to participate in the meeting, and was generally resistant. Ms. Luna did not suspect that Student might have a disability. As a matter of her standard practice, Ms. Luna would have explained to Mother the possible referral to the attendance review board. Mother did not sign a School Attendance Contract. District did not document the attendance meeting.

27. Ms. Wennes testified at the hearing. She was the principal of Sierra Linda from October 2010 through March 2016, when she left to become principal in another District school. She worked for District for seven years and had been an elementary school principal for 15 years. Ms. Wennes had multiple meetings and discussions with Mother regarding attendance beginning in Student's first grade until Ms. Wennes left Sierra Linda. Whenever Ms. Wennes discussed attendance, Mother became resistant, provided very little information, and quickly ended the conversation. Mother claimed that she showed Ms. Wennes Student's bottle of medication, but Ms. Wennes denied

this. Mother did not tell Ms. Wennes that Student had insomnia and was taking medication.

28. Ms. Wennes acknowledged that Student's first grade absences were excessive and that she could have referred Mother to the attendance review board process. Ms. Wennes typically tried to figure out why a student was absent and offered services or interventions. But she did not recall any services or interventions involving Student.

29. For the remainder of the school year, Ms. Luna regularly communicated with Mother regarding absenteeism. Mother never told her Student's absences were caused by insomnia, a sleeping disorder, or that he was taking medication. Student's attendance improved slightly in the third trimester, down to 15 absences. Ms. Luna was not aware of the frequency of Mother's early removals of Student, which continued for the remainder of the year. District did not have another meeting with Mother during the first grade school year.

30. Student's grades did not significantly improve over the year. Student learned and made progress, knowing more each trimester, but he was not at grade level. Ms. Pauley did not believe Student's poor performance was caused by a disability or that Student was a child who needed special education.

31. Ms. Pauley believed her teaching experience enabled her to identify children who were learning or emotionally disabled. She had never received any specific training in identifying and referring pupils for special education assessment, although she had students who were referred for assessment or were in special education. At Sierra Linda, a teacher assisted a struggling student with one-on-one or group instruction. Then, a pupil could be referred to a Coordinated Services Team. The next level of support was a Student Success Team, which included the parent and could provide a number of interventions and supports. If the success team was proving

ineffective, the pupil could be referred for special education assessment. Student was not referred to these more intensive interventions. Ms. Pauley believed the primary reason Student performed poorly was because of missed tests and instruction time and because Mother had not provided any reason for the continued absences and early removals.

32. Student's final trimester grades were Below Basic in number sense, algebra and functions, measurement and geometry, statistics and data analysis, and mathematical reasoning. He was Basic in word analysis and vocabulary development, reading comprehension, writing, and written and oral conventions. Student was Proficient in listening and speaking. Ms. Pauley's last comments were that Student was making slow progress in reading and needed to memorize basic math facts.

33. Student was absent 39 days for the school year. The number of absences could have resulted in a referral to the attendance review board. District did not do so.

#### 2014-2015 SCHOOL YEAR: SECOND GRADE

34. Student attended second grade at Sierra Linda; The first day of school was August 20, 2014. Esperanza Pascual was Student's teacher; she testified at the hearing. Ms. Pascual had been teaching second grade for almost 24 years and had been with District for 25 years.

35. Ms. Pascual described Student as a happy boy, who fell asleep in class about once a week and had occasional angry outbursts. When awakened from sleeping, Student was irritable and not in a state to learn. Student then asked for Mother, who frequently withdrew Student early from class. Mother was very involved with Student. After taking Student to class, she usually remained to see how he was doing. Mother was always available for Student whenever he wanted to see her. On good days, Student was smiling, energetic, laughing, and sharing.

36. Student had angry outbursts five or six times over the school year, enough to cause Ms. Pascual concern. Student got upset, hit his desk, picked his desk up and slammed it down on one occasion, and pulled his books out of his desk. He was unable to do school work and Ms. Pascual referred him to the school office, where Mother met and took him home. Student was chronically absent, more than 20 percent the first trimester and about 30 percent in the second and third trimesters.

37. The absences, early withdrawals, sleeping, and angry outbursts caused Student to miss a substantial amount of instruction and tests. Ms. Pascual believed that Student was capable, but he could not learn if he was not emotionally or physically able to participate in class or was absent from class. Ms. Pascual explained this to Mother, with whom she spoke almost daily.

38. Ms. Pascual came to believe within a month or so after school started that Student's absences, lethargy, and sleeping in class were caused by his insomnia. Ms. Pascual had reason to suspect that Student had a disability as of September 30, 2014.

39. Mother told Ms. Pascual that Student had insomnia, that she struggled to get Student to sleep, and Student often was not able to wake up and come to school. This also caused Student to be sleepy and irritable when at school. Shortly before the Thanksgiving break, Mother said she was taking Student to a doctor for help with the insomnia. Ms. Pascual did not know what the doctor determined. Ms. Pascual believed that Student's absences, lethargy, and sleeping in class were caused by his insomnia. Neither Student nor District provided clear, unambiguous evidence of when Mother told Ms. Pascual that Student had insomnia, which caused the absences and early removals, but it was between the first day of school on August 20, 2014 and the Thanksgiving break.

40. Over the years, Ms. Pascual had students who had been assessed and were receiving special education services. She did not believe that Student had a disability

because the absences, sleepiness, and irritability were caused by a medical issue. If she believed Student had an academic problem, she would have referred Student to the success team process as a first step. Medical issues were not referred to a student success team. She did not believe that she could directly refer a pupil for special education assessment.

41. Ms. Luna became Sierra Linda's school counselor at the beginning of the 2014-2015 school year. She possessed a master's degree in school counseling and held a pupil personnel services credential. She knew Mother from the previous year when Ms. Luna was the outreach coordinator involved in Student's attendance issue.

42. In second grade, Mother told Ms. Luna that Student was being bullied at school and did not know how to make friends or handle himself socially. Ms. Luna offered counseling and social skills classes to support Student; Mother agreed.

43. Mother did not tell Ms. Luna that Student had insomnia, anxiety, or that he did not like coming to school. Ms. Luna recalled being told by a teacher that Student fell asleep in class, but it did not appear to happen often.

44. Ms. Pascual told Ms. Luna about Student's poor academics caused by poor attendance, early withdrawal (often within the first hour of school), and not being fully alert. Ms. Luna did not recall this and did not address these issues in her counseling of Student.

45. Before the social skills group started, Ms. Luna provided Student with four or five individual counseling sessions. Student did not tell Ms. Luna that he was being bullied or that he was anxious. In the individual sessions, Ms. Luna determined how Student was doing and if he was upset. Student never cried during the sessions. He did not say he had had trouble sleeping or disliked school.

46. The social skills group started in late fall and met on Fridays for 10 weeks. The group did not meet over the holidays. Student only attended four or five group

sessions because of absences or early withdrawals. Ms. Luna tried to follow-up with Student, holding individual sessions to make up for the lost time with the group. The individual sessions were on an "ad hoc" basis; there was no schedule. Ms. Luna did not provide any other services to Student during second grade. The social skills group sessions had sign-in sheets, which Ms. Luna destroyed after a year. Ms. Luna and District did not have any record of Student's individual counseling sessions, his participation in the social skills class, or his progress.

47. Mother recalled three meetings with Ms. Wennes during second grade. The first meeting concerned Student having a difficult day at school. The second meeting was for attendance. Mother was shown the computer attendance record, reflecting the excess absences. Mother told them she had provided the school with notes from the doctor regarding Student's insomnia and medication. However, Student never produced evidence of any writings from Student's doctor before the filing of the due process request.

48. Mother attended a third meeting regarding attendance at the end of the school year. By this time, Ms. Wennes knew or should have known about Student's insomnia, which Mother claimed was a primary cause for his absences and early removal. Mother asked for help in getting Student in school. Ms. Wennes suggested pairing Student with one of his good friends, next year, thus encouraging Student to come and stay in school. Mother did not receive an attendance contract and was not told about the attendance review board.

49. Ms. Pascual believed that Student showed some progress by the end of second grade, except in mathematic standards, where Student's scores lowered as the year progressed. Overall, Student ended the year low. For the 10 reading standards, he was proficient in three and below proficient for the remaining seven standards. Student was proficient in science, progressing toward proficient in history/social science and the



two physical education standards, and exceeded standards in visual arts. In math, Student ended the year with grades of proficient in one standard, below proficient in eight standards, and minimally proficient in the remaining nine standards. Ms. Pascual believed Student had potential, but his absences substantially contributed to his low scores.

50. Student was absent 55 days in second grade. At the end of the year, Ms. Pascual wrote on Student's cumulative education file that Student had many health issues, missed many school days, and became aggressive and defiant. Ms. Pascual, Ms. Wennes, and Ms. Luna did not inform Mother of her special education rights.

#### 2015-2016 SCHOOL YEAR: THIRD GRADE

51. Student attended Sierra Linda for the 2015-2016 school year, attending a third grade class of 27 students. Natalie Gonzales was Student's teacher; she testified at the hearing. Ms. Gonzales had been a District teacher for 15 years, taught third grade for 10 years, and was at Sierra Linda for two years. She had an excellent recall of Student's third grade year, answering questions in a forthright and sincere manner. She demonstrated genuine concern for Student and appeared to have a good relationship with Mother. Ms. Gonzales was a credible and persuasive witness.

52. Ms. Gonzales described Student as intelligent, kind, and a good friend to his classmates. He was a good reader, but struggled with math. She experienced very few behavior issues with Student, who was generally honest, respectful, and helpful.

53. Mother brought Student to the classroom door, carrying his backpack. This was unusual; parents typically dropped their children off at the front of the school. As a consequence, Student had great difficulty separating from Mother. Student would continue to stare at Mother, reaching for her, as he came into class. Ms. Gonzales urged Mother to leave by letting her know that Student would be fine. Ms. Gonzales noted on Student's cumulative education file that Student had separation issues with Mother.

54. The first trimester, Student was absent 12 days. Also, for the first two months of the school year, Mother picked Student up early everyday he was in school, because she needed to pick up a sibling at another school. As a result, Student missed the special intense reading instruction which took place at the end of each school day. Additionally, Mother often withdrew Student from school early, three or more times a week, at about lunchtime. Student therefore missed math instruction, which was after lunch. Because of excessive absences and early withdrawals from school, Student had a hard time connecting with the material. Student then was frustrated or anxious and did not want to remain in class.

55. Ms. Gonzales believed the lack of attendance was alarming and compromised Student's ability to learn. Mother told Ms. Gonzales that the absences were caused by insomnia and that Student became anxious in the morning and did not want to come to school. Student was sometimes tired in class and became anxious about not being with Mother. However, Ms. Gonzales sensed that Student often simply did not want to come to school and Mother allowed Student to stay home. On a number of occasions, Mother acknowledged that she needed to "back off" and let Student go, giving him more independence. In September or early October 2016, Ms. Gonzales made a referral for attendance by emailing the outreach coordinator Elva Serrato and copying Ms. Wennes. She also informed them that Mother said Student had insomnia, became anxious, and then resisted coming to school.

56. Ms. Gonzales participated in two attendance meetings with Mother, Ms. Serrato, and Ms. Wennes. Ms. Serrato and Ms. Wennes held two additional meetings with Mother. On December 11, 2015, Mother participated in an attendance meeting that included Ms. Serrato, Ms. Wennes, and Ms. Gonzales. Mother was provided a proposed School Attendance Contract for the 2015-2016 school year, upon which the outreach coordinator wrote a note that Mother said the absences were caused by a medical

reason but this “was not by medical diagnosis.” Mother was given a medical release form, which would have allowed District to contact Student’s doctor. Mother took the contract and release, to return by December 14, 2015. Mother did not return a signed contract or release.

57. For a short time in January 2016, Student was in class four or five days a week. Student was less emotional when he was consistently in school. However, Student soon returned to frequent absences and early withdrawals.

58. Ms. Gonzales did not believe Student had a learning disability. If she had, she would have made a referral to the coordinated services team, who would then decide if Student should be referred to a student success team. She thought Student’s academic challenges were caused by his lack of attendance; he could not learn if he was not in school. Her goal was to get Student to come and remain in school. At hearing, she acknowledged that she had since become better acquainted with the Sierra Linda coordinated services team process and, in hindsight, might have also referred Student because of his attendance.

59. Ms. Gonzales had no specific training in special education assessment referral. She believed that she could not make a referral for assessment without first going through the coordinated services team and student success team. She previously had special education students in her class who received speech and language services. Ms. Gonzales had never directly referred a child for special education assessment.

60. For language arts standards, Student progressed from first trimester grades of five C’s and two B’s, ending the year with three A’s in phonics and word recognition, speaking and listening, and language, three B’s in reading fluency, literature, informational text, and one C in writing. He received final grades of B in science and history/social standards. Student remained well below standards in math throughout the year, with final grades of two C’s in number sense and fractions and

three D's in operations and algebraic thinking, knowing math facts, and geometry. His effort increased from satisfactory to excellent in all areas. He needed to improve in completing and returning homework and class work, was satisfactory for writing legibly and taking responsibility for learning and behavior, and excellent in all seven remaining measures for behavior.

61. Student was absent 47 days in third grade. Ms. Gonzales thought the school referred Mother to the attendance review board, but District did not do so.

#### 2016-2017 SCHOOL YEAR: FOURTH GRADE

62. Carmen Serrano was Sierra Linda's new school principal in the 2016-2017 school year. She arranged for a meeting with Mother and Student about a week before the start of school. Mother told Ms. Serrano about Student's sleep disorder, anxiety, and medication, which caused a lot of absences. Ms. Serrano said she would invest time and build a relationship with Student. Mother felt that Ms. Serrano made a difference for Student at school.

63. Student's fourth grade teacher was Melissa Turner, who testified at the hearing. Ms. Turner had been teaching for 31 years, has had pupils who were assessed for special education, and students who were receiving special education services. She was Student's teacher at the time of hearing, having met him when school started in August 2016. She had not received specific training in identifying students for special education assessment, although she believed her decades of experience enabled her to identify children suspected of a disability.

64. Ms. Turner had spoken to Ms. Gonzales and was aware that absences harmed Student's academic performance. Ms. Turner spoke to Mother, who told her that Student had issues with anxiety and insomnia. Therefore, Ms. Turner did not push Student to produce, but encouraged him to stay and work in class. Student said he was anxious only a few times, in response to Ms. Turner's offer to help him with math.

Student occasionally appeared tired in class, two to three times a month. Ms. Turner discussed the absences with Ms. Serrano, noting Mother's reference to Student's anxiety and insomnia. Also, early in the school year, Mother told Ms. Luna for the first time that Student was taking prescription medication to help him sleep.

65. On September 22, 2016, Student filed his request for due process.

66. Mother was not cooperative in scheduling a parent-teacher meeting with Ms. Turner. Finally, Ms. Turner had a meeting with Mother on October 11, 2016, with Ms. Serrano and Ms. Luna. Mother brought a one-paragraph October 6, 2016 letter from Sam K. Hansuvadha, M.D., which stated that Student had been diagnosed with insomnia since June 2012 and anxiety disorder on February 20, 2015. Dr. Hansuvadha also said Student had "either claustrophobia or school phobia on May 27, 2016." Student was taking 0.1 mg of Clonidine at bedtime and was waiting to be evaluated by a psychiatrist.

#### November 3, 2016 Section 504<sup>4</sup> Meeting and Service Plan

67. District convened a Section 504 meeting on November 3, 2016. Attending were: Mother; Student's attorney Janine Steel; Director of Special Education Services, Amelia Sugden; school psychologist, Rachel Boxer; District's attorney, Leah Smith (via telephone); and Ms. Serrano. The attendees reviewed Dr. Hansuvadha's letter and discussed how Student's diagnoses affected his education. Student was absent, did not stay in class, did not complete work, could not catch up with missed work, would become stressed and anxious, and struggled managing his fatigue.

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<sup>4</sup> Pupils may qualify for service plans under Section 504 of the Rehabilitation Act of 1973, which guarantees certain rights to disabled people, including students in public schools. The Office of Administrative Hearings has no jurisdiction over Section 504 claims. Student's Section 504 service plan is considered herein for the sole purpose of evaluating appropriate compensatory remedies that may be awarded by this decision.

68. The team found Student eligible under Section 504 and developed a Section 504 Service Plan, based on identified areas of difficulty. To assist in completing work and catching up on missed work, Student's class work would be modified; incomplete class work would be sent home; Student would use a daily planner; and District would provide a home hospital teacher, two hours per week. To encourage Student to maintain time in class, Student could use a "break card" and request to be referred to the counselor, school psychologist, or principal. The counselor and Parent would only employ positive behavior support and communication, with a log. To help Student manage his stress or anxiety, he could use a stress ball or silly putty; use a break card; and attend school counseling, 30 minutes a week. The school counselor would check Student in and out of school, daily, and would check in with Mother at school gate every morning to see how Student was doing; and the school counselor would talk with Student every afternoon. To help Student manage fatigue, he could use a "rest card," which gave Student 10 to 15 minutes to rest; and could go to the school nurse.

69. Mother signed and agreed to the Section 504 Service Plan. Mother also signed an assessment plan for behavior, to be conducted by the Ventura County Behavioral Health department.

#### Implementation of Section 504 Service Plan

70. Student checked-in with Ms. Luna every morning when he came to school. Ms. Luna also saw Student at least twice per week, at the weekly counseling sessions and, informally, on an as needed basis.

71. In the mornings, Ms. Luna asked Student how he was doing. Student said things like he was "mad at school," worried about natural disasters (like a meteorite hitting the earth), or frightened by something he saw on television (horror movies). Student talked about his concerns for a while. Ms. Luna and he then discussed ways to overcome his worries, anger, or fears. Student typically moved on to his class.

72. Student was usually quiet in class, but was talkative with his friends. Ms. Turner described Student as intelligent and creative, but apprehensive to instruction. Student did not like to do work that required him to put forth a lot of effort or work. He became anxious, sometimes worrying about current events. In these situations, Student used his break card, and went to the office or counselor.

73. Overall, Student used the break cards appropriately, though occasionally he used them to avoid work he did not want to do. Sometimes when Student pulled out a break card, Ms. Turner encouraged Student to wait until after the instruction and Student agreed. Generally, the break cards helped Student better regulate, with the aim of keeping him in school.

#### Student's Initial Psycho educational Assessment<sup>5</sup>

74. School psychologist Jenny Ponzuric prepared an initial, 43-page Psycho educational Assessment Report of Student, dated December 13, 2016.<sup>6</sup> District contracted with Ms. Ponzuric to conduct Student's psycho educational assessment. Ms. Ponzuric had never previously worked with District or Student. Ms. Ponzuric had a 1997 bachelor's degree and a 1999 master's degree in psychology. She was a licensed

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<sup>5</sup> Student's psychoeducational assessment report and individualized educational program are reviewed for the sole purpose of evaluating appropriate compensatory remedies that may be awarded by this decision. Both parties affirmed on the record that they are not seeking a determination of whether District's assessment and IEP provided Student with a FAPE.

<sup>6</sup> Drafts of the report were presented at Student's November 30, 2016 initial IEP team meeting and the finalized, updated report was presented at the second IEP team meeting on December 14, 2016.

educational psychologist and held California pupil personnel services and administrative services credentials. In 2007, she obtained a certificate in neuropsychology from Texas Women's University. Ms. Ponzuric was self-employed for three years and, previously, was a school psychologist with Conejo Valley Unified School District for 13 years. She had conducted between 700 and 750 psycho educational assessments. Ms. Ponzuric's education and experience qualified her to conduct Student's assessment and prepare the report.

75. Ms. Ponzuric reviewed available health and developmental records, Student's cumulative educational record, the Section 504 plan, and Student's release logs from Sierra Linda. She interviewed Student and Mother and obtained input from Student's teacher. Ms. Ponzuric observed Student in the classroom, during physical education class, and throughout the testing sessions, where Student was comfortable doing tasks but uncomfortable sharing information. She administered or conducted the following standardized tests: the Kaufman Assessment Battery for Children – 2nd edition; Wechsler Intelligence Scales for Children – 5th Edition; Comprehensive Test of Phonological Processing – 2nd Edition; Beery-Buktenica Developmental Test of Visual-Motor Integration – 6th Edition; Sentence Completion Task; and the Kinetic School Drawing.<sup>7</sup>

76. Special education teacher Courtney Saldana conducted the achievement tests, pathologist Cindy Evans did the speech and language evaluation, school nurse Jennifer Curry contributed the health evaluation, and Ventura County Behavioral

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<sup>7</sup> Student's counsel stipulated at hearing that Student was not claiming the psychoeducational assessment's standardized tests did not comply with test protocols or were otherwise not legally appropriate.



clinician Cynthia Kravets conducted an intensive social emotional services assessment report. Ms. Ponzuric included these contributions in her final assessment report.

77. Ms. Ponzuric summarized her findings, noting that the ongoing and primary concern was Student's attendance. Absences, tardies, and early removal from school meant Student had missed about 25 percent of the learning experiences in the school setting since kindergarten. Student missed at least two afternoons a week during fourth grade.

78. Student demonstrated many processing strengths or areas within expected range and had intact thinking and problem solving skills, with and without the use of language. He had average speed of processing for tasks that involved paper and pencil, as well as the fluency of his verbal skills. Student had some difficulties in short-term verbal memory and some aspects of auditory processing (phonological processing, specifically).

79. Academically, Student had average reading decoding, reading fluency, and reading comprehension skills. His written language skills were in the average range. Though Student showed average math problem solving skills, he had evident difficulties with math calculations, with scores below the expected level. Ms. Ponzuric noted that Student's lower math scores were consistent with informal assessment results and his academic history.

80. Ms. Ponzuric found that Student had difficulties with anxiety that caused him to be absent or leave school early. Ms. Ponzuric's professional opinion was that the absences and early removals created a cycle, leading to greater anxiety. Student would miss class instruction and work, become anxious when he went to school because he did not understand, would then be removed early or kept home, and would miss more instruction. Therefore, addressing Student's attendance was foundational to addressing his academics.

81. Ms. Kravets found diagnoses of dysthymia, generalized anxiety disorder, and insomnia related to anxiety. Ms. Kravets concluded that Student had insight into what was triggering his anxiety, but at that time, he did not have the coping strategies to calm himself.

82. Ms. Ponzuric considered various special education eligibilities. She concluded that Student was not eligible under the classification of specific learning disability. Also, referring to the speech pathologist's findings, Student did not meet the eligibility criteria for speech and language impairment because Student's language abilities were found to be at the level of his peers and did not adversely impact his ability to be understood and express himself in the school setting.

83. Ms. Ponzuric found Student met the criteria for other health impairment eligibility. Student's insomnia caused "limited alertness" on some days. His anxiety impacted his vitality and alertness on the days he attended school. These also kept him from consistently attending school, which adversely impacted his academic performance.

84. Ms. Ponzuric found that Student met the eligibility criteria as a student with an emotional disturbance. Student exhibited three of the five characteristics used in evaluating emotional disturbance eligibility. Ms. Ponzuric noted Student had demonstrated anxious behaviors on a consistent basis, which impacted his educational performance because he had not been able to regularly attend school since kindergarten. Ms. Ponzuric concluded her report by suggesting some accommodations and strategies to assist Student.

#### Student's Initial Individualized Education Program Meetings

85. District convened Student's initial individualized education program team meetings on November 30, 2016, and December 14, 2016. Attendees at both meetings were: Mother; attorney Ms. Steel; Manager of Special Education, Nadia Villapudua;

resource specialist program teacher, Courtney Saldana; Ms. Evans; Ms. Ponzuric; Ms. Curry; Ms. Kravets, attorney Ms. Smith (via telephone); Ms. Luna; and Ms. Serrano.

86. The team reviewed the psycho educational assessment and discussed special education eligibility. The team found Student primarily eligible as a student with emotional disturbance, with a secondary eligibility of other health impairment. The team agreed upon two goals for math, two goals for social-emotional functioning, a vocational goal, and a goal in writing.

87. The IEP team continued the accommodations provided by the Section 504 Service Plan. Additional accommodations included testing in a small group, preferential seating, access to a multiplication chart or calculator, an extra set of books at home, pairing of visual with verbal directions, and the use of self-monitoring strategies.

88. The IEP also had a positive behavior intervention plan, which identified Student's behavior that interfered with his learning (problem behavior) and caused Student not to regularly attend school. Irregular attendance meant missed instructional time. Consequently, Student would then not understand a lesson and become anxious, causing him to escape the situation by not coming to school or leaving early. Positive replacement behaviors included continued use of the break cards, ability to see the school counselor, and allowing Student to go to a safe, comfortable designated area on the school campus. The case manager was to develop a list of appropriate coping strategies with the other service providers. Whenever Student worked to completion on a task, he would receive positive reinforcement by the general education teacher. The behavior plan stated that positive reinforcement of work completion was also to be provided Parent before and after school hours. Ms. Kravets told the team that Ventura County Behavioral Health could provide child focused cognitive behavior therapy and break down interventions based on Student's individual needs, but cognitive behavior therapy was not further discussed.

89. Special education services included specialized academic instruction in math for 160 minutes per week, four times a week, where the resource specialist teacher would pull Student out of class for small group instruction. Student also received 200 minutes a week of specialized academic instruction in writing, by the resource specialist in a small group, with 50 minutes a week reserved of individual support of Student's vocational and social/emotional goals. Those providing specialized academic instruction were to consult and collaborate on a weekly basis, for a minimum of 30 minutes a month. The team agreed to provide Student with two hours a week of specialized academic instruction at home by a special education teacher. However, the IEP clearly specifies the home instruction as an interim transitional service to support Student's attendance goal as of June 2017, at which time the home instruction services would be reevaluated, and was not intended to be a "stay-put" service after the November 2017 annual IEP meeting.

90. A Ventura County Behavioral Health clinician would provide Student with intensive social emotional services, in the form of individual counseling, for 240 minutes a month, or a minimum of 60 minutes a week. The county behavioral clinician had a higher level of training to serve students with mental health diagnoses and was able to provide intensive therapeutic support. At the time of hearing, Ms. Luna had provided about 15 to 17 individual sessions with Student for the school year. Ms. Luna also met with Student informally and had unscheduled sessions, as needed. Ms. Luna testified that Student would benefit from additional, more consistent counseling from someone who could provide more time than a school counselor.

91. Parents would receive a minimum of 40 minutes a month of social work services, consisting of parent education, parent training, and parent support in the form of referrals to community-based services.

92. Ms. Ponzuric emphasized that the IEP services were designed to get Student to attend and remain in school, by decreasing his anxiety. The two hours a week of home tutoring by a special education teacher would assist Student in doing his homework, catching up on class work, and reteaching concepts, with the intent of minimizing Student's anxiety about attending school. The specialized academic instruction at school was to assist in math and writing, helping to alleviate anxiety, and keep Student on campus. Similarly, the counseling and social services were intended to decrease Student's anxiety and provide support for Parents in increasing Student's attendance.

93. Mother signed and agreed to the IEP, which was implemented on January 9, 2017. Mother was given the option to move Student to another fourth grade class but she decided to have Student remain in Ms. Turner's class, where Student said he was comfortable.

94. District implemented the IEP. Student received related services of specialized academic instruction and counseling by Ms. Luna and Ventura County behavioral. Ms. Turner utilized the accommodations and the behavior intervention plan, employing interventions as needed. The special education teacher provided home tutoring, helping with classwork, homework, and keeping track of missing assignments and due dates. Ms. Turner provided a list of homework assignment to Student at the end of each day, if he was present. She also electronically sent assignments to Mother daily.

95. Student's absences and early removals from school did not improve after implementation of the Section 504 service plan and IEP. As a consequence, Student missed instruction, class work, and related services. For example, on the day Ms. Turner testified at the hearing, Ventura County Behavioral Health went to Sierra Linda to provide therapy but Student was absent. Student was regularly missing the services that

were calculated to increase his attendance. Ms. Turner and Ms. Luna had been unable to find out what occurred at home, which caused Mother not to bring Student to school. When asked, Mother sometimes said Student was upset or crying, but other times Mother said it was too hot, too windy, or too cold. When asked why not in school, Student recently said his sister was depressed and Student had to stay home to watch his sister while Mother went shopping. Mother said Student had been sick often, including a problem with a nose bleed that would not stop.

96. Student's first trimester grades reflect his many absences and early removals. For reading, Student was far below meeting benchmarks in literature, informational text, writing, speaking and listening, not meeting benchmark in language, and striving toward meeting benchmark in phonics and word recognition. For math, Student was not meeting benchmark in operations and algebraic thinking, number sense and operation in base ten, and math facts. He was striving toward meeting benchmark in science and social studies. Ms. Turner noted Student needed improvement in taking responsibility for his own learning and behavior, staying on task and using time efficiently, listening and following directions, actively participating in class, and completing and returning homework and class work. Student was satisfactory in legible writing, cooperating while in a group, critical thinking to solve social problems, and respectful toward adults and peers. He was excellent in the appropriate use of technology.

97. At the time of hearing, Student had been absent about 40 days and was being removed from school early, on average two times a week. Mother did not sign an attendance contract and District had not made a referral to the attendance review board.

## STUDENT'S EXPERTS

98. Student called two experts to provide opinions regarding District's child find obligations and Student's compensatory services. Both witnesses were highly qualified in their respective fields. However, neither expert had assessed, observed, or met Student. Neither had interviewed or met Mother, met any of Student's teachers or counselors, produced a report that was reviewed by Student's IEP team, or attended Student's IEP meetings. The experts reviewed documents, only. Nor were the experts qualified to assess the conflicting testimony at hearing, concerning what information District knew concerning Student, and when District knew it.

Lois A. Weinberg, Ph.D.

99. Lois A. Weinberg had been a professor at Charter College of Education, California State University-Los Angeles, Division of Special Education and Counseling, since 2002. She held a 1969 bachelor of arts in Spanish, a 1973 master's degree in philosophy of education, and a 1978 doctorate in philosophy of education, with a minor in educational psychology, all from UCLA. From 1985 to 2002, Dr. Weinberg was an education specialist with Mental Health Advocacy Services, Inc. She received and participated in numerous grants and consulting roles, frequently served on boards, committees, roundtables and symposiums, and prolifically published scholarly articles, taught workshops, and presented at professional organizations for more than 35 years.

100. Dr. Weinberg reviewed all available documentation regarding Student, including his educational records, grade reports, assessments, and IEP documents. She prepared a report of her document review.

101. Dr. Weinberg generally believed that Student's absences and consequential struggles in school since kindergarten, especially in math, were sufficient notice to trigger District's child find duties since at least first grade. Her opinion would

be unaffected even if District had been unaware of the reasons for Student's low attendance. She did not discuss the legal requirements for triggering child find nor otherwise address the legal guidelines for evaluating a district's conduct in the past.

102. Her reading of the psycho educational assessment, especially the observations of the school psychologist and the pathologist, caused her to conclude that Student would benefit from one-to-one education. She therefore recommended individual instruction, at least three time per week at home (one hour in addition to the two hours Student was provided in his IEP) and one-on-one specialized instruction in math and writing from a credentialed teacher, three time a week, as well as a paraeducator to work with Student in the classroom and keep him focused.<sup>8</sup>

103. Dr. Weinberg cited research that indicated cognitive interventions for children with anxiety disorders might be helpful. Here, such therapy might enable Student to remain in the instructional setting. She suggested that such cognitive behavioral therapy include parents, since they are involved in a student's development of skills and strategies to properly evaluate and react to otherwise anxious situations.

104. Dr. Weinberg recommended compensatory remedies be based upon the following services which Student should have been receiving for at least two years: (1) home teacher three times a week to complete his homework and to teach him the content he missed when absent because of his anxiety disorder; (2) individual instruction from a special education teacher during the school day three times per week for a total

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<sup>8</sup> Paraeducator is defined as a school employee who works under the supervision of teachers or other professional practitioners.



of 180 minutes for math; and (3) counseling at school, twice a week for 100 minutes total to address Student's anxiety.<sup>9</sup>

Ann Simun, Psy.D.

105. Ann Simun was a neuropsychologist and, since 2005, was the principal at Neuropsychologist Partners, Inc., which provided neuropsychological and psychoeducational evaluations. She received a bachelor's degree in psychology from Pitzer College in 1986, a master's degree in school psychology in 1989 from California State University – Los Angeles, and her doctorate in clinical psychology from Pepperdine University in 1998. She also served as a neuropsychologist at St. Mary Medical Center from 2005 to 2009, and in a professional capacity various hospitals and clinics.

106. Dr. Simun reviewed all available documentation regarding Student, including his educational records, grade reports, assessments, and IEP documents. She greatly relied upon Ms. Ponzuric's psycho educational report. Dr. Simun opined that Student should have been referred to a student success team in kindergarten or first grade. She believed that the absences and loss of instructional time greatly impacted Student's academics, which were consistently below basic, especially in math. She was unaware that Student's attendance and class participation substantively improved when he transferred to Sierra Linda for the remainder of his kindergarten year.

107. Dr. Simun agreed with the IEP's recommended eligibilities of emotional disturbance and other health impairment, primary and secondary, respectively. However, Dr. Simun believed that Student's anxiety, and his continuing absences, required more intensive mental health services. Sixty minutes a week of counseling was insufficient.

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<sup>9</sup> Dr. Weinberg also enumerated additional services that she opined should be included in Student's current IEP in order to provide a FAPE. However, the IEP's offer of FAPE is not an issue in these proceedings.

108. Dr. Simun noted that Student's continuing absences and early removals from school strengthened his tendency to avoid school because of his anxiety. As this cycle continued, the pattern became more intractable. She suggested a multipronged approach that included individual counseling with a psychologist trained in anxiety disorder, and school avoidance and phobias.

109. She also urged consideration of cognitive behavior therapy. Cognitive therapy was the most effective means of addressing anxiety. Student would be trained in identifying the actual, as opposed to imagined, causes of his anxiety and provided skills and techniques of responding appropriately. Cognitive behavior therapy differed from applied behavior therapy, which focused on the behavior by gathering data, identifying antecedents, and encouraging replacement behavior.

110. Dr. Simun recommended: an in-depth comprehensive mental health assessment, by a clinical psychologist; a functional behavior assessment to better understand how to intervene in the anxiety/absence cycle; cognitive behavior therapy, offsite; 240 minutes a month of individual counseling, onsite, in frequent short sessions of 20 minutes a week (basically what is in the IEP); and a family component that includes Parents.

111. She believed that Mother was trying to deal with a child who became terrified and her response was to keep him safe. Parents had not been given techniques to address Student's anxious behaviors. Something was happening at home, before school, that was keeping Student from going to school. Mother needed support to learn better ways of responding than merely keeping or taking him home.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>10</sup>

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)<sup>11</sup> et seq.; Ed. Code, § 56000 et seq.; Cal. Code Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called

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<sup>10</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>11</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

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 Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit" or "meaningful educational benefit," all of these phrases mean the *Rowley* standard, which should be applied to determine whether an

individual child was provided a FAPE. (*Id.* at p. 951, fn. 10.) In a recent unanimous decision, the United States Supreme Court also declined to interpret the FAPE provision in a manner that was at odds with the *Rowley* court's analysis, and clarified FAPE as "markedly more demanding than the 'merely more than the de minimus test.'" (*Andrew F. v. Douglas School Dist. RE-1* (2017) 580 U.S. \_\_\_\_ [137 S.Ct. 988, 1000] (*Andrew F.*.) The Supreme Court in *Andrew F.* stated that school districts must "offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." (*Id.* at p. 1002.)

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

## ISSUE 1: CHILD FIND

5. Student alleges that District failed to meet its child find obligation by not evaluating Student in all areas of suspected disability, since August 2013. Generally, Student contends District's child find duties were triggered at the beginning of first grade because District was aware that his chronic absenteeism was caused by a sleep disorder and anxiety. District asserts that Student's academic struggles were caused by unexplained chronic absenteeism, which was a consequence of Mother's willingness to allow Student to remain at home or leave school early. Mother did not transparently or consistently inform District personnel of a reason for Student's poor attendance until October 2016, when she provided a letter from Student's doctor. Thus, District personnel had no reason to suspect Student had a disability needing special education services. As discussed below, Student met his burden of proof that District's child find duty was triggered, but not before September 30, 2014.

### Law Related to Child Find Duty

6. The IDEA places an affirmative, ongoing duty on the state and school districts to identify, locate, and evaluate all children with disabilities residing in the state who are in need of special education and related services. (20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a).) This duty is commonly referred to as "child find." California law specifically incorporates child find in Education Code section 56301, subdivision (a).

7. A school district's child find obligation toward a specific child is triggered when there is knowledge of, or reason to suspect, a disability, and reason to suspect that special education services may be needed to address that disability. (*Dept. of Education, State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp. 2d 1190, 1194 ("Cari Rae S.")). The threshold for suspecting that a child has a disability is relatively low. (*Id.* at p. 1195.) A school district's appropriate inquiry is whether the child should be

referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)<sup>12</sup> The actions of a school district with respect to whether it had knowledge of, or reason to suspect, a disability, must be evaluated in light of information that the district knew, or had reason to know, at the relevant time. It is not based upon hindsight. (See *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (citing *Fuhrmann v. East Hanover Bd. of Educ.*(3rd Cir. 1993) 993 F.2d 1031, 1041).)

8. For purposes of evaluating a child for special education eligibility, the district must ensure that “the child is assessed in all areas of suspected disability.” (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157–1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all the child’s needs for special education and related services whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).)

#### Analysis of Child Find Issue

9. Student was a bright, generally sweet and respectful child. Student had a difficult experience in kindergarten during 2012-2013, at Emilie Ritchen Elementary School. Mother felt the kindergarten teacher was mean-spirited and abusive, publically ridiculing Student. Mother started to keep Student home, or remove him early from

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<sup>12</sup> In a footnote in an unpublished decision, the Ninth Circuit Court of Appeals noted that it has not yet articulated a test for determining when the child find obligation is triggered. (*G.M. ex. rel. G.M. v. Saddleback Valley Unified Sch. Dist.* (9th Cir. 2014) 583 Fed.Appx. 702, 703, fn. 1.)

class, because Student did not want to be in school. While at Ritchen, Student was absent 30 days and tardy 11 times.

10. In May 2013, Student transferred to Sierra Linda Elementary School. Student finished the remaining five weeks of kindergarten in Mr. Arreguin's class. Mr. Arreguin persuaded Mother to bring Student to school each day, and let him stay, to see how he would do. Mother confirmed that Student did well and brought Student to school every day for the remainder of the year, except one day. Mother was appreciative and thanked Mr. Arreguin. Student was happy, not tired, adjusted to the new class, worked on assignments, was responsive to instruction, participated in small groups, and made friends. At no time did Mother indicate that Student's absences at Ritchen were for any reason other than her displeasure with the teacher.

11. Student argues the first kindergarten teacher's note that Student received "Tier I RTI" intervention put District on notice of Student's need for assessment. However, District convincingly demonstrated that such intervention was for core curriculum, perhaps consisting of preteaching or reteaching, in a small group or individually. Such intervention was not for pupils at risk of academic failure. Mr. Arreguin viewed Student's difficulty with math as a consequence of his many absences at Ritchen. The Tier I intervention did not indicate Student was in need of assessment and Mr. Arreguin did not have reason to suspect Student had a disability and needed assessment. Student finished kindergarten with excellent attendance, good academic performance, and responsive class participation.

12. Student started first grade in August 2013. Ms. Pauley regularly talked to Mother, especially about how Student's repeated absences and early removals from school negatively affected Student's academics. This was especially true in math, where Student struggled with addition and subtraction. Mother was on campus daily, often volunteering.



13. Mother said she told Ms. Pauley and others at school that Student was absent because he had insomnia and was taking medication, had asked for help, and no one offered assistance. However, Mother's contention in this regard was contradicted by others' testimony and unsupported by additional evidence. Contrary to Mother's assertion that no one offered to help, Ms. Pauley informed Mother at the November 2013 parent-teacher conference that Student was below standards in math and outlined the interventions she was using to assist Student. Mother acknowledged in writing that Student was receiving the interventions. Ms. Pauley was convincing in her testimony that Mother never mentioned insomnia, a sleep disorder, or medication at the meeting. As Student's absences and early removals increased over the year, Mother never indicated any specific, ongoing problem that contributed to the absences.

14. Ms. Luna arranged a formal attendance meeting with Mother. Mother failed to appear for the first meeting, saying "they were sick." Mother appeared at a rescheduled meeting with Ms. Luna and Ms. Wennes. Mother was resistant, was not open to inquiry, and did not want to be at the meeting. Ms. Luna demonstrated a good recollection of the attendance meeting, recalling that Mother did not say Student had a sleeping disorder, insomnia, anxiety, or was taking medication. This was confirmed by Ms. Wennes, who noted that Mother quickly cut short any conversation regarding Student's attendance.

15. Ms. Pauley and Ms. Luna continued to regularly communicate with Mother regarding absenteeism for the remainder of the year and Mother never said Student's absences were caused by insomnia, a sleeping disorder, or medication. Ms. Pauley, Ms. Luna, and Ms. Wennes persuasively testified that Student's absences and early removals remained a mystery throughout the year.

16. Student refers to District's December 2016 psycho educational assessment as conclusively demonstrating that District's child find duties should have been

triggered by first grade. Ms. Ponzuric stated that Student had exhibited behavior that impacted his educational performance since kindergarten. However, in evaluating whether the child find duty was triggered, District's actions with respect to whether it had knowledge of, or reason to suspect, a disability must be evaluated in light of information District knew, or had reason to know, at the relevant time. It is not based upon hindsight. District knew Student had excessive absences, which affected Student's academics. However, despite meetings and multiple inquiries, District personnel did not learn the reasons for Student's absences other than Student's attachment to Mother and Mother's willingness to keep him home or remove him early.

17. Student further cites his experts' testimony, who independently came to the conclusion that Student should have been referred for assessment in first grade. Dr. Simun and Dr. Weinberg were well-qualified, recognized experts in their respective fields. However, a proposed expert must also possess factual information directly related to the issue upon which they provide an opinion. Here, they were not qualified to render an opinion as to whether District's child find duty was triggered in first grade. The experts reviewed documents, only. They did not observe, interview, or meet Student, did not meet Mother, and did not talk to any of Student's teachers, counselors or school personnel. They did not hear the witness testimony, which provided the evidence that enabled informed factual and legal findings.

18. In conclusion, during Student's first grade year of 2013-2014, District did not have reason to suspect Student had a disability or that special education services may be needed to address that disability. Without such information, District's child find duty was not triggered.<sup>13</sup> Student did not meet his burden of proof as to Issue 1(a).

19. Circumstances changed when Student started second grade in the 2014-2015 school year. Ms. Pascual saw Student as a generally happy boy, who fell asleep in class about once a week and had angry outbursts. Ms. Pascual then saw a pattern of frequent absences and early withdrawals, which were negatively affecting Student's academics. Student was missing a substantial amount of instruction and tests. She concluded that Student was capable, but Student could not learn if he was not emotionally or physically capable to participate in class or was absent. She told the school counselor Ms. Luna about the poor attendance and early removals, including how Student was often not fully alert.

20. Ms. Pascual explained to Mother that the poor attendance was harming Student's academics. Mother told Ms. Pascual that Student had insomnia and described how she struggled to get Student to sleep and that Student often was not able to wake up and come to school in the morning. Mother also told Ms. Pascual that this caused Student to be sleepy and irritable at school, which contributed to his early removal.

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<sup>13</sup> Student's excessive absenteeism warranted referral to the attendance review board. Pupils ages six through 18 years old are subject to compulsory full-time education (Ed. Code, §§ 48200). The student attendance review board legislation (Ed. Code, §§ 48320-48325) establishes panels to address absenteeism, when a minor becomes a habitual truant (Ed. Code, § 48262). OAH does not have jurisdiction over attendance review board proceedings and, therefore, District's failure to refer Student is not discussed herein.

Therefore, District was now aware of information that should have caused personnel to suspect that Student had a disability or that special education services may have been needed to address that disability.

21. Neither Student nor District provided clear, unambiguous evidence of when Mother told Ms. Pascual that Student had insomnia, which caused the absences and early removals. The first day of school was August 20, 2014. Mother told Ms. Pascual shortly before Thanksgiving break that she was taking Student to a doctor to help with the insomnia. However, Ms. Pascual came to believe within a month or so after school started that Student's absences, lethargy, and sleeping in class were caused by his insomnia. Ms. Pascual had reason to suspect that Student had a disability as of September 30, 2014, at which time District's child find duties were triggered.

22. Ms. Pascual said that she did not suspect a disability in need of assessment. She thought the absences, sleepiness, and irritability were caused by a medical issue. Ms. Pascual's belief in this regard was similar to that of Ms. Luna and Student's other teachers. However, chronic medical issues such as insomnia can form a basis for special education eligibility, such as other health impairment.

23. 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)). Ms. Pascual concluded Student could not learn if he was not emotionally or physically capable to participate in class or was absent. Accordingly, Mother's statement that Student had insomnia which caused lack of alertness in school and which regularly prevented him from awakening to go to school, triggered District's child find duty to refer Student for assessment.

24. District argues that it established a referral structure which assured that pupils in possible need of support were properly vetted by District professionals

equipped to evaluate a pupil's needs. District cites how its teachers were trained to spot and refer students suspected of needing academic support to a coordinated support team, which gathered information and determined if the pupil should be referred to a student success team that included additional professionals who would develop, with the parents, supports and interventions to address the pupil's academic needs. Sometimes, these teams referred a pupil for special education assessment.

25. Here, this referral process failed to address Student's educational needs and meet District child find duties. Ms. Pascual thought the absences, sleepiness, and irritability were caused by a medical problem, not an academic problem. She therefore did not refer Student because she incorrectly believed medical issues were not a basis for success team or special education intervention. In fact, District personnel never referred Student to a support or success team, further demonstrating that District's referral process did not herein satisfy its child find obligations.

26. In summary, Student met his burden of proof by demonstrating that District failed to meet its child find duties and refer Student for assessment when it learned that Student's poor attendance, fatigue, and irritability were allegedly caused by a sleeping disorder or insomnia. Ms. Pascual had reason to suspect that Student had a disability as of September 30, 2014, at which time District's child find duties were triggered. Student prevailed on Issue 1(b).<sup>14</sup>

#### Analysis: FAPE Denial from Procedural Violation

27. Child find does not guarantee eligibility for special education and related services under the IDEA. It is merely a locating and screening process used to identify

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<sup>14</sup> Since the District's child find duty was first triggered within two years of the date Student filed a due process request, this decision does not further discuss or analyze issues related to the tolling of the two-year timeline for requesting hearing.

those children who are potentially in need of special education and related services. Once identified, the district must conduct an initial evaluation to confirm the child's eligibility for special education. (34 C.F.R § 300.301; Ed. Code, § 56302.1.)

28. Violations of child find, and of the obligation to assess a student, are procedural violations of the IDEA and the Education Code. (*Cari Rae S., supra*, 158 F.Supp. 2d at p. 1196; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031.) A procedural violation results in liability for denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School Dist.* No. 23 (9th Cir. 1992) 960 F.2d 1479, 1484.)

29. In the fall of 2014, Student had limited strength, vitality and alertness, due to his chronic insomnia, which affected his educational performance. Student's insomnia caused "limited alertness" on some days and affected his ability to awaken on other days. This kept him from consistently attending school, which adversely impacted his academic performance. The evidence demonstrates that if District had assessed Student in the fall of 2014, Student would have been found to have met the eligibility criteria for other health impairment.

30. District's failure to assess Student when its child find duty was triggered impeded Student's right to a FAPE, because he would have been found eligible and otherwise entitled to a FAPE. Further, the failure to assess deprived Student of the educational benefit of the related services and placement that he would have received in an IEP. Therefore, District's failure to assess Student in the fall of 2014 was a procedural violation that denied Student a FAPE.

ISSUES 2(A) AND (B): FAILURE TO PROVIDE AN IEP THAT MET STUDENT'S UNIQUE NEEDS AND THAT WAS CALCULATED TO OFFER HIM EDUCATIONAL BENEFIT

31. Student alleges in Issue Two that District denied Student a FAPE by failing to provide an individualized education program that met his unique needs and that was reasonably calculated to offer educational benefit to Student, since August 2013. District generally argues that it was not obligated to provide an IEP because its child find duty had not been triggered. As discussed above, Student demonstrated District was obligated to provide Student with an individualized education program since the fall of 2014. Student therefore did not prevail as to Issue Two (a) but met his burden of proof as to Issue Two (b) for the time period beginning in the fall of 2014.

32. "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.) Here, Student was entitled to assessment in the fall of 2014. As discussed above, Student would have been found eligible as other health impaired and, therefore, would have received special education if he was assessed in fall of 2014. Because he was not assessed and could not receive special education, Student has met his burden of proof as to Issue Two. Student has not had his unique needs as a child with a disability addressed by special education since fall of 2014.

33. An IEP must be reasonably calculated to "confer some educational benefit" upon the child (*Rowley*), enabling the child "to make progress appropriate in light of his circumstances" (*Andrew F.*). Here, Student would have been entitled to special education had he been assessed in fall 2014. Student was not assessed until November 2016. Parents agreed to an IEP in December 2016 and Student started receiving special education placement and services in January 2017. Therefore, Student did not receive an IEP that conferred educational benefit so he could make progress appropriate for his circumstances, since fall 2014. Student has met his burden of proof as to Issue Two (b).

## REMEDIES

1. Student prevailed as to Issue One (b) and Issue Two (b), beginning September 30, 2014. If District prepared an assessment plan at that time, Parents could be assumed to have returned the same day, thus commencing the 60-day time period within which District would assess and hold an IEP. The 60 days are calendar days but do not include days between the pupil's regular school sessions, terms, or days of school vacation in excess of five school days. (Ed. Code, § 56344(a).) Sixty days from September 30, 2014 is November 29, 2014, but this included the five-day Thanksgiving break. So, District should have held the first IEP team meeting by December 5, 2014. Student's first IEP meeting was not held until November 30, 2016.

## COMPENSATORY SERVICES

2. Federal law provides that a court that hears a civil action taken from a special education administrative due process hearing "shall grant such relief as the court deems appropriate." (20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(c)(3)(2006).) The United States Supreme Court has held that this authority "confers broad discretion on the court" to grant relief that is appropriate in light of the purpose of the IDEA. (*School Committee of the Town of Burlington, Massachusetts v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385].) The broad authority to grant relief extends to the administrative law judges and hearing officers who preside at administrative special education due process proceedings. (*Forest Grove School District v. T.A.* (2009) 557 U.S. 230 [129 S.Ct. 2484, 2494, fn. 11; 174 L.Ed.2d 168].)

3. The fashioning of equitable relief in IDEA cases requires a "fact-specific" analysis. (*Parents of Student W. v. Puyallup School District No.* (9th Cir. 1994) 31 F.3d. 1489, 1497.) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Id.* at p. 1496.) The



conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Ibid.*) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day compensation.” (*Id.* at p. 1497.) The award must be fact-specific and be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524)

#### Academics

4. Student seeks compensatory education that is primarily based on computations covering the approximately two years Student was without an IEP: 197 hours of specialized academic instruction in math; 246 hours of academic instruction in writing; and 148 hours of academic instruction (akin to home instruction).

5. However, an award of compensatory education need not provide a “day-for-day compensation. The guiding principle of compensatory education is what will benefit Student.

6. The 2016 IEP team’s approach provides appropriate guidance for what compensatory services are appropriate to benefit Student now. Part of the 2016 IEP team’s strategy addressed Student’s poor academic performance by intensive academic support in school and specialized academic instruction at home. The intent into ameliorate lost instructional time and improve academic performance, thus decreasing Student’s school performance anxiety and encouraging better school attendance.

#### INTENSIVE ACADEMIC SUPPORT IN SCHOOL

7. The 2016 IEP provides 160 minutes a week for math and 200 minutes a week for writing, by a resource teacher. This is six hours a week of specialized academic instruction at school. Student receives these services in the classroom and in a small

group out of the classroom, with some individual instruction. Consistent with the strategy of providing these services in school, some of Student's compensatory education should be provided in the school setting.

8. Student responds well to individualized instruction. An additional hour of individualized instruction can specifically identify and address Student's struggles in the areas he missed because of the lost instructional time, within the context of his current curriculum. Using the two years in which Student should have had an IEP as a guideline, with 37-week school years, for an hour week, Student is entitled to school-based compensatory academic instruction of 74 hours.

#### HOME INSTRUCTION

9. The other part of the IEP's stratagem is to support Student at home, keeping him fully informed and current on his assignments, well-prepared to attend school. The IEP provides two hours a week of home instruction by a special education teacher. However, the IEP emphasized that this was a temporary service, designed to get Student to decrease anxiety, and would be reevaluated within the context of his 2017 attendance goal. Yet, Student is below basic in his academics and, having been denied an IEP for two years, is entitled to compensatory service for support he should have otherwise been receiving. Student shall receive 37 hours of additional District home instruction, by a special education teacher, one hour a week.

10. Additionally, to specifically address lost instruction because of the failure to assess and provide services for two years, District will provide 37 hours of intensive academic instruction, through a nonpublic agency, to be used by Student whether school is in session.

## Counseling and Behavior Therapy

11. Student asks for 74 hours of individual counseling and 148 hours of off-site psychological counseling by a licensed psychologist, as compensatory mental health services. However, no "fact specific" analysis supports Student's request for the counseling. If Student had been assessed in fall 2014, he would not have been found eligible for emotional disturbance; Student was not diagnosed with anxiety until the following year. So the suggestion that Student would have been receiving counseling and intensive social-emotional services, to the extent provided in his present IEP, is conjecture. Dr. Hansuvadha's October 11, 2016 letter stated that Student was diagnosed with insomnia in June 2012, but Student was not diagnosed with anxiety disorder until February 20, 2015. Mother did not inform Ms. Pascual, Ms. Wennes, or Ms. Luna during Student's second grade.

12. A more suitable approach to compensatory mental health services is to consider what would assist the Student now, to address emotional issues that might have been addressed earlier. In this regard, Student submitted little evidence. Student's two experts never met Student, much less evaluated his mental state. Yet, they did provide insight as to possible avenues to be explored for possible additional or alternative mental health services. Dr. Weinberg and Dr. Simun proposed evaluating Student for cognitive behavioral therapy to assist in regulating his anxiety. Ms. Kravets apparently concurred; she concluded that Student had insight into what was triggering his anxiety, but at that time, he did not have coping strategies. Ms. Kravets told the IEP team that Ventura County Behavioral Health could provide child-focused cognitive behavior therapy and break down interventions based on Student's individual needs. However, the IEP did not further discuss this proposal.

13. Pupils may be equitably entitled to publicly funded independent educational evaluations when a district was obligated to assess but failed to do so. (See,

e.g., *M.S. v. Lake Elsinore Unified School Dist.* (C.D. Cal. July 24, 2015) 2015 WL 4511947, at pp. 10-11; *Los Angeles Unified School Dist. v. D.L.* (C.D.Cal. 2008) 548 F.Supp.2d 815, 821-822.) This equitable remedy is available independently from a student's statutory right to an independent educational evaluation. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b); *Letter to Baus*, 65 IDELR 81 (OSEP 2015).)

14. Here, District had an opportunity to explore the viability of cognitive behavior therapy for Student. It did not do so. Also, District delayed providing IEP services to Student, which would likely have diminished Student's present need for mental health services. Therefore, as an equitable and compensatory remedy, Student is entitled to a District funded independent educational assessment, to determine if Student is an appropriate candidate for cognitive behavior therapy to address his anxiety, with recommendations. Such assessment will include Parents and suggest possible parental services to assist Parents in supporting Student's mental health. District shall timely convene an IEP team meeting to review the assessment. District's funding of the assessment shall include the assessor's time for attending the IEP team meeting. The assessment shall be performed by a professional qualified to assess whether cognitive behavior therapy is indicated for Student's anxiety.

#### TRAINING OF DISTRICT PERSONNEL

15. Staff training is also an appropriate remedy. (*Park v. Anaheim Union High School Dist, supra*, 464 F.3d at p. 1034 [student, who was denied a FAPE due to failure to properly implement his IEP, could most benefit by having his teacher appropriately trained to do so].) Appropriate relief in light of the purposes of the IDEA may include an award that school staff be trained concerning areas in which violations were found, to benefit the specific pupil involved, or to remedy procedural violations that may benefit other pupils. (*Ibid.* See also, e.g., *Student v. Reed Union School Dist.*, (OAH Case No. 2008080580) [requiring training on predetermination and parental participation in

IEP's]; *Student v. San Diego Unified School Dist.*(OAH Case No. 2014120525) [requiring training regarding pupil's medical condition and unique needs].)

16. Here, Student should have been assessed in the fall of 2014 but was not assessed until two year later. Fundamental to District's failure to timely assess was a general misunderstanding of a school district's child find obligations. General education teachers, counselors, and administrators stated that they did not suspect Student to have a disability that might need to be addressed by special education services, because Student's absences were the consequence of a medical issue. Yet everyone agreed that Student's chronic absenteeism and early removal negatively affected his academics. In fact, though Student's academics were obviously compromised by his lost instructional time, District personnel did not refer Student for a coordinated support team or a student success team.

17. District personnel's misunderstanding in this regard was systemic.

18. Therefore, to assure that Student and other special education students are afforded the procedural protections to which they are entitled under the IDEA and state law, District shall train its Sierra Linda Elementary School personnel in special education eligibility, child find duties, and the ability to directly refer a student for assessment, for a minimum of six hours. Further, such training will provide guidelines to identify students who might have disabilities and might benefit by special education services.

## ORDER

1. District shall provide Student 74 hours of school-based, one-on-one specialized academic instruction, outside of the classroom, at a rate of one hour per week, beginning within 30 days of the date of this order, and continue each full week that school is in session, until the 74 hours have been used. The services will be provided by a special education or resource specialist teacher, at a regularly scheduled time each week. If Student misses a scheduled session because he was absent from school, or

removed early from school, District shall not be required to again offer the one-hour session, unless the absence or early withdrawal is excused with a note from a doctor, medical professional, or mental health professional.

2. District shall provide Student 37 hours of additional home instruction beyond what is provided in his 2016 IEP, by a special education teacher, at a rate of one hour per week, beginning within 30 days of the date of this order, and continuing each full week that school is in session, until the 37 hours have been used. If Student misses or cancels less than 24 hours before a scheduled session, District shall not be required to again offer the one-hour session, unless the absence or late cancellation is excused with a note from a doctor, medical professional, or mental health professional.

3. District will fund 37 hours of intensive academic instruction through a nonpublic agency, to be used by Student whether or not school is in session. Scheduling of instruction shall be made by Parents and the agency. Any scheduled appointments which Student misses and for which the agency bills the District, pursuant to the agency's cancellation/scheduling policy, shall be counted toward the 37 hours.

4. District shall fund an independent educational evaluation to determine if Student is an appropriate candidate for cognitive behavior therapy to address his anxiety, with treatment recommendations. The assessment shall be performed by a professional qualified to assess whether cognitive behavior therapy is indicated for Student's anxiety. Such assessment will include Parents and suggest possible parental services to assist Parents in supporting Student's mental health services, if deemed appropriate. District shall timely convene an IEP team meeting to review the assessment. District's funding of the assessment shall include the assessor's time for attending the IEP team meeting.

5. District shall, no later than August 30, 2017, provide six hours of training to all Sierra Linda Elementary School general education teaching staff, paraprofessionals,

aides, student study team members, school administrators, service providers, counselors, school psychologists, speech and language therapists, and any other staff who work with parents and students on their educational programs. The training shall address special education eligibility, child find duties, and the ability to directly refer a student for assessment. Further, such training will provide guidelines to identify students who might have disabilities and might benefit by special education services. The training shall be provided by qualified professionals either employed or contracted by the Ventura County Special Educational Local Plan Area, or a private provider selected by District. The training may be held concurrently or in coordination with any training ordered through any other OAH Decision issued within 90 days of this Decision, to the extent the ordered training overlaps or is duplicative.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on Issue 1 (b) and Issue 2 (b). District prevailed on Issue 1 (a) and 2 (b).

## RIGHT TO APPEAL THIS DECISION

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

DATED: May 12, 2017

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*/s/*

CLIFFORD H. WOOSLEY

Administrative Law Judge

Office of Administrative Hearings